

YEARBOOK

HUMAN RIGHTS PROTECTION

**PROVINCIAL PROTECTOR
OF CITIZENS - OMBUDSMAN**

FROM UNLAWFULNESS TO LEGALITY

ГОДИШЊАК
ЗАШТИТА ЛЉУДСКИХ ПРАВА
“ОД ПРОТИВПРАВНОСТИ ДО ЗАКОНИТОСТИ”

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Provincial Protector of Citizens – Ombudsman

Institute of Criminological and
Sociological Research



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FOREWORD

The Provincial Protector of Citizens - Ombudsman and the Institute for Criminological and Sociological research from Belgrade, supported by the OSCE – Mission to Serbia, organized The 2nd International Scientific Conference on **Protection of Human Rights: From Illegality to Legality** in Novi Sad, Serbia, on 29-31 October, 2018. Conference papers and presentations have been compiled in the publication of the same title, and they are divided into three chapters: *Legal Theory and Philosophical Aspects of Illegality and Legality*, *Relation of Independent Institutions towards Illegality and Justice and Illegality*. The text below offers a short overview of scientific and expert articles presented at the Conference. Hopefully, these papers will answer at least some of the numerous current questions concerning human rights' protection.

I. LEGAL THEORY AND PHILOSOPHICAL ASPECTS OF ILLEGALITY AND LEGALITY

The first thematic chapter deals with the legal theory and philosophical aspects of unlawfulness and legality. It includes ten scientific and expert papers, which address the question of natural rights, legitimacy, human statistics, development of criminal law, public moral, unlawfulness, prevention, EU standards, legality, freedom of expression, predictability and uncertainty.

In the paper *Natural Rights, Legitimacy of Laws and Supranational Basis of Unlawfulness*, Vlado Kambovski, member of the Macedonian Academy of Sciences and Arts, full professor at the Law Faculty in Skopje points out that the UN Universal Declaration of Human Rights of 1948 established a symbiosis of natural and positive law. The interpolation of natural, equal and innate human freedoms and rights in positive law through the adoption of numerous conventions, from the European Convention on Human Rights to the Charter of Fundamental Rights of the European Union, laid the foundations of a contemporary "secular religion" that affects not only the concept of state and law, but also on the social paradigm and global society. The postulate of strengthening the position of natural freedoms and rights is imposed as a counterpoint to the challenges of a modern society that needs to ensure its human and sustainable development. Since the adoption of the Universal Declaration, there have

been turbulent changes in the very concept of law caused by the processes of globalization and the development of a post-industrial society. The plurality of sources of law - national, international, self-regulatory, etc. - complicates the framework in which the synthesis of natural law and positive law is to be achieved. The concept of universal natural freedoms and rights becomes effective if it has an impact on strengthening the rule of law, the legitimacy of positive law, and imposing its value criteria in the determination of law and wrongdoing, unlawfulness and its exclusion. The realization of this postulate requires deep legal reforms aimed at strengthening the independence and activism of the courts and other institutions (Ombudsman) for the protection of human rights and freedoms.

PhD Zoran Pavlović, the Provincial Protector of Citizens – Ombudsman, and a full-time professor at the Law Faculty, University of Business Academy in Novi Sad and PhD Milica Solarević, associate professor at the Faculty of Natural Sciences and Mathematics, University of Novi Sad remember the fact that the 21st century is described as a century of intense increase in life expectancy and population aging, thus civilization process has become a segment of many public policies. At the same time, many societies have faced a paradoxical process of violating the rights of old people to dignified life and social inclusion. Psychological, social, cultural, age and other barriers to old people, emphasize the need to proclaim the age-defined legislative framework, conventions and principles, often not binding. In the last two decades, Serbia has made important steps in this field, but the main question in this paper is the extent of solidarity of our society and "openness" for all. In comparison with the European and world recommendations and standards, the aim of the paper is based on the analysis of the society preparedness for intergenerational solidarity and mutual respect, while recognizing the main barriers. Research was conducted in the territory of Vojvodina, on a representative sample, using the survey method, and presented as a case study.

In the paper *Dialectical Contradictions and Patterns of Development of Criminal Law*, Yury Pudovochkin, Doctor of Law, Professor, Head of the Department of Criminal Law Studies, Russian State University of Justice, and Vladimir Andrianov, Candidate of Legal Sciences, Senior Research Fellow, Criminal Justice Research Department, Russian State University of Justice claim that the development of law is something without which its existence is impossible. The right of any state does not arise in the final and once for all form. To effectively fulfill its social mission, it must be in a state of renewal and change in the corresponding development of society's life. Therefore, it is natural not only the emergence, but also the development of law. In this paper, for the

first time, laws of its development are established on the basis of identifying dialectical contradictions inherent in criminal law.

PhD Aleksandar Stevanović and PhD Borislav Gvozdić, professors at The Faculty of Law for Commerce and Judiciary in Novi Sad in *The Idea of Human Rights as a Means of Change of the Public Moral* are analysing relations between Public moral and Human Rights. At the beginning a history of differentiation of Public moral is given, starting with the antique morality through Christian moral, till the Secular moral of the present days. The author sees the origin of idea of universal morality for all mankind in the Christian religion. After that, the development of the Human Rights from their origin in the Period of Enlightenment is given, with special attention to the contemporary use of Human Rights for justifying military and political aggression. Considering Public Moral as a social value per se, the author explains ethical sides of such use of the Human Rights and impossibility of ethical justifying for such political action.

In the paper named *The Theoretical Definition of the Notion of Unlawfulness – a Step towards Positive Law*, PhD Dragana Ćorić, assistant professor at The Faculty of Law, University in Novi Sad, states that law should be seen as a living and self-supporting organism. The inner architecture of the law is not once and for all given, but in accordance with the needs of society and often in accordance with the political establishment, it is changed and processed differently, and its further construction rarely looks like its first original. Nevertheless, we can agree on something: the one that is “legal“ is regulated by legal (state’s) norms, with respecting the appropriate procedure for adopting these norms, and with the participation of the appropriate authority. But, is everything that is “legal“ really- legal, and is the unlawfulness really found only outside the law in the sense that these are the relations and consequences of those relations that are not regulated by law, or is it possible to find the unlawfulness within the law? The main role of the law in country is to regulate and establish the society, the state and the system as a way of behaviour of its citizens, and to impose sanctions for non-compliance with the prescribed rules. The unlawfulness would, therefore, be the opposite of what is prescribed as a way of behaviour, and the unlawfulness is, for that reason, an integral part of the delict. On the other hand, if we consider law as just what is by law proclaimed as a lawful, we can also see the unlawfulness as the absence of any regulation of a relationship or the consequence of that relationship, which does not mean at the same time - that relationship or that consequence does not exist but simply did not become part of the architecture of positive law. In this paper, she highlights the notion of unlawfulness from the point of view of the theory of law and the philosophy of law, using the opinions of some theorist and philosophers, which are found the most

significant in this matter, in order to approach practical understanding of the same concept; and relations of positive law and unlawfulness as such.

PhD Gianluca Ruggiero, associate professor, University of Piemonte Orientale, presents that in 2011 the new “Anti-Mafia Code” came into force (Act. 159/2011), bringing together the legislation on anti-Mafia action and preventive measures concerning individuals and property and repealing Act no. 1423/1956.

The Italian Constitution does not provide for personal preventive measures (misura di prevenzione personali). The relevant provisions of Articles 25 and 27 on afflictive measures only set out rules on penal sanctions (pene) and security measures (misura di sicurezza). In many judgments, the Constitutional Court affirmed “the principle according to which the orderly and peaceful development of social relations must be guaranteed not only by a system of norms punishing illicit acts but also by a system of preventive measures against the danger of such acts in the future”. The personal preventive measures are applied under the 159/2011 Act against persons suspected of crimes before their conviction and in the event of their acquittal or of a sentenza di proscioglimento pronounced in accordance with Article 530 § 2 of the Code of Criminal Procedure for insufficient or contradictory evidence. The first step to impose a preventive measure consist in to establish that the individual posed a “current danger”, which was not necessarily linked to the commission of a specific offence, but rather to the existence of a complex situation of a certain duration indicating that the individual had a particular lifestyle that prompted alarm for public safety.

In *The Uniform Application of Law - EU Standards and Challenges in Serbia*, PhD Milica Kolaković-Bojović, Institute of Criminological and Sociological Research, PhD Elena Tilovska Kechevi, University of St.Kliment Ohridski, Bitola and PhD Rejhan Kurtović, International University, Novi Pazar, point out that the uniformity of case law remains an imperative in process of strengthening the rule of law all around the world. In spite of differences in status that case law has in the hierarchy of the sources of law in particular country, from the perspective of citizens, uniform application of law ensures the equality before law and the possibility to, based on earlier decisions in identical or similar cases, predict the outcome, duration and costs of the decision-making process. That possibility is essential for access to justice. In parallel, from the angle of judges, uniform application of law is an important border line between their freedom of judicial discretion and possibility and/or obligation to follow earlier decisions in similar cases. In the context of achieving EU standards in the process of accession negotiations with EU, a decision of authorities on how to regulate conditions, processes and means to

ensure the uniform application of law does not depend anymore only from legal tradition and wishes of legal professionals and stakeholders. This became obvious also for Serbian authorities in the process of constitutional changes aimed at strengthening independence of judiciary, where balancing judicial independence and uniformity of case law appears as a one of the greatest challenges.

PhD Laura Stănilă, senior lecturer, Faculty of Law, West University Timișoara, Romania, in her paper *Principle of Legality: New Dimensions of an Old Rule* reminds that Principle of legality is one of the first rules taught in law schools, often stated, but rarely properly explained. Its two components expressed by the two latin adagiums ”nullum crimen sine lege” and ”nulla poena sine lege” tend to be reshaped in the light of the nowadays standards in the matter of legislating and applying the law to concrete situations. Due to the increasing role of case-law in interpreting rules in force, on the one hand, and the mandatory feature of supra-national provisions, on the other hand, even the Continental System, once recognized for its rigidity and traditionalism, seems to become more flexible and opened to interpretations. The consequence of this trend is that we are facing a deeper and a wider meaning of the principle of legality than 70 years ago.

The paper by PhD Dragica Popesku, a judge at the Court of Appeal in Belgrade is dealing with the conflict between Personality Rights and Freedom of Expression. The European Convention on Human Rights equally guarantees freedom of expression, as well as the right to respect for private and family life, while allowing the restriction of freedom of expression for the protection of reputation or rights of others, which include personality rights, in addition to human rights guaranteed by this Convention. The Constitution of the Republic of Serbia guarantees freedom of expression and freedom of the media, as well as inviolability of personal psychical integrity, confidentiality of letters and other means of communication, and protection of personal data, among other human and minority rights. However, these rights and freedoms may be restricted by law if the restriction is allowed by the Constitution for the purposes permitted thereby, to the extent necessary for the constitutional purpose of the restrictions to be satisfied in a democratic society and without prejudice to the substance of the protected right. In limiting human and minority rights, all state bodies, and courts in particular, are obliged to take into account the essence of the rights which are restricted, as well as the importance of the purpose of the restriction, the nature and extent of the restriction, the relationship of the restriction and its purpose, and the existence of a way that the purpose of the restriction may be achieved by a smaller limitation of rights. The conflict between personality rights and the freedom of expression in connection with disclosure

of information, as a conflict between two or more identically guaranteed rights, is resolved by allowing or denying the right to a reply, correction or revocation to persons whom the information relates to. This conflict can be solved by restricting the right to information at the disposition of the editor-in-chief, or by the court's decision if the editor-in-chief of a public medium is ordered to publish a reply or correction of the published information, regardless of the existence of his guilt as a respondent, or in the litigation over a claim for publishing a revocation of information in which case the guilt of the author of the information i.e. the responsible editor/editor-in-chief/editor of the section must be determined, for the damage incurred due to the publication of the information. Civil law protection of personality rights from violations in mass media is predominantly carried out through special provisions of the Law on Public Information and Media, as well as through general provisions of the Law on Obligations and the Law on Civil Procedure. According to special provisions, the means of this protection are publishing a reply and correction of information, prohibition to republish information; right to share in profit of the founders of the media outlet; publication of information on the outcome of criminal proceedings and monetary compensation of damages, which is carried out per special provisions of the Law on Public Information and Media, but also in accordance with general regulations. Other means of legal protection of personal goods under general regulations are the unjust enrichment claim and the declaratory claim to proclaim violation of rights. The mentioned legal means of protection are the legal answer to the problem which was created by the conflict of a personal good, as a potentially or already threatened interest, and published information, which attacks the personal goods as objects of the personality rights.

Zubiydat Magomadova, a postgraduate student of The Russian State University of Justice, covers the topic of *Illegality and Uncertainty*. The article considers the ratio of illegality and uncertainty; the essence of the principle of legality in the field of criminal law is examined, the thesis of certainty as an inalienable and essentially necessary attribute of legality is put forward. The certainty of the criminal prohibition is complex and cannot be absolute, proceeding from the essence of the legal norm as a result of the generalization of patterns present in the society. At the same time, the article focuses on the uncertainty produced by the legislator consciously for the sake of achieving political goals, such uncertainty undoubtedly has a negative character and is an element and an aid to illegality (as an illustration of this statement, *recent examples of the amendments of the Criminal Code of the Russian Federation are cited*).

II. RELATION OF INDEPENDENT INSTITUTIONS TOWARDS ILLEGALITY

In the second part, the debate has centred on the relation of independent institutions (courts, ombudsmen, protectors etc.) to illegality. This chapter includes nine papers dealing with the relation of independent institutions towards legality and illegality, reporting on the right to trial within a reasonable time, Constitutional Court`s practice, the practice of the Ombudsman for human rights in Bosnia and Herzegovina, the principle of justice in criminal law, historical injustice against Romas in Norway, co-operation among institutions, the status of of unmarried couples, the role of media, and the role of independent institutions in the protection of the right to healthy environment. Stands and claims in support of independency have been noted in the following approaches:

Acad. Miodrag N. Simović, judge of the Constitutional Court of Bosnia and Herzegovina, Full Professor of the Faculty of Law of the University of Banja Luka, Corresponding Member of the Academy of Sciences and Art of Bosnia and Herzegovina, Active Member of the European Academy of Sciences and Arts, Foreign Member of the Russian Academy of Natural Sciences and Active Member of the Balkan Scientific Center of the Russian Academy of Natural Sciences, Marina M. Simović, PhD, Secretary of the Ombudsman for Children of the Republic of Srpska and Associate Professor at the Faculty of Law of „Apeiron“ University in Banja Luka and Vladimir M. Simović, PhD, prosecutor of the Prosecutor's Office of Bosnia and Herzegovina and associate professor at the Faculty of Security and Protection of the Independent University in Banja Luka and Faculty of Law of University „Vitez“ in Vitez, in the paper *Modern Standards of the Right to Trial within Reasonable Time and its Implementation in the Case-law of the Courts in Bosnia and Herzegovina* report that Bosnia and Herzegovina is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights, through its judgments and decisions, interprets this Convention and establishes Convention standards of human rights protection and its judgments and final and binding for the parties. In case the Court finds the State has violated the appellant's rights under the Convention - this State has an obligation to implement the judgment. The judgments, depending on circumstances of each individual case, shall be implemented by way of payment of a fair compensation, by individual and or general measures. The Paper deals with European system of legal protection of the right to trial within reasonable time and implementation of its standards in judiciary and case-law of Bosnia and Herzegovina. After introductory remarks dealing with basic legal sources,

the competencies of the European Court of Human Rights and criteria for finding violation of the right to trial within reasonable time in the case-law of this court, the authors analyze limitations of the right to trial within reasonable time in Bosnia and Herzegovina, case-law referring to the right to trial within reasonable time in criminal cases, violations of the right to trial within reasonable time in civil cases, as well as legal opinions of the Constitutional Court of Bosnia and Herzegovina.

Tamás Korhecz, PhD, full professor, UNION University, Faculty of Legal and Business Studies “Dr Lazar Vrkatić” Novi Sad, and judge at the Constitutional Court of the Republic of Serbia, in his paper *Constitutional and Judicial Protection of Citizens Against Illegal Individual Acts and Actions – Illegalities, which are without Protection in Proceedings on Constitutional Appeals*, points out that the fundamental and original jurisdiction of constitutional courts is the abstract normative control, or establishing and control of the conformity of laws and other general acts with the Constitution. At the same time, the majority of constitutional courts nowadays also carry out other constitutional and judicial functions: deciding on conflict of jurisdiction between authorities, special electoral disputes, prohibition of operation of political and other organisations, deciding on citizens’ constitutional appeals etc. A constitutional appeal was extensively introduced to the constitutional law of the Republic of Serbia only by the 2006 Constitution of the Republic of Serbia. Pursuant to Article 170 of the Constitution: “A constitutional appeal may be lodged against individual acts or actions performed by state bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been applied or not specified“. The Constitutional Court of the Republic of Serbia has operated within the present constitutional framework since late 2007. In the previous decade, the greatest amount of the Constitutional Court’s administrative, expert and intellectual capacities was engaged and used in resolving of constitutional appeals. For years the Constitutional Court would receive more than 10,000 constitutional appeals annually, whereas the total number of cases in all other fields within the Constitutional Court’s jurisdiction was below 1000. To put it simply, a constitutional appeal is a legal instrument used to control the constitutionality (as well as, indirectly, the legality) of court rulings. With only rare exceptions, constitutional appeals are lodged directly or indirectly against rulings made by courts of general or specific jurisdiction (in some cases, citizens actually appeal the acts and actions of administration, local self-government and other authorities, but in such cases too, their legality and constitutionality had been previously established as legally binding and controlled in the proceedings before courts). A

reasonable question is raised as to where to draw a demarcation line between illegality, in relation to which protection is provided by the Constitutional Court by way of constitutional appeals and potential cases of illegality for which there is no constitutional and judicial protection. This paper will focus on the analysis of the constitutional case law of the Constitutional Court, with a special emphasis on determining this demarcation line, as well as specifying the concrete, individual acts of authorities in which, regardless of their potential illegality, the Constitutional Court fails to provide any protection in the proceedings on deciding on a constitutional appeal.

Phd Ljubinko Mitrović, full professor and the Ombudman for Human Rights of Bosnia and Herzegovina writes about the protection of human rights and freedom of persons deprived of their liberty. He emphasizes that the Institution of the Ombudsman for Human Rights of Bosnia and Herzegovina represents a specific and independent institution for the protection of human rights established with the task of promoting good governance and the rule of law, i.e. the protection of human rights and fundamental freedoms. It is within its competence to protect and promote human rights and fundamental freedoms, then to prevent or eliminate discrimination of all kinds, to deal with complaints concerning freedom of access to information at all levels of government in Bosnia and Herzegovina, and the handling of complaints related to the ministerial, governmental and other appointments. A special segment of its activity is the protection of human rights and freedoms of persons deprived of liberty, which is the organizational responsibility of the Detention/Prisoner Unit.

PhD Tolkachenko A., a honored lawyer of the Russian Federation, professor, chief researcher, Criminal Justice Research Division, Russian State University of Justice and PhD Pudovochkin Y.E. a professor, head of the Department of Criminal Law Studies, Russian State University of Justice in their paper *The Concretization of the Universal Principle of Justice in Criminal Law* claim that the issues of the fairness of criminal law do not lose their relevance and can not be considered definitively settled, despite the thousand-year history of the very idea of social justice. Justice is a multifaceted and broad concept. It requires an equitable distribution of social benefits and a just retribution for violation of the social order. Criminal law has a very limited role in its provision. Criminal law does not construct justice, creating a just social order is not its function. Criminal law does not discuss the question of how fair the relations existing in society are; it only supports the power of repression that order that has developed in society and which is a priori for criminal law is fair. In this regard, the principle of justice, being a fundamental principle of the legal system, needs criminal law concretization so that its demands become instrumental in nature. It was established that

the validity of the criminal law presupposes: the fairness of the criminalization of socially dangerous acts, the fairness of the legislatively formulated sanction for their commission, the fairness of the criminal-legal assessment of the crime, which does not allow bringing to responsibility twice for the same act; fairness of individualization of criminal liability measures.

PhD Lars Petter Soltvedt, Associate Professor in Political Science and Human Rights, University of South-Eastern Norway and Ralf Thomas Heberling, University Lecturer in Social Sciences, University of South-Eastern Norway, presented the paper titled *The Genocide and Crimes against Humanity: The Role of Independent Institutions in Coming to Terms with Historical Injustice against the Norwegian Romani People*. The authors relate part of the legal definitions of Genocide and Crimes against Humanity to how Norwegian authorities, both through legal means as well as political inactivity until recently, abstained from effectively regulating the treatment of the Romani national minority in a fair and humane manner consistent with the evolution of democratic institutions and the international regime for human rights after 1948. Coming to terms with this historical and moral injustice, the authors explore the role of independent institutions at the national as well as the international level to bear pressure on the Norwegian government to admit to well documented historical wrongdoings. Underlying their approach is a warning that maltreatment and injustice of individuals and groups may happen again – today more specifically immigrants with Muslim background. Finally, they list a set of prerequisites for this not to happen again.

In her paper, *Cooperation among Institutions – between Legality and Illegality*, PhD Ioana-Celina Pașca, West University of Timișoara, Romania, Faculty of Law, reminds that Romania is currently confronted with a series of disclosures regarding the conclusion of collaboration protocols between the Superior Council of Magistracy and various institutions, including the Romanian Intelligence Service. The present study aims at analysing the extent to which the conclusion of such protocols violates the procedural rights of the parties, from the way in which the commission of a crime is brought before the judicial bodies to how suspects are investigated and the damage is established, with consequences on criminal and civil liability.

Zorica Mršević, PhD, senior research fellow, Institute of Social Sciences, Belgrade, posits in her treatise *Unmarried Couples in Serbia between the Constitution and the Laws* that the object of the paper is to point out that the Constitutional equalization of the marital and extra-marital unions is not followed by the legal provisions of several laws. The differences cause unequal treatment in use of existential human rights of

unmarried couples. Namely, the Constitution of the Republic of Serbia stipulates that the unmarried couples are equal to the marital ones, and that the family, mother, single parent and child in the Republic of Serbia enjoy special protection. Therefore, marital and extra-marital unions are not only recognized by the Constitution, but also equalized as such. Also, the Constitution provides the family with special protection, whereby the Constitutional Court points out that, when it comes to the family the Constitution makes no distinction between marital and extra-marital unions. But the status of the extramarital partners is not recognized by the Labor rights Law, the Inheritance Law, the Law on Pension and Disability Insurance the Law on Personal Income Tax the Law on Property Tax. For example, Law on Pension and Disability Insurance do not recognize the right to family pension to the survived partner of the deceased insured partner, thereby violating and changing the essence of the Constitution of the guaranteed right to equality of marital and extramarital unions in front of law. The aim of the paper is to indicate the necessity of legal changes that would take into account the modalities that allow the surviving spouse to protect human rights in the form of enjoyment of family pension and legal inheritance in analogy to marital partners. Comparative legal solutions point to criteria such as the duration of the extramarital unions, common children, the absence of a marital union, neither the deceased nor the surviving spouse, etc...

Professor Goran Bašić, PhD, Institute of Social Sciences, Senior Research Associate and Ivana Stjelja, PhD candidate at the Faculty of Law, Union University, in their paper *Media Reporting on National Minorities in Serbia* analyse public policies and legal framework of media reporting on national minorities in Serbia, the role and practice of independent bodies with regard to media reports which are not in line with legal and professional standards, and the impact of such reporting on the status of national minorities and the level of implementation of minority rights. They analysed public policies and legal framework and professional standards in media reporting on national minorities in Serbia, as well as their implementation by independent bodies. The legislation regulating media reporting on national minorities, primarily the Law on the Prohibition of Discrimination and a set of media laws proscribe the expression of ideas, information or opinions that instigate discrimination, hatred or violence against minorities. Journalists are bound by professional standards defined in the Serbia Journalists' Code of Ethics to oppose anyone who violates human rights or advocates any type of discrimination or hatred or instigates violence. The Code of Ethics requires journalists to be aware of the threats of discrimination the media can spread and to give their best to avoid discrimination. The practice of the Commissioner for the Protection

of Equality with cases of discriminatory reporting on national minorities in the media, as well as the practice of the Press Council, as an independent self-regulatory body, indicates that the protection of the rights of national minorities in media needs improvement.

In *The Role of Independent Institutions in the Protection of the Right to Healthy Environment*, PhD Ana Batričević, a research fellow at the Institute of Criminological and Sociological Research in Belgrade, posits that at the time of intense rising of environmental awareness and increased environmental risks caused by the impact of negative anthropogenic factors, the protection of human right to healthy environment is given more and more attention. The protection of this right is guaranteed by the Constitution, laws and subordinate legislation and, depending on the gravity of its violation or endangerment, it can be achieved in criminal, misdemeanour, civil or administrative procedure. Special role in this belongs to independent institutions such as: Ombudsperson, Commissioner for Information of Public Importance and Personal Data Protection, as well as to the Environment Protection Agency that functions as legal person within the Ministry of Environment Protection. In this paper, the author highlights the importance of providing an adequate, prompt, efficient and comprehensive protection of the right to healthy environment in Serbia, with special focus on the aforementioned institutions and offers recommendations directed towards the improvement of conditions in this field.

III. JUSTICE AND LEGALITY

The final chapter is focused on justice and legality, and it is comprised of 14 papers relating the EU-accession process, money laundering, the processing status of young adult persons, normative endangerment of institutional independence of judiciary, domestic violence, hate speech on the internet, the freedom of the will of disabled persons, the recently introduced defence right in China, data retention, the crime of aggression, the scope of forensic science in the legal system, liquidity of intimacy in cyberspace, and the implementation of the *nullum sine lex certa* principle.

Tanja Mišćević, PhD, full time professor, Faculty of Political Science, Head of Negotiation Team of the Government of the Republic of Serbia for the Accession Negotiations with the European Union, in her paper Legislative Obligations of Serbia in the Accession Process to the European Union - the Case of Fundamental Rights, points out that the obligation to harmonize the law of the Republic of Serbia with the EU *acquis* began with the entry into force of the Interim Agreement with the Stabilization

and Association Process, especially in adjustments relating to free movement of goods and services. However, Accession Negotiation spread area of harmonization to the entire EU law, and in fact, the whole process of negotiations is an agreement on the terms, the necessary measures and ways of this harmonization. A New Approach to Negotiations, which the Union created for the Western Balkan countries, bearing in mind the experience of previous enlargements, has brought a lot of innovation in the negotiation process. Changes are exactly in terms of techniques and rules of negotiations, which ultimately affect the legislative obligations of Serbia as a future member of the EU, because unlike previous cases and because of the experience of new Member States, brought much more needs to prove concrete results achieved in all areas. In particular, such a result is necessary to show in the areas that are a priority for the negotiations: the rule of law, reform of public administration and local self-government and economic management. This is, in fact, the first time a candidate country must prove before the accession all three phases of harmonization of national law with EU law - harmonization, implementation and enforcement.

Next, professor István László Gál, PhD, University of Pécs, head of Department of Criminal Law, deals with money laundering, and records that the AML regulation is continuously enhancing in the last two decades in Europe. The time which was passing by between the EU Directives regarding this topic became shorter and shorter. Experts (criminal lawyers, compliance officers, judges, prosecutors etc.) have to train themselves day by day, if they want to make their job properly. Money laundering is the complex entirety of illegal economic transactions pursued under the concealment of legal economic transactions that aim to justify the origin of wealth obtained through criminal act, this way getting rid of its recognisably illegal nature. “Therefore the reason and origin of money laundering is always a crime that becomes unretractable, while its aim is that the fortune obtained this way should be used in the legal economy.”

Professor Osman N. Jašarević, PhD, Faculty of Law, University of Travnik, Bosna i Hercegovina, says that the motive of his work is to distinctly explain the position of young adult persons in terms of criminal and procedural position, and certain peculiarities in the process, and to explain their significance, determine the facts of the process towards young adults, with a special emphasis on their rights through a special criminal proceedings.

The paper by Valerija Dabetić, PhD, University of Belgrade, Faculty of Law, analyzes the level of institutional independence of the judiciary in contemporary Serbia and the ways of its normative endangerment. The structural changes and political instability, as

a feature of countries in the post-socialist transformation, have led to the weakening of institutions in Serbian society. Institutions are not a simple set of rules, but rather complex structures made up of formal and informal rules, convention, norms and traditions, and as such make judicial reform more difficult. Although judiciary in Serbia remembers several attempts of changes formal institutional rules, informal practices between governing sets survived in all political structures. She is intending to show that the current domestic regulations guarantee a certain level of institutional independence of the judiciary, but that in each of the existing solutions, is left possibility for the influence of the executive or legislative authority as well as other actors. These cracks are undermining the principle of the separation of powers, as one of the foundations of the rule of law, and endanger the judiciary that needs to be autonomous in relation to the other two branches of government. This status of the judiciary has multiple consequences for the functioning of the state, as well as for the whole society.

Aleksandar Bošković, PhD, and Radosav Risimović, both of them associate professors at The Academy of Criminalistic and Police Studies, in their paper *Domestic Violence* point out that with the adoption of the Law on the Prevention of Domestic Violence, the legal protection from domestic violence has been improved in the Republic of Serbia, which clearly shows the strong intention of the state to effectively combat this widely represented social problem. In this way, the significance of the preventive action of the competent state authorities is even more emphasized, and consequently, zero tolerance towards the perpetrators and potential perpetrators of domestic violence has been introduced. The Law on the Prevention of Domestic Violence started to be applied on June 1, 2017, and taking into consideration previous period of application, there are some specific arguable issues that need to be answered properly. That having been said, the subject of the research in this paper is focused on the critical analysis of certain provisions of the Law on Prevention of Domestic Violence, and beside general considerations of the mentioned law, particular attention has been paid to the criminal justice aspect of Domestic Violence as well as to certain procedural aspects related to, above all, police activity in accordance with the relevant legal provisions. Certain issues and problems that have arisen so far in practical application has been pointed out and in the end they provided certain proposals *de lege ferenda* in order to improve the current legal solutions and improve the efficiency of the actions of the competent state authorities in case of preventive protection against violence in the family.

Phd Aleksandar R. Ivanović, assistant professor of Criminal law at Department for law sciences, International University of Novi Pazar, deals with the problem of combating hate speech on the Internet. In this regard, the author first starts from the problem of

making hate speech on the Internet illegal and creating legal frameworks for punishing responsible persons for delivering content on the Internet that contain hate speech. A particular challenge in this business is the establishment of a balance between freedom of speech on the Internet, on the one side, and the fight against hate speech on the Internet on the other. The author points to the key problems in the fight against the hate speech on the Internet, and it involves, first of all, defining when something published on the Internet can be regarded as a hatred, who is responsible for controlling such content on the Internet, in order to delineate the responsibility of the author of the content of the responsibilities of the web administrator, Internet portal editor, social networks, etc., and how to determine the sanctions for this type of behavior. In this regard, the author analyzes the provisions of the Council Framework Decision on the Suppression of Certain Forms and Expression of Racism and Xenophobia through the Criminal Code (2008/913/PUP), then the provisions of Code of Conduct for Combating Illegal Hate Speech, by which the European Commission agreed with with Facebook Microsoft, Twitter and YouTube to prevent the spread of illegal hate speech on the Internet in May 2016, as well as the provisions of Germany Act to Improve Enforcement of the Law in Social Networks from 2017. The purpose of this paper is to address problems in process of making hate crimes on internet illegal, and providing effective law means for combating against this sort of behavior.

Ivana Milas Klarić PhD, assistant professor, Faculty of Law , University of Zagreb, in her *Freedom of will of Persons with Disabilities* analyzes the reform of custody legislation for adults in the Republic of Croatia after the adoption of the new Family Act in 2015. The text deals with the legal position of people with disabilities and legal relevance of their statements of will. This is to say about the statements of will in status, family law, but also those related to medical procedures. Incapability for reasoning is seen either as a legal category (restriction of legal capacity) or as a factual situation (inability to give legally relevant statements due to states such as coma, permanent vegetative stature, etc.). Croatian law is pending the reform of family law in 2015. yearly approval of legal capacity persons, and "substitute" decision-making for persons who are not capable of declaring a legally relevant will. Comparative legislation and practice recognize the relevance of will in a case of future incapacity. This are advance directives, certified by the Council of Europe in the Recommendation [2] 11 (2009) . The reform of family legislation in the Republic of Croatia is the first step towards harmonization with the requirements of the UN Convention on the Rights of Persons with Disabilities in 2008 and in part and in accordance with the Recommendation. The reform encompasses a comprehensive revision of the custodial institute for adults and,

consequently, other family law institutes where adults under guardianship appear as parties in judicial and administrative proceedings.

Cheng Yan, Lecturer in East China University of Political Science and Law, Shanghai, China, reports that the legislation of criminal defense in China has been through a slow and tough process. In 1979, Chinese Criminal Procedure Law was enacted and the right to defense was included. However, at that time the regulation about defense was pretty vague, which resulted in its infeasibility. In 1996, the amendment of Chinese Criminal Procedure Law was enacted and the defense regulations were perfected to a large extent. The access to lawyer during investigation phase was realized and the legal aid system was also improved. The defense right had its greatest development in 2012, when the latest amendment of Criminal Procedure Law was enacted. The defense rights of attorneys during investigation phase were expanded. Their rights to meet with the client, to have the experts on their side, and to cross-examine the witness were realized to some extent.

Silvia Signorato, PhD, a Researcher in Criminal Procedure at University of Padua (Italy) and a lecturer in Criminal Procedure at University of Innsbruck (Austria), in her paper *Data Retention*, argues that whenever a telephone or a computer device connected to the network is used, the telecommunication service providers keep some data, e.g. the origin of the communication, its destination and its size. The prior storage activity of telephone traffic data and electronic communications traffic data is defined as "data retention" and can play a fundamental role for investigative purposes. This article aims at recognizing the benchmarks for regulation of data retention that respects the proportionality principle. As part of this analysis, an approach that also takes into account the right to the defense of the accused is proposed. Furthermore, the article disputes the possibility of *ab origine* define the data retention period on the basis of the type of crime. This is because the internet service provider cannot know a priori what kind of crime will be combined with any given data, until access to that data is requested by the competent national authorities.

In the paper called *International Criminal Court's Crime of Aggression. A Different Crime from all the Others*, presented by PhD Raluca Colojoară, associate assistant at the West University of Timișoara, Faculty of Political Science, Philosophy and Communication Science, Romania, and PhD Darian Rakitovan, notary public office, Alibunar, Serbia, the co-authors posit that ever since its adoption in 1998 was the Statute of the International Criminal Court unique in its kind. Not only was it establishing the first permanent criminal Court on an international level and tried to

encompass as many crimes as possible within its field, but, it was the first, after the International Military Tribunal of Nuremberg and the International Military Tribunal of Tokyo, to include the Crime of Aggression as crimes over which it had jurisdiction. The article follows the underwent path of defining the crime till its adoption and later by the Court's possibility to exercise jurisdiction over it. Further on, they try to answer to the question of whether in real life the ICC will be able to exercise jurisdiction and prosecute people for its commission, as well as try to define the perpetrator's necessary *actus reus and mens rea* at times of the commission of the crimes.

The next paper by PhD Dragan Obradović, a judge, Higher Court in Valjevo, Research Associate at the Institute for Criminological and Sociological Research in Belgrade and Strahinja Pavlović DMD, MSc in Forensic science (Forensic dentistry), an associate at the Laboratory for Anthropological Research, School of Medicine, University of Belgrade, highlights the scope of forensic science in the legal system. Cooperation between forensic science and the legal system in the world as well as in Serbia is constantly changing, improving, uncovering new opportunities. In this paper, they briefly present a short history, a study of some areas and the scope of forensic science in the world. Also, they focus on the scope of the application of forensic science through various types of expertise in the Serbian legal system. In that part, the focus is on the area of criminal law, the problems that they have so far noticed in the work of the police and judicial authorities regarding the application of certain forensic science from the aspect of human rights protection. In addition, they also point to possible new human rights concerns, bearing in mind the provisions of certain new yet insufficiently known regulations relating to certain aspects of forensics.

Rivera García Jomarie, M.A. University of the Basque Country, International Institute for the Sociology of Law, Oñati, Gipuzkoa explains in *Liquidity of Intimacy in Cyberspace: a Critical Approach to the Impractical Character of Revenge Porn in Criminal Law* that "revenge porn" is the concept that aims to account for the act of disseminating sexually explicit material (naked pictures, or the representation of any type of sexual act) through cyberspace without the consent (sometimes even without the knowledge) of some of the parties involved, with revenge as the motivation. However, it is a problematic concept insofar as neither of the two signifiers that compose it, (i.e. 'revenge' and 'porn'), encompass the complexity of what they purport to describe. In any case, even without consensus on the accuracy of the concept, there are sectors that seek to activate criminal law as a tool for punishment on those who perpetrate revenge porn, since the mainstream assumes that this will solve the problem in question. However, the above would result in simplifying a highly complex sociological problem, which not

only requires discussions on gender but also a critical look at the realities that characterize contemporaneity; one that has very close links with technology, and that assumes it as an instrument to visualize all the dynamics among actors, thus leaving the dividing margins between those practices that are socially permitted in the public sphere and those that are socially thrown into the space of private, blurred. Hence, through this work the intention was to: add nuance to the complexity of the phenomenon of revenge porn mainly as a sociological problem, deconstruct the legal rationale that seeks to criminalize the practice, and explore alternatives that have been taken to address the phenomenon of revenge porn outside of criminal law. The latter with the intention of answering the research question: Is criminalization the solution to the problem of revenge porn?

Veljko Delibašić, LLD, attorney from Belgrade, research fellow with the University of Belgrade examines the criminal law aspects of domestic violence. The paper focuses on the topic of the criminal offence of domestic violence under Article 194 of the Criminal Code, taking a stance regarding this issue and as to whether the family members are to be given additional criminal legal protection by prescribing this criminal offence. This analysis aims to find valid arguments for the existence of this criminal offence given that all the actions under this criminal offence can be subsumed under another criminal offence which protects all citizens, regardless of who the perpetrator is, a member of the family or another person. In addition to this, the paper warns that violence in the presence of children constitutes violence against children of sorts and calls for stricter sanctioning of such behaviour. The paper also points out to the basic characteristics of the Act on the Prevention of Domestic Violence. Special attention has been given to the views taken in respect of this question by the European Court of Human Rights. The paper also points out to the obligations which Serbia has taken upon itself by ratifying the Istanbul Convention, as well as to the need to fulfill some more, so far unfulfilled obligations, all in order to ensure maximum of human rights protection for all citizens, and primarily the victims of domestic violence.

And eventually, the chapter-closing is the paper presented by Adrian Stan, a lawyer at Timiș Bar Association, Timișoara, and PhD student at the West University, Law Faculty, Timișoara, Romania. The central element of his article *Nullum crimen sine lex certa* is the central element is the idea of the previsibility, more called foreseeability of the criminal law, as a derivation of the great principle „nullum crimen sine lege“. While this principle does not refer textually to all the qualitative conditions of the law, reality has shown that these new regards, among which the foreseeability, have come to the fore when speaking of the qualitative criteria of the norm. So it happened in the

ECHR jurisprudence, and so happens in Romanian law constitutional control. He first noticed the early moments of the idea of clarity of the law from the classical age of criminal law, and then briefly analyzes the provisions of the Rome Convention which provide for the principle of the lawfulness of incrimination, with its famous exception. In the following, he has quoted a few judgments of the European Court of Human Rights in the matter, in which it can be observed that the rigor of the predictability of the law has gained a great deal of power in the Court. Then, going to Romanian domestic law, he shows how a special law deals with the way in which laws are to be drafted, and the control of the Constitutional Court refers to this, as sometimes unclear or ambiguous texts are made.

CHAPTER I

Legal Theory and Philosophical Aspects of Illegality and Legality

Acad. Vlado Kambovski*

NATURAL RIGHTS, LEGITIMACY OF LAWS AND SUPRANATIONAL BASIS OF UNLAWFULNESS

The UN Universal Declaration of Human Rights of 1948 established a symbiosis of natural and positive law. The interpolation of natural, equal and innate human freedoms and rights in positive law through the adoption of numerous conventions, from the European Convention on Human Rights to the Charter of Fundamental Rights of the European Union, laid the foundations of a contemporary “secular religion” that affects not only the concept of state and law, but also on the social paradigm and global society. The postulate of strengthening the position of natural freedoms and rights is imposed as a counterpoint to the challenges of a modern society that needs to ensure its human and sustainable development. Since the adoption of the Universal Declaration, there have been turbulent changes in the very concept of law caused by the processes of globalization and the development of a post-industrial society. The plurality of sources of law - national, international, self-regulatory, etc. - complicates the framework in which the synthesis of natural law and positive law is to be achieved. The concept of universal natural freedoms and rights becomes effective if it has an impact on strengthening the rule of law, the legitimacy of positive law, and imposing its value criteria in the determination of law and wrongdoing, unlawfulness and its exclusion.

The realization of this postulate requires deep legal reforms aimed at strengthening the independence and activism of the courts and other institutions (Ombudsman) for the protection of human rights and freedoms.

Keywords: *Universal Declaration of Human Rights, symbiosis of natural and positive law, rule of law, legitimacy of law, unlawfulness and its exclusion, judicial independence and activism.*

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1. Lawful and unlawful in the light of the principle of the rule of law

1.1. The UN Universal Declaration of Human Rights of 1948 established a symbiosis of natural and positive law as the supreme principle of modern society. With adoption of numerous international and regional documents and conventions, starting from the European Convention on Human Rights (ECHR) to the Charter of Fundamental Rights of the European Union, natural, innate and equal human freedoms and rights become a valuable landmark, an incentive for the modernization of law and an integral part of the legal community. During several decades of implementation of international human rights instruments, a relatively consistent system of *ius cogens* and other binding norms are interpolated into national legal systems, as well as a basis for jurisdiction of supranational court instances of the type of European Court of Human Rights (ECtHR), *ad hoc* international criminal courts and, finally, a permanent International Criminal Court. Elevated at the level of the main criterion and a recognizable sign of a democratic and humane character of society, the respect and protection of basic human freedoms and rights becomes the corner stone of human and sustainable social development. With their inner and original power, driven by the aspiration for the creative action of a man in the field of unlimited possibilities, their universal corpus requires the examination of classical teachings, categories and law institutes, especially from the aspect of the legitimacy of national laws as the basic postulates of the rule of law, the limitation of state punishment (*ius puniendi*) and determining the unlawfulness of human actions. At the heart of the universal concept of natural and innate freedoms and rights is the broader understanding of individual freedom, which implies the attitude of the restrictive determination of its restrictions by the state (“the individual is allowed everything that is not forbidden, and the state is forbidden everything that is not predicted with the constitution under its jurisdiction”).

The consideration of this significant sequence of the symbiosis of natural and positive law presupposes the existence of a law, its legitimacy and its rule. Beyond these frameworks, the explanation of the meaning of human freedoms and rights and human dignity as their source, content and goal remains the subject of idealistic and utopian aspirations. The struggle for human freedom and rights is the struggle for their legal guaranteed assumptions whose fulfillment is the primary obligation of every modern state. The dynamics in the field of law introduces the concept of human rights and freedoms and implies the observation of categories of positive law not only in their existing form and content, as they are, but also in the perspective opened up by the improvement of that concept, that is, what should be. In the relation to the concept of illegality it opens two levels of observation: at the general level of determining lawful

and unlawful and their mutual relations; and at a lower, concrete level of the unlawfulness of certain human behavior. The first level belongs to the philosophy of law, while the other one belongs to the field of legal science of criminal, civil, administrative or disciplinary law, whose categories are formed about the notion of unlawful punishable work or unlawful act.

The common connection point for both angles of observation are the natural freedoms and rights, as the basis and value criterion for the legitimacy of the law and the differentiation of the lawful and the unlawful: the legal prohibitions do not create unlawful, but unlawful which consists in violation of freedoms and rights is sanctioned by its prohibition.

1.2. Of particular interest to the subject of this debate is the relationship between law and unlawful, as phenomena that are two sides of one and the same phenomenon: there is no law without lawlessness, nor in the legal context a lawlessness without law: *ubi ius-ibi iniuria; summum ius, suma iniuria* (Klenner, (2015), 10: fear of unlawful creates law). The relationship of lawful and unlawful puts the question - what should be considered right and what is wrong. What legitimizes the law by stamping wrong? Is only the power of the state determining what is lawful and what is unlawful? Or the law must have some internal content that legitimizes it? The law is legalized, but what legitimizes the law. The law illegalizes the lawlessness, but does it illegitimize it. It is a dialectic of the will and freedom of the legislator to determine the law and the lawlessness. The answer is- law is what is just (fair) and correct, but it depends on the social relations in the given society, which will influence the assessment of what is lawful and what is unlawful (since *Trazimah* remained “justice is what is of benefit to the powerful”). There is always a conflict between the universalism of lasting values and the particularism of the real and concrete interests of individuals and the possibilities for their realization.

Legitimacy as the criterion of the law can not be carried out only from its legality (the form of the law, adopted in the legal process of the legislator, etc.), and not on the basis of what it is, but from the “what should be”. This leads to the search for the basis for autolegitimation of the law. As a system of rules of reason this basis is expressed in the famous *Protagoras’ ipsissima verba* “Homo mensura,” which by the development of the law at a higher stage of the emergence of legal law is supplemented by *Plato’s* idea that “God is the measure of all things.” Nowadays the dominant thesis is that the idea of justice and natural law is sufficient as a basis for the self-legitimation of the law.

The achieving of justice remains the highest legal ideal with a different degree of embodiment and in the most developed societies. Neither the EU, which seeks to establish a consistent legal order (founding treaties, regulations, conventions, etc.) does not expose justice as its core value, due to its insufficiently defined nature (super-state or *sui generis* political community, modern federation etc., s. *Douglas-Scott*, (2017), 59). The main reason why justice is not defined as core value, although Article 3 of the EU Treaty explicitly emphasizes that the EU will “promote social justice” is that in a society oriented towards the market ideology the idea of social justice is not a shared value among all its members; they are divided into two groups from the aspect of the market model - redistributionists and welfarists, so there is a constitutional asymmetry between the policies of states that promote market efficiency and others that promote social protection and equality.

Natural rights are an essential moral element of law and its rule, the “secular religion” of our era, but their conversion to a positive law for some authors is exactly the “Faustian agreement” (*Gearty*). There is a risk that human rights are corrupted on the one hand by conserving them in a robust legal framework and thereby limiting them, and on the other hand by their possible abuse as a means of achieving other goals that do not correspond to the idea of justice (*ibid.*, 76).

In the light of jusnaturalism, which received the final forms of the positive-legal principle of the Universal Declaration of Human Rights and human rights conventions and documents, the only measure of law and its legitimacy are natural and innate human freedoms and rights, and only the law that serves them is correct (just) law. The measure of lawful and unlawful is justice, which separates it as a bifurcation of good from bad human acts, invoking the “golden rules” - *honeste vivere, neminem laede, suum quique tribuere*.

The consideration of the relation of lawful and unlawful as a simplified image of opposing negations is not always adequate from the aspect of the specificity of the legal systems that belong to the family of Continental and Anglo-Saxon law. Thus, for Anglo-Saxon law, the liberal principle of the presupposition of the law applies: everything that is not explicitly declared to be unlawful is legal. By contrast, on the continental law, burdened with the tradition of Justinianism (*Corpus Juris Civilis Justinian I*, VI century), makes a strong pressure the principle of the supreme power of law to determine what is lawful: what is allowed must be explicitly determined by law, everything else is unlawful (s. *Luhmann*, (2014), XXXV).

Finally, the relation between the law and the unlawful as a one-way relation of the legal norms and behaviors that contradict them complicates with the phenomenon of “lawlessness through law”. A typical example is nazi law during *Hitler's* dictatorship (s.*Rückert*, (2018), 361). This is an unlawful, criminal behavior, to which the form of legality is given. On these grounds, *Radbruch* made a famous formula of “legal lawlessness and supra-legal law”. In contemporary criminal law, the same meaning has the phenomenon of “crime under the protection of the law”.

1.3. In the era of globalization and post-industrial society, the importance of the rule of law becomes more and more complex, to the extent that the state loses absolute sovereignty in the creation of law, departing from the transnational and international norms and autoregulatory or hybrid (state-private) rules in the free spheres of society. There is a high degree of consensus that modern legal science faces very complex challenges: lacking general concepts in relation to law in the global world; accepting the reality of non-state (self-regulatory) law means recognizing the fact of legal pluralism; it is still a strong conception of legal positivism, so many non-state systems remain inconsistent with the ideal of the rule of law; the ethnocentrism of the Western traditions of academic legal thought, etc., is also emphasized (*Tvinning*, s. *Muller* et al. (2012), 28).

The internal tension between the universalization of law, conditioned by the process of globalization, and the traditional state (national) concept, raises the importance of the rule of law precisely in response to the process of dispersion of its sources and power centers who create the legal rules. This will also affect the internal changes in state functions, in particular the maintenance of the basic regulatory, while strengthening the supervisory function as a consequence of autoregulatory institutions that create non-state law (*Scott*, s. *Muller* et al., (2012), 64). Under the conditions of “regulatory capitalism” and the emergence of all the more numerous legal rules established by independent state agencies and international bodies, it is necessary to rethink the concept of rule of law that can retain its sense of subordination of the state and positive law to “higher” ideas and values of law at the national level, but encounters major challenges at a supranational level that is beyond the democratic control of citizens. Changing the character of a state that is increasingly becoming a “welfare state” leads to profound changes in the legal systems and their structure: it becomes complex and does not come down to imperative and prohibitive norms, directly applicable from state authorities and controlled by the central government, but it is increasingly being pushed into instructive norms (regulation of state subsidies, social assistance, etc.).

The problems of the integrity of the concept of law, caused by the emergence of autoregulatory rules, the weakening of the normative power of the legal rules, due to the need for legal norms to contain not directly applicable solutions, but more general instructions for the application and resolution of cases by courts and other institutions, urge the demand for strengthening the rule of law principle. This requirement becomes the main basis for achieving unity not only in the creation, but even more in the application of law by various and dispersed institutions that must be subordinate to the same principles of “good governance”.

Expanding the circle of sources of law - internationally and nationally, state and autoregulatory, as well as the mechanisms and institutions responsible for its application, creates a real confusion in the legal thought about determining the notion of “law”, so that its definition becomes fluid and dependent on different perceptions of what is or should be its role and what its goals are. The diversity of functions (in criminal law, private law, etc.), as well as the types of legal norms (international, national, municipal, state, self-regulatory etc.), make the notion of law a more element of the academic categorical system than from the social practice sublimated synthetic concept.

Creating a global economic and, partly, a political order is necessarily linked to global governance that seeks to establish a system of uniform rules through which the international community directs the activities of international and national institutions to a specific goal, using a diverse network of organizations to impose their authority (s. *Rozenau, Held / Mekgru* (2010), 80). Most of these activities can not be incorporated into strict international law norms or in the rigid competence of international judicial and other legal institutions, so that their institutionalization is achieved through more or less informal mechanisms of negotiation, compromise, international mediation and peaceful resolution of conflicts. Hence the question is whether the principle of the rule of law needs to be redefined in accordance with the universalization of human rights objects in the context of economic globalization (*Kinley*, (2003), 241). An analysis of the relationship between these categories must take into account that globalization takes place as a two-sided process, expressed on one side as a “globalized localism”, and on the other as “localized globalism”.

Today's degree of globalization of law does not produce a result that could be regarded as a consistent system of “global law” (*Teubner*), close to *Kant's* conception of creating a transcendental legal order for all humanity (*ibid.* 243). But it can not be denied that a major step forward has been made in protecting universal human freedoms and rights

and, thus, in suppressing the monopoly of the state to create laws, guided only by the unlimited and arbitrary will of the legislator

The rule of law is essentially a mechanism for implementing natural law standards on human rights in international law and in national legislation. In addition to economic globalization, it also appears as the strongest support for the claim that modern society has already emerged in the state of “neo-medievalism” and experiencing the end of national sovereignty (*Gilpin, s. Held / Mekgru, (2010), 278*). This concept emerged from the political theory of *Bull* in the late 1970s, according to which the undisputed analogy exists between the present-day globalized world and medieval Europe, in which they did not have complete sovereignty, nor states, nor the church or other territorial organization, but these entities participated in complex interconnected sovereignty (*Bull, (1977), 254*). The cause of weakening the power of the state is, on the one hand, strengthening the status of individual freedoms and rights and, on the other hand, spreading the awareness and feeling of “the world's common good”.

2. Natural freedoms and rights as the material side of the unlawfulness

2.1. Unlawfulness is a normative term that denotes the opposite of the law of certain human behavior. Given the objective and general character of legal norms, whose function, by threatening coercion, motivates the addressee of the norms to certain behavior, the unlawfulness can be nothing but the qualification of the conduct of an individual - the addressee of the legal norm, contrary to his duty to respect the prohibition or command contained in it (*Hold-Ferneck, (1903), 371*). Determining exactly this individual element that reduces the general norm to the specific obligation to act in accordance with it is an essential criterion for distinguishing the unlawful behavior of an individual, from a general unlawfulness which arises from the non-application of the legal norm. If some norm does not apply, a situation that is contrary to the law arises, that is, the situation is unlawful, but it is not yet “against” the law. Non-implementation can be caused by the action of various factors: non-disclosure by the state of the conditions (financial resources, capacity of institutions, etc.) for the application of the law or mass obstruction to the law of such scope, that the individual participation of individuals in this can not be separated. In this situation, the law did not fulfill its goal in terms of human rights and social conditions for their realization (for example, the law that should provide pensions, social security, health care, etc.). In this case, it is about the state of the unlawful, or about the unlawfulness in a wider sense, to which it can not be reacted with the means of the law.

The characteristic of the unlawful act is that it must consist in violating a specific legal norm. Establishing unlawfulness is an inherent part of the process of determining the factual situation - what is the act, which is its objective and subjective elements, and through the procedure of its subsumption under the legal norm - the adoption of a conclusion about the existence of an unlawfulness or consent of the act with a legal norm. On the contrary, the grounds for the exclusion of unlawfulness have a general annihilating effect. Such are, for example, the necessary defense and ultimate necessity, conflict of obligations (stronger excludes less important) or the consent of the injured party in case he freely disposes of his legal good. They are not only outside the specific legal norm that is injured by certain behavior, in the same system, or branches of law, but also out of that system (such as the grounds for excluding criminal offense).

This distinction is important because it leads to the conclusion that the unlawful action is examined on two levels: at the level of the legal norm itself, if it is injured by a concrete act that should meet certain objective and subjective conditions (harmful consequence, causality, subjective elements, etc.); and at the level of the legal order as a whole-whether there is a conflict of legal norms, one that implies a negative judgment on the prohibition of conduct, and the other that introduces a special criterion for the assessment of lawful and unlawful.

The existence of this difference allows the issue of unlawful behavior to be extended to the area of not only explicit permissive norms (on the necessary defense or ultimate necessity), but also on norms and standards, domestic or international, on human freedoms and rights, which introduce value criteria and about the existence of unlawfulness and about its exclusion.

2.2. In addition to the general notion of unlawfulness as a relationship between law and unlawful, his narrow notion is focused on behavior that is legally prohibited. The unlawfulness presupposes anticipation of prohibited conduct in the law as a punishable offense or a delict of civil, administrative and disciplinary law. In criminal or prohibited acts, unlawfulness is the normative element of the offence that expresses the attitude of the behaviour towards the legal good, whose protection is prescribed. It may be a prohibitive norm that prohibits, or an imperative norm that orders certain conduct under the threat of sanctions.

Unlawfulness in criminal law is indicated by the fulfillment of the elements of the being of a concrete offence (action, causal link, consequence, subjective elements, etc.). In such a case, unlawfulness is presumed, and it can be excluded only if there is a

particular basis for its exclusion. The presumption of unlawfulness when the being of an offence is prescribed by law is *praesumptio iuris* (a precarious assumption), so that the basis for its exclusion must be proved in particular.

The essence of the notion of unlawfulness that applies to all conduct contrary to the law is derived from the relation between individual conduct and concrete norms of the legal order. It is objective unlawfulness, an objective normative judgment on the legal impermissibility of a particular act. There is no conduct that is in itself unlawful, without relation to a specific legal norm. Unlawfulness is not an ontological element of act, but from the aspect of a specific legal norm to a particular conduct projected assessment of its prohibition.

On the other hand, the unlawfulness can not be identified with the extra-legal nature of the forbidden offence. It is not an unlawful conduct because it is forbidden, but is forbidden because it is unlawful. The estimate of its unlawful character is preceded by the unlawfulness of the act and differs from that concept. It is possible that an act is forbidden, and if it is not unlawful, and *vice versa*, it is possible that the act is not lawful, but it is not illegal because it is not prohibited by law. The material side of the unlawfulness and then the forbidden (unlawful) offence, consists of natural human freedoms and rights and other social values that are in the function of their respect, expression and protection. Their injuries are the core of their unlawful nature, from which the unlawfulness is performed and, in the absence of the injuries, the basis for its exclusion (s. *Kambovski*, (2011), 212).

Accepting the formal and material definition of the notion of a criminal offense, its material substrate – unlawful character in terms of violation of human freedoms and rights - is concentrated precisely in unlawfulness as a general element of its structure. The violation of the norms of criminal law does not make any sense if it is not connected with the protective function of criminal law and the legal good as a protected object. Hence, material unlawfulness expresses the relation between the act of the perpetrator and the legal property in whose protection the criminal law is established (*Jescheck / Weigend*, (1996), 234).

2.3. In a material sense, unlawfulness is an internal dimension of opposing a legal norm consisting of a violation of a legal good. In itself, the violation of legal goods not prohibited by law is not illegal offence (for example, alcoholism, drug addiction, etc.). Realizing the lawfulness of a prohibited offense is the first and inevitable element for assessment of an unlawful act, but only the exercise of a legal being of the offence is not

sufficient for a conclusion of unlawfulness; it is possible in the concrete case that on the side of the perpetrator there is a certain permissive norm that makes his behavior legally permissible. In the conflict of prohibitive norms, the fulfillment of which is indicative of a unlawfulness, and the permissive norms that exclude it, the key role is the assessment of the infringement of a legal good and the priority of one or other provision: the murder committed in the necessary defense is not unlawful because there is no violation of the right to life as a legal good, that is, in the conflict of rights (the victim of the attack) and the unlawful act (the attacker) the dominance must relate to the legal good of the party on whose side it is the law.

As opposed to formal unlawfulness that signifies the attitude of opposing a certain act to a legal norm, “material unlawfulness” is, on the one hand, the starting point on which the legislator establishes formal unlawfulness, and on the other hand the material criterion and the justification of permissive norms that exclude unlawfulness. For such determination of the unlawfulness and the basis for its exclusion it is less important whether it is considered that it is contained both by the very being of the forbidden offence, or outside it. According to the second opinion (*Binding, Mayer*), disagreement is not contained in the lawfulness of the offence, but in the violation of other norms that stand behind him: these are cultural norms (*Mayer*), which have a superior meaning (do not kill, not steal, etc.), and legal being is only their “cognitive base” (*ratio cognoscendi*, s. *Kunert*, (1958), 29). In contrast to this teaching, other authors point out that the unlawfulness is contained in the very legal being of the offence, because if it is outside it would mean that it is subsequently constituted and it depends on the absence of some basis for the exclusion of unlawfulness (*Schmidhäuser*, (1969), 438). It is acceptable to have a medium solution, represented in much of the criminal law science, on the indicative function of a legal being in relation to unlawfulness (*Jescheck / Weigend*, (1996), 245). The fact that the offence is forbidden (stipulated) by law and that this legal provision is violated by the execution of a prohibited act, is based on the general negative judgment on its unlawfulness. The statutory provision and its being, therefore, is the center of unlawfulness and represents its not “cognitive,” but “essential basis” (*ratio essendi*).

As the presumed element of a criminal offense, it has an indication of the importance of a final assessment of its illegality, but besides it the existence of possible grounds for eliminating unlawfulness must also be taken into account. As the violation of natural freedoms and rights is a material substrate of unlawfulness, so the absence of such a violation of the material substrate is the basis for the exclusion of unlawfulness, formulated as permissible legal norms. Their purpose (necessary defense, ultimate

necessity, etc.) is to make legally permissible acts that are formally contrary to explicit prohibitive norms, but in the material sense they are on the same line of protection of legal goods in whose protection these norms are set. By such an effect of the basis for the exclusion of unlawfulness, they reinforce the position of prohibitive norms, solving specific life situations in which the integrity of protected freedoms and rights can be better protected by the execution of a generally prohibited act (*Kambovski*, (2011), 215).

Accordingly, the violation of natural human freedoms and rights as the material side of the unlawfulness has more significance: it appears primarily as the basic criterion of criminogenesis - the opinion of the legislator about what forms of unlawfully conducts should be incriminated as certain types of offences (criminal offenses, civil tort, etc.). It depends from this assessment the graduation of easier and more difficult forms of forbidden offences. Likewise, the severity of the infringement of a legal good is one of the grounds for imposing the sentence and other sanctions and legal consequences. Likewise, taking as the basis of material unlawfulness the corpus of human freedoms and rights and enables the more precise determination of the limits of lawful and unlawful acts, unlawfulness and permissibility of acts, in contrast to other approaches, which point to the criterion of general social values and principles, the violation of social solidarity (*Durkheim*) or general “social harm” of behavior as a political platform for incriminating certain offences. Neither the “social harm”, which some authors favor, is not a sufficient precise ground of material unlawfulness, but it is necessary to attach elements of the violation of the legal and social-ethical order (*Mayer*, (1967), 53).

3. The international dimension of unlawfulness

3.1. Contemporary development of universal norms and standards on human rights, supranational *ius cogens* norms of International Criminal Law, international treaty rules within the WTO and conventions of other international organizations in the field of international trade relations, ecology, capital markets, health and other areas, opens a new dimension of law issues, unlawfulness and the basis for its exclusion, and thus the complex problems of collision of all these norms and national legal systems. The collision arises when supranational norms contained in international conventions provide for the prohibition of certain conduct or oblige States Parties to ban them or lay down some ground for excluding unlawfulness not provided for in national laws. Until a couple of decades ago, whether effective international sanctions exist if the state does not fulfill its obligations for the implementation of cogent international norms, it was predominantly of a theoretical or political significance: the only law in determining the lawful and unlawful acts is the domestic law. After the creation of international courts,

starting with the International Court of Justice, the ECtHR, *ad hoc* tribunals as the Hague tribunal for the trial of war criminals from the former Yugoslavia, the permanent International Criminal Court in The Hague, universal and supranational norms and standards in the area of human rights and freedoms protection get more concrete content and far more efficient application.

Their scope is most pronounced in the field of International Criminal Law, whose cogent norms are explicitly included in the principles of legality in more and more criminal legislation: no one can be punished for an offence that is not provided for by law or international law or ratified international treaties (so in our region Croatian, Macedonian and other criminal codes). With the application of the ECHR, and even more with the ECtHR “case law”, norms and standards that become an integral part of the justice system with a suspensive effect in relation to prohibitive norms of the law are introduced into national legal systems.

These changes have an unimaginable significance from the aspect of achieving the synthesis of natural and positive law, acting in a very sensitive sector, which is always under the shadow of the absolute sovereignty of the state and of the understanding of the unlimited power of state coercion in determining the boundaries between law and injustice in accordance with arbitrary will of the national legislator. The notion of unlawfulness is thus extended to all behaviors in opposition to the law understood as a complex of norms, which include international, cogent and other norms of binding character, and which, more importantly, have priority over national laws. By becoming positive at the supranational level, the natural law, which is animated by the universal corpus of human freedoms and rights, becomes a positive law at the national level.

3.2. The national laws and the prohibitive and permissive norms they contain are not the only and last instance in the assessment of unlawfulness; the final becomes an estimate of the opposite of certain conduct with supranational norms. In fact, the issue of unlawfulness extends to the “behavior” of the legislator himself, whose laws come under the scrutiny of supranational observation and evaluation, which ultimately, as in the case of a case brought by the ECtHR on a case-by-case basis, can also be completed by an assessment of the malfunction (unlawfulness) of the legal norm itself, if its implementation leads to a systematic violation of a particular basic right. In this case, the ECtHR does not, of course, have the power of a constitutional court to suspend the norm itself, but the judgments of the court, which in several cases its application finds that the problem is in the norm itself, are the trigger for the appropriate reactions of international bodies in the system of human rights protection (Council of Europe, EU,

UN and its bodies, etc.). International pressure is also not excluded - politically, economically, and even military, that the state changes its laws and adapts its implementation to the requirements of the ECHR and other international human rights instruments.

In cases where national law does not prohibit behavior that is envisaged as a violation of human rights (such as torture) or does not undertake international incrimination *stricto sensu*, or when national law provides for a prohibition contrary to a permissive international norm or standard (for example, if the law prohibits the freedom of political organization and this is foreseen by law as a punishable offense), the assessment of the unlawfulness must be supported by international norms and standards, and not by national laws.

This principled attitude about the relationship between the national and supranational levels of the assessment of the unlawfulness faces the problem of selecting methods and means for its practical application, left to national law. In the constitutions of the countries from our region (as well as the Macedonian Constitution Articles 98 and 118), the direct application of international treaties ratified in accordance with the Constitution (monistic system) was stipulated. But if, in relation to ratified international treaties, this wording guarantees the effectiveness of the application of the norms they foresee, there remains a dilemma - whether the assessment of the unlawful conduct, whether or not envisaged by national laws, may be relevant and cogent international norms in the conventions not ratified by the state. This possibility, for example, suggests that the universal principle of the validity of these conventions be prescriptive, which is usually envisaged for international incrimination *stricto sensu* (genocide, war crimes, etc.). This principle is also accepted in national criminal legislation: for example, the Macedonian Criminal Code in Article 120 paragraph 4 provides that a foreigner may be punished for the serious crime done abroad, regardless of whether this crime is provided for as a criminal offense in the law of the State in which it is done, in so far as it concerns “the offence which, at the time it was committed, was regarded as a punishable act according to the general principles of law recognized by the international community”. What is valid in relation to other individuals and other states, *argumentum a simile* it should apply to your own state. In the ultimate instance of logical conclusion, this would mean that the domestic court should have the power to prosecute a domestic national if he has done such an offense that is considered punishable “according to the general principles of law recognized by the international community”, although the state has not ratified conventions providing for such serious offence and universal jurisdiction to prosecute them. Regardless of this argumentation, there remains an

ultimate reservation to such a solution, expressed by the permission of the courts to judge only on the basis of the “Constitution, laws and ratified international treaties” (Macedonian Constitution, art. 98). A rare exception is the German Constitution, which provides that courts, in addition to constitutions and laws, are bound by “law” in adjudication. But German jurisprudence under that term implies, in the first place, conventions ratified in accordance with the constitution.

3.3. All this speaks of the great inconsistency in the integration of natural law into national legal systems and the need to seek new constitutional solutions to overcome the restrictive approach of states to international norms and standards. The latest development of the International Criminal Law, an international criminal justice system that culminates in the creation of a permanent ICC, together with the codification of the ICL in the 1998 Rome Statute, manifests the supremacy of these norms and shows the weakening of the rigid position of exclusive state sovereignty in the field of the protection of human freedoms and rights.

The first step in achieving the requirements for a higher degree of synthesis of natural and positive law is the extension of the power of the constitutional courts to interpret the constitutions and laws in the context of a coherent system of international norms and standards. As a demand for a new era of globalization and a technological era and the imperative of the human development of a modern society, the state's constitution becomes an open gateway to the constant development of the concept of human freedom and rights and the promotion of means and instruments for their protection.

Another equally significant step, which could also be carried out without specific systemic, first of all constitutional changes, is the conquest of freedom by the court to invite an internationally established basis for its exclusion in determining the unlawfulness of a particular conduct in accordance with the principle of “pro libertate omnium”, and when any behavior is prohibited by law, but the exclusion of unlawfulness is not legally foreseen. In this way, universal human rights and guarantees for their protection provided for by the ECHR and other conventions will be incorporated into national legal systems as over-legal bases for assessing unlawfulness. This concept corresponds to the spirit of natural law. The non-recognition of human freedoms and rights can be expressed not only by their unjustified legal restrictions, but also by the absence of legally foreseen grounds for the elimination of unlawfulness.

3.4. For the synthesis of natural and positive law, the recognition of judgments of the ECtHR and other international courts as a source of law by national courts is of

particular importance. The introduction of the “case law” into national legal systems is confronted with the conceptual differences of continental and Anglo-Saxon law: the law as the highest authority determining the measure of natural rights, aligning it with social necessity, or inventive judicial practice that is constantly seeking new premises for them through judicial precedent.

In our region there are different constitutional solutions and extensive or restrictive practice of courts in relation to the acceptance of the principles contained in the ECtHR judgments. The Macedonian Constitution, for example, stipulates that the sources of the law enforcing the court may be only the Constitution, laws and ratified international treaties (Article 98). This formula is also taken over by the Law on Courts, with addition (Article 2 para. 2) that the courts in the application of the law protect human freedoms and rights, which further implies the conclusion that in the exercise of such a “protective function” they are not restricted by law, taking into account international norms and standards, including the standards developed by the ECtHR (“judge made law”). This law further regulates the relation to the judgments of that court, as well as other international courts whose jurisdiction is recognized by the Republic of Macedonia (Article 18 paragraph 5): the court in the concrete case directly applies the final and enforceable decisions of these courts, if they are suitable to the execution. By rounding-off, we come to the conclusion that the court is nevertheless bound to the judgments of the ECtHR, that is, it does not only judge “on the basis of the Constitution, laws and international treaties”, but also on the basis of court precedents of this and other international courts. There is a much more specific solution contained in the Serbian Law on the Organization of Courts, according to which (Article 1) the courts decide, in addition to the constitution, laws and general acts and ratified international treaties, and on the basis of the “generally accepted rules of international law”. The only disadvantage of this formulation is that it is not more precisely focused on the rules and standards relating to human freedoms, and rights especially those foreseen in the ECHR or other international courts.

The main reason for reservation of the legislation and courts for the wider application of the “case law” in the field of human rights (primarily the ECtHR judgments) is the latent restraint of political systems in relation to judicial independence and autonomy, and to greater freedom of court in the interpretation and application of law. It is still under the sign of the legal metaphor which continental law established during the French Revolution (1789): “le juge, bouche de la loi” (“judge is the mouth of the law”; *Montesquieu*, (1961), *De l'esprit des lois*, 96). It is no coincidence that in France, the last couple of decades, a very influential opinion emerged that it should withdraw from

the ECHR because the case-law of the ECtHR, by applying the standards and interpretative rules that are the product of the Anglo-Saxon system, allows excessive procedural guarantees and the protection of the defendants in criminal proceedings, making it difficult to punish them.

Legal systems in our region will remain committed to the concept of natural human freedoms and rights if they abandon existing Justinianism and an imperative concept of positive law as an expression of the inviolable will of the legislator. Inventive and empirical anglosaksonic spirit, which prefers an inductive rather than a deductive method of interpreting and applying the rights inherent in the continental concept, views the court as an institution whose basic characteristics are: to arbitrate in legal disputes and to make a fair decision on the concrete case before it, and not to decide on general principles; he remains within the scope of his function and if he changes or rejects the general principle by his decision, but not by doing it by losing sight of a concrete case (*De Tocqueville*, (2002), 117).

There is a profound contradiction between, on the one hand, the individual character of human freedoms and rights, and, on the other hand, the overstatement of the generality of legal norms inherent in continental law, which presses the court to always pay more attention to that (state) than to the individual reason of its judgment. This contradiction, which the court in our legal and political environment can not overcome, blocks the activism inherent in the ECtHR, which proceeds from the principle of the evolutionary and dynamic interpretation of the ECHR, although it does not officially recognize the doctrine of the “judge made law”, respects its earlier decisions in similar cases as a precedent (*Omejec*, (2014), 1285). The final judgments of the ECtHR are binding for the states parties to which they relate (ECHR, Art.46), but it is becoming more and more influential to have the *erga omnes* effect in terms of “interpretative authority” with implications for other countries. The ECtHR in certain judgments (*Opuz v. Turkey* 2009) refers to such an interpretation of fundamental freedoms and rights, pointing out (in that case) that it will consider whether the national authorities “have sufficiently taken into account the principles deriving from its judgments” (*ibid.*, 244).

3.5. Especially important are the principles formulated in the cases in which the ECtHR discusses relatively protected derogable convention rights (Articles 5, 6, 12, 13 and other rights), qualified convention rights (Article 8-11) in which the state can interfere with certain restrictions, and the use of the test of the necessity of the restriction “in the interest of a democratic society” (when this is specified by law, for the protection of goods that are specifically listed in certain provisions of the Convention in a “legitimate

aim”). The restrictions that a state can legitimately impose on fundamental human freedoms and rights must be in accordance with the principles of legality, necessity and proportionality. In several court verdicts, the ECtHR defines the content of the standards of necessity “in a democratic society”, which implies a minuscule assessment of the justification of state interference in relation to natural freedoms and rights, which are assumed by the state.

The binding force of the court judgments of the ECtHR and their “interpretative authority” implies a requirement to respect the principles and rules developed by it in assessing “the margin of appreciation” of the state's interference with certain freedoms and rights. The key role in promoting the concept of a supranational dimension of unlawfulness has an independent tribunal, which, to the extent that it strengthens its position as a national institution, must also be confirmed as a supranational institution of justice. It is therefore of primary importance to ensure that all guarantees are provided not only for the direct application of international conventions but also for the freedom of the court for “euro conformal” interpretation of national laws in line with the ECHR and for the application of the “case law” of the ECtHR.

It is necessary to create a constitutional and legal basis in the legal system for such an extension of the powers of the national courts. In this way, the principle of restricting the power of the state would be introduced in positive law, which would be under the control of not only the constitutional judiciary, but, in the specific cases, under the control of the regular judiciary in relation to universal human freedoms and rights. The court should be given the freedom and duty to, in each specific case, proceed from the “euro conformal” interpretation of the law, referring to the judgments of the ECtHR, applying qualitative tests of the evaluation of individual freedoms and the rights and necessity of respecting the “interests of a democratic society”.

Acceptance of such a solution would mean a genuine legal revolution in order to create a stronger symbiosis between natural and positive law and would have far-reaching implications on the status of human freedoms and rights in the national legal systems. First of all, it would lead to the strengthening of the position of the Ombudsman, which should have the authority to initiate judicial proceedings for the protection of human rights, as well as to redefine the relationship between the individual and the state administration bodies and other public institutions.

Conclusion

Realizing the idea of the synthesis of natural freedoms and rights and positive law is far from a sufficiently explored area in terms of the principle of the rule of law. Since their establishment in 1948 of the UN Universal Declaration of Human Rights, through the European Convention on Human Rights to other contemporary documents on their national and supranational status and protection, there have been turbulent changes in the very concept of law caused by the processes of globalization and the development of post-industrial societies. The plurality of sources of law - national, international, self-regulatory, etc. - complicates the setting of a framework in which this synthesis should be achieved by affirming the principle of the rule of law, the legitimacy of laws and inaugurating the supranational dimension of unlawfulness and the basis for its exclusion.

Modern law, and within its framework, legal systems from our region, are in front of a demand for deep reform, which should open new international and national perspectives, in order to strengthen the independence and activism of the courts and other institutions (Ombudsman) for the protection of human rights.

Bibliography

- Bingham, Tom*, (2011): *The Rule of Law*, London
- Bull, Hedley*, (1977): *The Anarchical Society: A Study of Order in World Politics*, Second ed., London
- De Tocqueville, Alexis*, (2002): *Democracy in America (1835/1840)*, Translator – Henry Reeve. A Penn State Electronic Classics Series Publication The Pennsylvania State University
- Douglas-Scott, Sionaidh*, (2017): Human rights as a basis for justice in the European Union, *Journal Transnational Legal Theory*, Vol.8, 59-78
- Held, Dejid, Mekgru, Entoni*, (2010): *Upravuvanje so globalizacijata*, Skopje
- Hold-Ferneck, Alexander*, (1903): *Die Rechtswidrigkeit, Eine Untersuchung zu den allgemeinen Lehren des Strafrechts, Erste Band*, Jena
- Jeschek, Hans-Heinrich, Weigend, Thomas*, (1996): *Lehrbuch des Strafrechts, Allg. Teil, Funfte Aufl.*, Berlin
- Kambovski, Vlado*, (2011): *Kazneno pravo Opšt del*, Skopje
- Kinley, David*, (2003): *Human Rights, Globalization and the Rule of Law: Friends, Foes or Famil?* Sydney Centre Working Paper 16, Sydney
- Klenner, Hermann*, (2015): *Recht und Unrecht*, 1. Aufl. EBook (PDF)
- Kunert, Karl Heinz*, (1958): *Die normative Merkmale der strafrechtlichen Tatbestände*, Berlin
- Luhmann, Niklas*, (2014): *A Sociological Theory of Law*, New York
- Mayer, Hellmuth*, (1967): *Strafrecht, Allg. Teil*, Stuttgart

- Montesquieu, Charles*, (1961): *Lettres persanes; De lesprit des lois, Les Philosophes du XVIIIe siecle*, Paris
- Muller, Sam, Zouridis, Stavros, Froshman, Morly, Kistemaker, Laura* (edit.), (2012): *The Law Of the Future and the Future of Law: Volume II*, The Hague
- Omejec, Jasna*, (2014): *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Evropskog suda za ljudska prava, Strasbourški acquis, Drugo izm.izdanje*, Zagreb
- Rükert, Joachim*, (2018): *Unrecht durch Recht, Beiträge zur Rechtsgeschichte des 20. Jahrhunderts*, (herausgegeben von T.Duve, H.-P.Haferkamp, J. Rükert, C.Schönberger), Tübingen
- Schmidhäuser, Eberhard*, (1969): *Der Unrechtstatbestand*, Festschrift f.Engisch, Frankfurt a.M.

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AGING AND HUMAN RIGHTS: HUMAN DIMENSION OF STATISTICS AND LEGISLATION IN SERBIA

Recognizing the fact that the 21st century is described as a century of intense increase in life expectancy and population aging, this civilization process has become a segment of many public policies. At the same time, many societies have faced a paradoxical process of violating the rights of old people to dignified life and social inclusion. Psychological, social, cultural, age and other barriers to old people, emphasize the need to proclaim the age-defined legislative framework, conventions and principles, often not binding. In the last two decades, Serbia has made important steps in this field, but the main question in this paper is the extent of solidarity of our society and “openness” for all. In comparison with the European and world recommendations and standards, the aim of the paper is based on the analysis of the society preparedness for intergenerational solidarity and mutual respect, while recognizing the main barriers. Research was conducted in the territory of Vojvodina, on a representative sample, using the survey method, and presented as a case study.

Keywords: *aging, human rights, intergenerational solidarity, Serbia, Vojvodina*

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Introduction¹

Demographic trends are one of the most important factors of societal development as they lead to the transformation of social, political, economic, cultural and other processes. Historically low fertility rate in Europe and in many other parts of the world on one hand, and civilization processes that lead to the triumph of health, social, economic measures, and that extend the life expectancy on the other, have led to deep and long-term changes of the age structure. For this reason, a major part of the world, and Europe as a whole, is faced with demographic aging and depopulation. The number of the elderly is increasing faster than the number of people of any other age category and therefore, their participation in the total population is also at an increase. According to United Nations estimates, the number of people over the age of 65 will, by mid-21st century, for the first time in human history, exceed the number of children younger than 5, even children younger than 14, and every fourth inhabitant of the planet will be over the age of 65 (World Population Ageing: Report, 2015; Dobriansky, Suzman, Hodes, 2007). The share of people older than 65 in Serbia is among the highest in the world – 17.4% (Statistical Office of the Republic of Serbia, 2012), and the projections based on vital statistics witness its further increase.

At the same time, due to the increase in life expectancy, the part of the population over 80 and 85 years old is at a highest increase in many countries in the last few years, so the world is faced with demographic aging of the elderly population (Mihajlović, 2013). With the historically low fertility rates, according to the latest United Nations estimates (World Population Prospects – The 2017 Revision), by 2060 the number of persons in Europe older than 80 will increase to 61 million (with 22 million only 10 years ago, 2008). Globally speaking, during the same period, the most pronounced depopulation zone will be created in Serbia and the Eastern brim of the European Union.

The concept of active aging is one of the most important paradigms appearing in demographic literature by emphasizing its practical application in order to milden the consequences of population ageing, and where the increasingly higher part of elderly persons is treated as a demographic potential (Stojilković Gnjatović, Belij, 2014). Most demographers and the expert public take the age of 65 as the border for the “third age” following the guidelines of the World Health Organization (2002), but in accordance

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with current trends, more opinions appear regarding the need of redefining this border and the concept of “the fourth age”, entered after 80 or 85 years old. Therefore, it is certain that an increasing part of the population spends a significant part of their lives “in old age”, so the concept of active aging is imposed as necessary. According to the World Health Organization (2002), this concept promotes healthy lifestyle, increasingly “longer” activity of the elderly, and their full participation in society through social, cultural, psychological, economic, and primarily through physical aspect (vitality). The demographic changes emphasize the need for strengthening of cohesion between the generations, and the family has the most important role in providing social support and care of the elderly in Serbia. A more present intergenerational solidarity in society would enable the adaptation of the surroundings to all ages, a more active role of the elderly, social and cultural inclusion and participation, understanding the needs and respecting the rights and specificities of older persons.

The right to old age

Have we, as a society, been brought to a paradoxical situation, where, the efforts of all societal factors have led to the extension of the human lifespan, progress of medicine and healthcare, but also to a more emphasized infringement of basic human rights and the rights to use those benefits in the very stage of life which those factors have enabled us? In a traditional society, the elderly played an important role in the family and societal community, and their experience was used in existentially difficult situations. Commodity and money economy, education and employment of the young outside the family, have led to the decrease in the authority of the elderly, to expansion of new ideas about personal liberties, as well as gender and generation equality. In the modern age, the elderly increasingly “lose their importance” in many societies, frequently their reputation as well, and their social impact and material income rapidly decrease in retirement (Mitrović, Škorić, 2018).

Instead of being seen as a natural course of life, old age is more frequently seen as a problem. Prejudice and negative attitude towards the oldest members of the community are ever more present, as well as the inhumane opinion regarding their needs, the lack of solidarity between the generations. One of the conditions necessary to realize the quality of the elderly is active aging and the promotion of measures that lead up to it. The modern concept of social inclusion is one of the starting points for modeling and tracking of social policies in the European Union, and is based on theoretical traditions that dominated in European social thought, amongst which, the French republican tradition is emphasized. This stream indicated the importance of generational solidarity

in regards to the integration of the community, so that, in this way, favorable conditions and social climate are created that would enable active aging as the only sustainable concept. Active aging index that is used as benchmark in many documents was 29.4 in Serbia based on the pilot report of 2016, which is lower than the average in the European Union (33.9). Out of the four components quantitatively expressed, stimulating environment and social participation are approximately or above average in Serbia. This reason further imposes the importance of inter-generational connection and solidarity, which would first qualitatively and then quantitatively lead to a better situation in the field of active aging, which would mean a higher degree of respect regarding the rights of the elderly (Radu Halabring, 2016, Babović et al., 2018).

Ageism or inter-generational solidarity?

Ageing is a complex and dynamic process that is not only defined through the passing of time, however, the definitions that stem from the biological nature of old age are the most common (Petrušić, Todorović, Vračević, 2015). Here, we could point out that it is a universal process that happens to all human beings, that it is a *biological* right. Human rights are those rights that belong to people simply for being human beings, regardless of age (among other). They are universal, generally accepted and the key for understanding humanness (United Nations, 1948). Ageism is a stereotype, prejudice or discrimination of a person based on their age. As far as mid-20th century, Tuckman and Lodge (1953) have indicated that population aging is imminent and that prejudice towards the growing elderly population is bound to appear. However, the creator of the term ageism is believed to be Butler (1969; 1980; 1989; 2005), who, in several research papers since the 1960s, has explained this term, its causes of creation, emphasized its expansion in modern time and pointed out the importance of inter-generational connection, solidarity and transfer. Research of ageism and prejudice towards the elderly of a more intense volume is a recent phenomenon, however, the available data say that prejudices do exist and the people often have contradictory opinions towards the elderly (Petrušić, Todorović, Vračević, 2015). The appearance of age discrimination at the beginning of the 21st century has become a significant topic, as indicated by research papers done by Nelson (2002) and Macnicole (2010). Demographic aging could become a threat to societal stability through generational tension, which could happen due to increasingly lower number of work-able population, which will “have to” support the growing number of elderly persons.

For the purpose of increasing awareness regarding the importance of active ageing and intergenerational solidarity and respecting of elderly rights, numerous initiatives are

being started. As an example, the year 1993 was European Year of Older People and Solidarity between the Generations, and the year 2012 was European Year of Active Ageing and Intergenerational Solidarity. One of the newer projects is the European Innovation Partnership on Active and Health Ageing, the goal of which is to extend the lifespan of Europeans “spent healthy” by two years by the year 2020 (Rešetar Čulo, 2014; https://ec.europa.eu/eip/ageing/home_en). In Serbia, 2017 was the year of generational solidarity and cooperation, and April 29 was selected to be the European Day of Intergenerational solidarity, commemorated every year (<http://pio.rs/cir/glas-osiguranika-cir/1078-cir/medjugeneracijska-solidarnost.html>).

Theoretical and legislative framework

The rights of elderly persons are set, but not explicit in international conventions on human rights related to economic, social, civil, cultural and political rights, but they are given protection in a general sense (the right to equitable protection under the law, the right to own real-estate, right to work, and the right to participate in government). Even though International human rights ensure a system that formalizes human rights and applies them (“hard laws”), there is a group of “soft laws” that provide pointers on how to treat the elderly, such as UN Principles for Older Persons (1991), Madrid International Plan on Action of Ageing (MIPAA) (UN, 2002), Regional Implementation Strategies of MIPAA (RIS) (UN, 2002). They are not legally binding, but they are supported by strong recommendations (<https://www.redcross.org.rs/media/1672/jacanje-prava-starijih-serbian.pdf>). Until now, four regional minister conferences on ageing have been held: in Berlin – 2002, in Leon – 2007, Vienna – 2012, and Lisbon – 2017. The Open-Ended Working Group on ageing (<https://social.un.org/ageing-working-group/desa-ageing.shtml>, <https://social.un.org/ageing-working-group/>, <https://social.un.org/ageing-working-group/unohchr.shtml>) was established by the resolution of the General Assembly of the United Nations in 2010. A significant contribution in this field is given by the Global Alliance for the Rights of Older Persons (GAROP, 2015), founded in 2011 and formed from the organizations of civilian society.

In February of 2012, Drafting Group on the Human Rights of Older Persons (CDDH-AGE) was founded, the task of which was to create an outline of legally non-binding instruments, or recommendations that would promote the rights of older persons. In 2014, EU Council of Ministers adopted a Recommendation on the Promotion of Human Rights of Older Persons (http://www.europeanrights.eu/public/atti/2014 - 2_ing.pdf).

European Network of Human Rights Institutions (ENNHRI)² initiated a project in 2015 that would increase awareness of human rights of older persons, point out the need for a long-term care in Europe, and improve the quality of this network used for monitoring and support of human rights based on a system of measures in this field. National reports and recommendations were created in accordance with the standards set by the European Commission, which financed the project.

The earliest research in the field of generational linkage and solidarity stemmed from Bengtson and numerous associates (Bengtson, Kuypers 1971), and they developed one of the more complex models at the beginning of the 1990s (Bengtson, Roberts, 1991; Bengtson, Harootyan, 1994). Critics had pointed out that the model was related to family only, so Bengtson and associates (Bengtson, 2001; Bengtson et al., 2002) improved the original concept. Lamura, Döhner Doner i Kofahl (2008) researched the condition of elderly care within the family in six European countries through availability, acceptability and system of support. Ferring (2010) pointed out that aging is a topic that connects Europe as a whole, and Albert and Ferring (2018) researched the impact and significance of family, family surroundings, norms and values on the level of intergenerational solidarity, taking as a starting point various levels of connection within the family in societies in Europe. Dykstra and associates (2006), Saraceno (2008), Hank and Buber (2009) dealt with this problem in many European countries. In 2005, the Government of Serbia adopted the National Strategy on Ageing 2006-2015³ and founded the Council for Improving Intergenerational Cooperation and Solidarity in 2018.⁴ In accordance with the Madrid International Plan on Action of Ageing (MIPAA) (UN, 2002), and Regional Implementation Strategy (RIS) (ECE/AC.23/2002/2/6, 2002), Serbia is actively working on improving solidarity and inciting participation, non-discrimination and social inclusion of the elderly. The National Report on the Application of Madrid International Plan on Action of Ageing and evaluation results of National Strategy on Ageing (UN, 2016; Kozarčanin, Milojević, 2016) have indicated that implementation of the set goals of the strategy should be continued as they are in accordance with the goals defined by the European Union to 2022.

² European Network of National Human Rights Institutions

³ The Official Gazette of RS, 2005

⁴ The Official Gazette of RS, 2018

Research methodology

The research was conducted during July and August of 2018 in the territory of AP Vojvodina, by using a standard pen and paper method and electronic questionnaire, and it included 459 examinees. The questionnaire consisted of 20 questions according to the questionnaire model of Solarević and associates (2018). The first set of questions is related to the biological and socio-demographic characteristics of the examinees. The second set includes intergenerational relations and linkage, and the third set evaluates motives for spending time with persons older than 65, associations and memories related to this age group. The last set of questions examines the opinions and provides the perception of barriers linked to the social inclusion of elderly persons. Questionnaire analysis was done with the use of statistical package (software) SPSS 20.

Research results and discussion

Out of 459 examinees in total, women make up a slightly larger portion with 60.1%, which is the result of higher interest of women to participate in this research. The examinees were of 12 to 60 years of age, and the average age was 30 years old. The largest part of examinees was in the age group of up to 25 years old, while the participation of older examinees successively decreases (Table 1). In accordance with this, the largest part of the study consists of pupils and students (together) and then the employed. The educational structure showed almost equal part of examinees with high school degree and college / university education. The research was conducted in 37 locations in Vojvodina, out of which two thirds are urban settlements in accordance with the population size of Novi Sad, which contributes with the largest participation in the sample.

Table 1. Basic sample characteristics

Gender		Age categories	
Male	39.9%	up to 24 years old	45.1%
Female	60.1%	25-34 years old	22.7%
Age		35-44 years old	15.9%
Average	29.91 y.o.	45-54 years old	10.0%
Socio-economic status		over 55 years old	6.3%
Pupil	20.5%	Residence	
Student	27.5%	Novi Sad	46.2%
Employed	43.5%	Subotica	8.7%
Unemployed	7.2%	Sremska Mitrovica	7.0%
Retired	1.5%	Zrenjanin	3.9%

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Education			
		Temerin	6.8%
Incomplete/ Elementary school graduate	19.8%	Bačka Palanka	3.5%
High school	41.2%	Other locations	24.0%
College	9.4%	Type of settlement	
University	18.5%	Urban settlement	74.5%
Masters/ Magistrature/ Specialization	9.6%	Mixed/Rural settlements	25.5%
PhD	1.5%	Number of household members	
		Average	3.92

Source: Authors based on the questionnaire and statistical software

Additional characteristics were related to the family structure of the examinees. In most developed and developing countries, elderly persons live less and less with their children and grandchildren and increasingly more frequent in single or two-member nursing homes or households. However, in certain developing countries and less developed regions, multigenerational households are highly represented, traditionally ensuring mutual support and division of resources (Petrušić, Todorović, Vračević, 2015).

The analysis of biological and socio-economic sample characteristics (Table 1) has shown that over a third of examinees live in nuclear families, meaning in four-member households (37.5%), which is a consequence of household stratification. Pearson's correlation coefficient was used to test the link between the type of settlement and the number of household members, which did not result in statistical significance. This leads to the conclusion that multigenerational households in Vojvodina are consistently less numerous regardless whether they are located in cities or the countryside. A high as 85.4% of examinees have a brother or a sister, two thirds of which have one sibling, while as low as 16.6% of examinees have two brothers or sisters, so the average number of siblings is 1.4. Two thirds of examinees do not live in a household with persons older than 65 (69.5%), while in almost a fifth of the households (19.8%) there is a person older than 65. Almost half of the examinees recognize or meet over 10 people older than 65 (44.9%), which confirms the “presence” of population aging.

During 2008 and 2009, research was conducted in 28 countries in Europe about how Europeans perceive themselves and regarding their opinion when the youth ends and old age begins. The results indicate massive cultural differences between the examinees of various countries, and the average border of old age is 62. As high as 57% of examinees believe that persons over the age of 70 do not contribute economically to society and 53% do not have friends over the age of 70 (Age UK, 2011). Serbian Red Cross conducted a pilot research in 2013 in 9 municipalities in Serbia, and the examinee

responses showed that old age begins at 61.1 years old, which is on the same level as European average (Petrušić, Todorović, Vračević, 2015).). The starting point of the paper was primarily the chronological entry, meaning a border after which a person becomes *old*. The responses spanned from 18 to 90 years old, with the highest frequency for ages 60 to 65. Based on the responses, the average was 63.1 years old, and is somewhat higher than the aforementioned results. Based on cross tabulation method and Pearson’s correlation coefficient, the results indicated that the age of examinees has an effect on age perception ($r=0.24$, $\alpha=0.000$) after which the person becomes old. Younger examinees most frequently listed the threshold of 60 years old, while the eldest examinees listed a significantly higher border, 70 or 80. Such a result indicates a “fear” of the oldest examinees of approaching and entering the category of the old population according to its “definition”.

Table 2. Frequency and intensity of communication and spending time with the persons over the age of 65

Spending time		Talking on the phone		Spending time - duration	
rarely	12.2%	rarely	27.0%	less than half an hour	21.8%
once a month	10.9%	once a month	11.8	about an hour	40.1%
once a week	23.1%	once a week	21.6%	several hours	31.8%
several times a week	29.0%	several times a week	24.6%	the whole day	6.3%
every day	24.8%	every day	15.0%		

Source: Authors based on the questionnaire and statistical software

The largest portion of the examinees spend time with persons older than 65 on a daily basis or several times a week, which is a reflection of solidarity, emotional connection or sense of social obligation. A fourth of the examinees talk on the phone several times a week with persons older than 65, and slightly larger portion do so rarely or once a week. At most, time spent together lasts for about an hour (40.1%), followed by several hours, which contributes to a positive image of the analyzed space and persons. This time is usually filled with conversation, contained in 93% of the responses, and very frequent is also spending time while watching television, having lunch (71%) or through studying, reading, transfer of knowledge, experiences (54%). Approximately a third of the answers or less contained helping in house chores or board games (possible to circle several responses) (Table 2).

A third of the examinees do not spend time outside the house with persons over the age of 65 (29.3%), and a bit over half visit friends, family (54%), while 29.9% go on a walk or a field trip, and a somewhat smaller part visit the cinema or the theatre with persons over the age of 65. The examinees that listed one or more answers as none offered made up 9.3%, most frequently citing shopping, travel or going to a restaurant. A small

number of examinees (8.9%) believe that their peers spend enough time with persons over 65, or the older members of the community, while as high as 39.7% believe that they do not spend enough time, and over a half (51.4%) are uncertain. Even though this last answer is not essentially negative, nor does it have a positive connotation, it transmits an image that this is a segment of society and social policy that needs to be greatly worked on.

Table 3. Evaluation of motives for spending time with persons over the age of 65 according to extrapolated age groups

Motives	up to 24 years of age	25-34 age	35-44 age	45-54 age	55+ age	Σ average	Standard deviation
Feeling of love and connection	4.33	4.14	4.37	4.22	3.90	4.26	1.05
Providing help and assistance	4.12	4.24	4.27	4.15	4.17	4.18	1.00
Gathering during holidays, birthdays and similar	4.07	4.15	4.27	3.91	4.21	4.12	1.13
Sense of family and societal obligation towards the elderly	3.75	3.81	4.21	4.17	4.03	3.90	1.14
Getting new knowledge, experiences, skills	3.34	3.29	3.40	3.50	3.83	3.39	1.25

Source: Authors based on the questionnaire and statistical software

Perception of the elderly and of aging differs according to individual changes with lifestyle and age, therefore, the motivation and desire for spending time with the oldest members of the household or from close surroundings changes also. The highest degree of agreeing was expressed for the motives that have emotional connotation and include love, connection, empathy, and sense of providing assistance and support to the elderly. The most significant deviation, meaning the highest standard deviation, can be seen in motives that are from the sphere of intergenerational transfer of knowledge, skills, and experiences, and that are a result of personal and social awareness, socially responsible behavior (Table 3). This result indicates the conclusion that perception of older examinees is based on personal experience, which is long-term and has probably become richer in time compared with younger persons, and therefore, the consciousness and the desire to transfer knowledge and experiences is higher. Precisely these two groups of motives received a higher average grade from older examinees. The most frequent memories of examinees are related to conversations, socializing, holidays, joint travel (54%), then to learned skills, trades, business skills, experiences (32.6%), or emotional feelings/memories (13.4%).

The extent to which older people are marginalized or accepted in society and make equal participants in all social spheres can be concluded, among others, based on the

first associations regarding this age group. Answers with positive connotation prevailed in the research results (92%). The highest frequency is attributed to the answers related to the term old age (91), words grandmother (86) or grandfather (74), cakes or lunch (71), love (70), wisdom, advice (53), knowledge, experience (42), and highly present are also answers related to sensibility, warmth, happiness, attention, help and similar. One portion of responses was related to the “recognizable” characteristics from the life of the elderly. Other examinees listed associations related to physical or psychological condition of the elderly (helplessness, illness, sorrow, death, immobility, melancholy) and only a few individual responses can be characterized as having negative connotation (incompetent, stinky, boring).

Ageing stereotypes span over all segments of society and numerous research studies indicate that prejudices regarding aging and the elderly are on the rise. As Petrušić, Todorović and Vračević (2015) point out, society often sees them as burden, not as a resource, wisdom and experience of older persons is neglected, they are often treated with pity not respect. In 2008, World Health Organization published a document titled Demystifying the Myths of Ageing as a sort of a guide for the elderly, their families, service providers and policy creators (World Health Organization, 2008).

Table 4. Opinions regarding potential prejudice towards older people and barriers for their social

Claims	completely disagree	mostly disagree	cannot evaluate	mostly agree	completely agree
The elderly are incapable and useless for most societal activities.	46.6	37	13.3	2.6	0.4
The elderly have “difficult character” and are “inaccessible”.	16.6	29.8	28.5	22	3.1
The elderly are not mobile enough to be included in societal activities	22.4	28.8	37.3	10.9	0.7
The elderly should not be included in societal activities as they are retired and cannot contribute to society.	39.9	35.7	19.4	3.3	1.7
The elderly are not interesting and cannot transfer knowledge, skills, experiences, ideas.	56.2	30.2	8.9	2.6	1.3
The elderly reject suggestions and proposals of the young	15.3	25.9	28.8	26.1	3.9
The elderly should not be included in societal activities, as they should opportunity and support should be given to the younger generations.	28.3	30.7	27.9	9.8	3.3

Source: Authors based on the questionnaire and statistical software

Under the presumption that population in Vojvodina is also prone to certain prejudice or myths regarding older people, which could be the cause of lower participation of the elderly, examinees were offered seven claims to express their degree of (dis)agreement (Table 4). Most examinees completely or mostly disagree that older people are incompetent and useless, more than half do not think that the elderly are less interesting or that they cannot transfer knowledge or ideas or that they should be socially excluded due to retirement since they cannot contribute. However, there is a certain zone of divided opinion regarding rejecting the suggestions of the young, gravitating towards agreeing, similarly to the claim regarding “difficult character” of the elderly. In informal conversation with the examinees it was noted that many older people from their surroundings become withdrawn and “difficult” in regards to new ideas, suggestions, changes, which is connected with the fact that they have undergone many lifecycles, that they were growing up in different times and that they believe that it is time to “lay low or get out of the way”. Most examinees do not have a clearly stated opinion regarding the mobility of the elderly, which in great measure stems from insufficient knowledge of the essence and ways of active lifestyle, which includes many activities that do not require physical mobility.

Voluntary participation in activities of social inclusion and animation of the elderly is not pointed out as a completely desired activity as most of them are not sure whether they would participate (45.8%), or not participate (21.1%), and around a third of examinees have clear opinion that they would participate (33.1%). Therefore, about two thirds of examinees *probably* would not participate, so that indecisiveness should be used as the field of action of current and future measures, as it creates a distance from intergenerational solidarity and leads to social indifference and ambivalence. As a result, suitable “climate” is created where infringing upon the rights of the elderly can soon appear as a threatening phenomenon and it can become more frequent. Through close and more frequent contact and activities with the elderly, their needs, problems and desires can be “heard” better. At the same time, it would lead to an easier definition of the necessary measures due to involvement of all actors, as recommended by Lisbon Ministry Declaration (2017), the goal of which is the creation and development of society sustainable for all ages.

Conclusion

Civilizational processes transform society as a whole. The achieved level of expected life duration has led to decreased mortality rate, but at the same time opened the path to new challenges, such a demographic ageing. The end of the previous and start of the

21st century have seen the light of ageism, age discrimination, infringement upon the rights of older persons, marginalization and the need to create measures and legislative frameworks aimed against the aforementioned phenomena. On the level of United Nations, European Union and international organizations and institutions, initiatives of monitoring and improvement of elderly rights were started. Actions by the non-government sector and World Health Organizations were promoted through the prism of active ageing as dignified and functional aging, to which Serbian society has also joined.

On the example of Vojvodina, research results have indicated that statistics in the field of intergenerational solidarity and connections have a humane dimension, and therefore has the support of the human resource in the creation of public policies and laws that would support and encourage active ageing and cooperation between the members of various age and societal groups. It was noted that the awareness of the examinees regarding socially responsible behavior and importance of knowledge and experiences exchange grows with age, while the feelings of love, empathy and the desire for support are not at question as a motive in any examinee age category. The research confirmed the trend of emptying households, their separation regardless of the type of settlement, as well as the trend where increasingly more people over 65 live separately from their closest family in their own single or two-member households. However, this is mostly not an obstacle for the examinees to communicate or spend time with the elderly several times per week or every day. Apart from conversation, most examinees help in house chores or spend time socializing during lunches, cakes, learning new trades, and skills. A third of the examinees do not spend time with the elderly outside the home, which deviates from the positive image, while other regularly go for walks, field trips, visit relatives, friends or go shopping, to a restaurant. The confirmation of deviation was noticed with the section of the examinees that are not sure if the elderly are mobile enough for societal activities, meaning they cannot state a clear opinion about this potential barrier. As far as most predicted obstacles and barriers for social inclusion of the elderly are concerned, the examinees have clearly stated their disagreement, while the division is, in great measure, present with the claim that the elderly refuse to accept propositions and suggestions of younger persons. There is even a tendency towards a higher degree of agreement, which results in exclusion of the elderly in many communities and even their withdrawal into themselves and enclosed space leading to them being “difficult” and showing resistance towards changes and suggestions. Generational lifecycles of the examinees took place in various circumstances, so the perception of the coming age is different. With the oldest

examinees there is a visible higher level of awareness regarding socially responsible behavior, but at the same time, their responses indicated a dose of “fear” of the coming age category that is potentially exposed to the highest level of social marginalization. Positive and emotional memories and associations for the oldest family and societal members show the basis of intergenerational connection, but in order for the solidarity and respect of elderly rights to be demonstrated, it is necessary to engage all actors in order for the desire and the will in the field of societal inclusion of the elderly to be higher than the current share of positive responses on this topic in the research.

Literature and information sources

- Age UK (2011) *Grey Matters - A Survey of Ageism across Europe*. EU briefing and policy recommendations. London: Age UK.
- Albert, I, & Ferring, D. (2018) Intergenerational solidarity in adulthood: The role of family norms in intergenerational support and ambivalence. *Društvena istraživanja*, 27(1), pg. 5-25.
- Babović, K, Veličković, K, Stefanović, S, Todorović, N, & Vračević, M. (2018) *Social inclusion of the elderly (65+) in Serbia*. Belgrade: Red Cross.
- Bengtson, V. L, & Roberts, E. L. R. (1991) Intergenerational solidarity in aging families: An example of formal theory construction. *Journal of Marriage and the Family*, 53(4), pg. 856-870.
- Bengtson, V. L, & Kuypers, J. A. (1971) Generational difference and the developmental stake. *Aging and Human Development*, 2(4), pg. 249-260.
- Bengtson, V. L, Giarrusso, R., Mabry, J. B, & Silverstein, M. (2002) Solidarity, conflict, and ambivalence: Complementary or competing perspectives on intergenerational relationships. *Journal of Marriage and Family*, 64(3), pg. 568-576.
- Bengtson, V. L. (2001) Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bonds. *Journal of Marriage and the Family*, 63, pg. 1-16.
- Bengtson, V. L, & Harootyan, R. A. (Eds.) (1994). *Intergenerational Linkages. Hidden Connections in American Society*. New York: Springer.
- Butler, R. N. (1969) Ageism: Another Form of Bigotry. *The Gerontologist*, 9(4-1), pg. 243-6.
- Butler, R. N. (1980) Ageism: A Foreword. *Journal of Social Issues*, 36(2), pg. 8-11.
- Butler, R. N. (1989) Dispelling Ageism: The Cross-cutting Intervention. *Annals of the American Academy of Political and Social Science*, 503, pg. 138-47.
- Butler, R. N. (2005) Ageism. *Generations*, 29(3), pg. 84-6.
- Dobriansky, J. P, Suzman, M. R, & Hodes, J. R. (2007) *Why population aging matters: A global perspective*. Bethesda: National institute on aging, National institutes of health, U.S. Department of health and human services.
- Dykstra, P. A, Kalmijn, M, Knijn, T. C. M, Komter, A. E, Liefbroer, A. C, & Mulder, C. H. (Eds.) (2006) *Family solidarity in the Netherlands. (Population Studies)*. Amsterdam: Dutch University Pres.

- European Innovation Partnership on Active and Health Ageing, https://ec.europa.eu/eip/ageing/home_en, page accessed on 10.09.2018.
- Ferring, D. (2010) Intergenerational relations in an ageing society: Emerging topics in Europe. *Journal of Intergenerational Relations*, 8(1), pg. 101–104.
- GAROP (2015) The Global Alliance for the Rights of Older People, <http://www.rightsofolderpeople.org/>, page accessed on 15.09.2018.
- Hank, K., & Buber, I. (2009) Grandparents caring for their grandchildren: Findings from the 2004 Survey of Health, Ageing and Retirement in Europe. *Journal of Family Issues*, 30(1), pg. 53–73.
- Activity Report in the Republic of Serbia on Implementation of the Regional Strategy for Implementation (RIS) of the Madrid International Plan of Action on Aging (MIPAA)* (2016) Geneva: United Nations, Economic Commission for Europe, Department for population related activities.
- Strengthening the rights of older persons: For United Nations convention. Available at: <https://www.redcross.org.rs/media/1672/jacanje-prava-starijih-serbian.pdf>.
- Kozarčanin, L., & Milojević, S. (2016) *Evaluation of the implementation of the National Strategy on Aging of the Government of the Republic of Serbia, 2006 - 2015. and proposals for a new strategic framework*. Belgrade: Ministry of Labor, Employment, Veterans' Affairs and Social Affairs, United Nations Population Fund in Serbia.
- Lamura, G., Döhner, H., & Kofahl, C. (2008) *Family carers of older people in Europe: A six-country comparative study*. Münster: LIT Verlag.
- Lisbon Ministerial Declaration* (2017) A Sustainable Society for All Ages: Realizing the potential of living longer. Lisbon: 4th UNECE Ministerial Conference on Ageing. Available at: <https://www.bmfjsfj.de/blob/120590/2fa4c4f779aab884660d3644463f1e6f/lisbon-ministerial-declaration-data.pdf>.
- Macnicol, J. (2010) *Ageism and Age Discrimination*. London: International Longevity Center.
- Mihajlović, T. (2013) Demographic aging of older population in Serbia. *Collection of Selected Papes – Faculty of Geography University in Belgrade*, 61, pg. 73-102.
- Mitrović, M., & Škorić, D. (2018). The elderly in Serbia. *Thematic Collection of Selected Papers from X International gerontological congress – Aging and Human rights* (pg. 13-30). Belgrade: Gerontological Society of Serbia.
- National Ageing Strategy 2006-2015* (2005) Government of Republic of Serbia, Belgrade: Official Gazette of RS 55/05 and 71/05.
- Nelson, T. D., (Ed.) (2002) *Ageism: Stereotyping and Prejudice Against Older Persons*. Cambridge, MA: The MIT Press.
- Decision on the establishment of the Council for the Promotion of Intergenerational Cooperation and Solidarity (2018) Government of Republic of Serbia, Belgrade: Official Gazette of RS 03/18.
- Open-ended Working Group on Ageing, <https://social.un.org/ageing-working-group/>, page accessed on 19.09.2018.

- Petrušić, N, Todorović, N, & Vračević, M. (2015) *Introduction to Aging and Human Rights of the Elderly. A pilot of the financial abuse of the elderly*. Belgrade: Red Cross of Serbia.
- Political Declaration and Madrid International Plan of Action on Ageing* (2002) New York: United Nations. Available at : http://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf.
- Radu Halabrin, I. (2016) *Impact of elderly clubs on social inclusion of older persons in Serbia*. PhD dissertation. Belgrade: University in Belgrade, Faculty of Political Science.
- Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of the human rights of older persons. Available at: http://www.europeanrights.eu/public/atti/2014_-_2_ing.pdf
- Regional implementation strategy for the Madrid international plan of action on ageing* (2002) Economic and Social Council, ECE/AC.23/2002/2/6: 1-22. Available at: http://www.unece.org/fileadmin/DAM/pau/age/mica2002/documents/ECE_AC23_2002_2_R_ev6_e.pdf
- Republic Fund for Pension and Disability Insurance (2018) Intergenerational solidarity. <http://pio.rs/cir/glas-osiguranika-cir/1078-cir/medjugeneracijska-solidarnost.html>. page accessed on 23.08.2018.
- Statistical Office of the Republic of Serbia (2012) *Census of Population, Households and Apartments 2011. Gender and age, data by settlements, book 2*. Belgrade.
- Rešetar Čulo, I. (2014) Protection of the Rights of the Elderly in Europe: current situation, shortcomings and challenges. *Pravni vjesnik*, 30(2), pg. 117-135.
- Saraceno, C. (2008) Introduction: Intergenerational relations in families – A micro-macro perspective. U Saraceno, C. (Ed.) *Families, ageing and social policy: Intergenerational solidarity in European welfare states (Globalization and Welfare)*. Cheltenham: Edward Elgar, pg. 1-19.
- Solarević, M, Arsenović, D, Đerčan, B., & Đurđev, B. (2018). Intergenerational connection and solidarity as a myth or social reality. *Collection of Selected Papers of Matica Srpska for social sciences* (accepted for publication and print)
- Stojilković Gnjatović J, & Belij, M. (2014) Active ageing of the active elderly in Serbia – empirical approach. *Collection of Selected Papers of Matica Srpska for social sciences*, 148(3), pg. 643-652.
- The Human Rights of Older Persons in Long-term Care in Europe (2017) European Network of National Human Rights Institutions (ENNHRI). Available at: http://www.ennhri.org/IMG/pdf/ennhri_hr_op_ltc_exec_summary.pdf.
- Tuckman, J, & Lorge, I. (1953) When Aging Begins’ and Stereotypes about Aging. *Journal of Gerontology*, 8, pg. 489–92.
- United Nations (1991) Principles for Older Persons. General Assembly resolution 46/9116 Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/olderpersons.pdf>.
- United Nations - Ageing. Department of Economic and Social Affairs (UNDESA), <https://social.un.org/ageing-working-group/desa-ageing.shtml>, page accessed on 18.09.2018.
- United Nations Office of the High Commissioner for Human rights (OHCHR), <https://social.un.org/ageing-working-group/unohchr.shtml>, page accessed on 19.09.2018.

YEARBOOK
HUMAN RIGHTS PROTECTION
“FROM UNLAWFULNESS TO LEGALITY“

Universal Declaration of Human Rights (1948) UN General Assembly, 10 December 1948.

World Population Ageing: Report (2015). New York: United Nations, Department of Economic and Social Affairs, Population Division.

World Health Organization (2002) *Active Ageing: A Policy Framework*. Geneva: Noncommunicable Disease Prevention and Health Promotion Department, Ageing and Life Course.

World Health Organization (2008) *Demystifying the myths of ageing*. Copenhagen: WHO Regional Office for Europe.

World Population Prospects – The 2017 Revision, Key findings and advance tables (2017). New York: United Nations, Department of Economic and Social Affairs, Population Division.

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DIALECTICAL CONTRADICTIONS AND PATTERNS OF DEVELOPMENT OF CRIMINAL LAW¹

The development of law is something without which its existence is impossible. The right of any state does not arise in the final and once for all form. To effectively fulfill its social mission, it must be in a state of renewal and change in the corresponding development of society's life. Therefore, it is natural not only the emergence, but also the development of law. In this paper, for the first time, laws of its development are established on the basis of identifying dialectical contradictions inherent in criminal law.

Keywords: *dialectical contradictions, laws, development, criminal law.*

The necessary prerequisite for an adequate perception of the presented material should be an explanation of our position regarding the fact that the category of development is considered by us as a relatively independent stage in the evolution of criminal law, different from the time of the emergence of the industry. The emergence of a coherent system, of its original form, although connected with development, however, is not yet actual development; it is the interaction of elements that give rise to a new structure that assumes the beginning of development. Due to this, the laws governing the development of criminal law, largely predetermined by the previous stage of the emergence of the industry, are considered by us as an independent phenomenon, meaningfully different from those patterns through which the branch of law was formed.

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The knowledge of the patterns of development presupposes the existence of a system that is already a certain quality, later changed, but preserved throughout its existence. It is fair, therefore, to emphasize that the development “is a change of states that occurs under the condition of preserving their basis, i.e. a certain initial state that generates new states. Preservation of the initial state or foundation ... only makes it possible to implement the patterns of development” (Sviderskii, 1985: 27-28).

In criminal law, regardless of a particular historical period, one nature, one essential quality, is a system of legal norms aimed at protecting the interests of the individual, society and the state from the most dangerous encroachments that it retains throughout the history of its development.

In science the following main features of the general philosophical concept of development are distinguished:

– *the qualitative nature of the changes*

Two refinements are needed here. First, when they talk about development, the expression “quality change” is understood not in the sense of the system's disappearance of its basic, own quality. Therefore, whatever qualitative changes are introduced into criminal law, it has and will always have a protective nature. Otherwise, it will cease to be a criminal law. However, without repealing the prohibitive punitive nature of criminal law, certain changes may enhance or, on the contrary, mitigate it. For example, the prevalence of criminalization processes, the toughening of the nature of the punishability of already criminalized acts reinforce the repressive nature of criminal law, and the processes of decriminalization, depenalization by expanding the grounds for release from criminal responsibility and punishment, and mitigating the nature of the punishability of crimes, on the contrary, to some extent restrict it. Secondly, development is characterized not by a single change, not a one-time qualitative transformation, but by some complex of changes, by a link of a number of such transformations.

– *Irreversibility of changes*

Absolute reversibility is not present, as there is no pure irreversibility. Even if at a certain stage of its development the criminal law in some way returns to its previous state, for example, it acquires a poly-source character again, or in

some positions it becomes again casuistic or more repressive, then there is no “pure” rotation, complete and an absolute return to the “old”, but there is only a moment of reversibility. Since, in such cases, in particular, the list of formal sources of criminal law is changing, the degree and content of casuistry and the repressiveness of its legal regulations are different, and in many respects it is already substantially different from the former in terms of the content of criminal law.

– *Direction of change*

Development is correlated with directed transformations. To reveal a certain direction, the tendency in changes in the criminal law, it is necessary to study it in the historical perspective and the plan for generalizing the current amendments. Comparison of the criminal law of pre-Soviet, Soviet and modern periods shows the existence of continuity between its qualitative changes, the increment of changes in a certain trend, the accumulation of criminal legal values and traditions, which allows us to see certain directions in its historical development. The development of criminal law within a separate historical period implies not disorder, but a certain sequence, the internal coherence of changes. Otherwise there will be no development.

These are the basic, general signs of development. But to know the laws of the development of criminal law proper, they are still not enough, since the question of the source of development remains open.

Development is the main subject of study of dialectics. Dialectics treats everything (process, phenomenon, system) as the sum and unity of opposites, which means recognizing contradictory, mutually exclusive, parties (tendencies, forces) in “unity” and “struggle” in all phenomena and processes of nature and society. Contradictions form oppositely directed trends (sides), interconnected within the framework of a single system. There are contradictions in any developing system from the beginning to the end of the process of its development. “Struggle” of opposites, maturation and resolution of contradictions is the internal source and mechanism of development of each phenomenon. Consequently, development is where there are contradictions and their overcoming.

Thus, taking into account the dialectical conception, development is qualitative, irreversible, directed changes caused by the contradictions of the system. As a driving

force, contradictions are inherent in the source of the development of criminal law. Through the resolution of these contradictions, the laws of the development of criminal law are paving the way for themselves.

That is why the patterns of the development of criminal law can be sufficiently fully revealed and comprehensively covered precisely in connection with the examination of the contradictions inherent in criminal law. In combination, the issue of the contradictions and patterns of development in criminal law, as required by the dialectical method, has not yet been investigated. Meanwhile, the knowledge of the contradictions of criminal law and the laws of its development has a very significant scientific and practical potential in a bundle, together, rather than separately.

Therefore, before we proceed directly to the establishment of the laws governing the development of criminal law, we must single out those opposites whose unity and struggle give impulses to its development, while understanding under opposites, the parties or elements, parts of the system that have opposite trends of change (a form of differently directed forces).

Opposites that affect the development of criminal law are:

1. the stability of criminal legislation against the dynamism of the criminal realities (the desire for the stability of the criminal law that allows citizens to assimilate its demands, and the inevitability of its variability ensuring that criminal law meets the criminal challenges of our time);
2. full codification of criminal law against the poly-source nature of the industry;
3. the use of abstract reception of the statement of criminal law norms against casuistic;
4. an increase in normative generalizations in the criminal law (general, declarative and definitive norms) against a differentiated, content-specific criminal law regulation;
5. criminalization against decriminalization; depenalization versus penalization;
6. liberalization against the tightening of criminal law;
7. expansion of dispositive (private) principles in criminal law regulation against compliance with the total imperative of the industry;

8. achievement of the objectives of criminal law on the basis of incentive measures (stimulating positive perpetrators behavior of the perpetrator) against their implementation by means of punishment (coercion);
9. use of evaluation indicators against the formalization of signs in a criminal law;
10. expansion of the discretionary powers of the court in criminal law against strengthening the absolute certainty of criminal law regulation;
11. differentiation of criminal responsibility on the basis of data on the crime against differentiation on the basis of the personal characteristics of the perpetrator;
12. equality of citizens before the law against the differentiation of criminal responsibility, taking into account the identity of the perpetrator;
13. equality of citizens before the law against individualization (justice) of criminal responsibility;
14. legality against the discretion of the law enforcer in the regulation of criminal law relations;
15. the principle of legality against blankness in criminal law;
16. globalization and universalization of criminal law against national isolation;
17. the identity of national law against the universality of international criminal law;
18. politicization (ideologization) against the humanization of criminal law (the priority of universal values relative to class interests in criminal law protection, the strengthening of democratic against anti-democratic tendencies in the development of criminal legislation);
19. continuity against innovations in criminal law;
20. the contradiction between the unambiguous state recognition of acts being criminal and punishable in the law, and the lack of such unambiguity (categorical) in their public evaluation;
21. expansion of the range of criminal acts in the Special Part against the expansion of the list of grounds for exemption from criminal responsibility and punishment in the General Part of Criminal Law;
22. the need to protect the rights and interests of the victim from criminal assault against the protection of the rights and interests of the perpetrator of the crime (humanism towards the victim and society as opposed to the human nature of the offender);

23. sufficiency of punitive content of punishment for achievement of its purposes against inadmissibility of punishment by physical suffering or humiliation of human dignity;
24. the prevalence of the positive consequences of criminalization in comparison with social costs and losses from the expansion of criminal law into certain social relations.

The unity and struggle of these opposites are the source and main driving force for the development of criminal law.

The clash (“struggle”) of trends means that one of them is trying to displace, overcome the other. Such a relationship takes place, for example, between the tendency towards a complete codification of criminal law and a tendency towards a poly-source nature of the industry; between criminalization and decriminalization; penalization and depenalization.

But to a much greater extent the criminal law is characterized by unity (harmony, rational relationship) of opposites, rather than their mutual relationship.

“Unity” of opposites, characteristic for criminal law, is expressed in the following aspects:

- a) Unity as complementarity, communication as part of the criminal law system (such a combination of opposites exists, for example, between the equality of citizens before the law and the individualization of criminal responsibility, the achievement of the objectives of criminal law on the basis of incentive measures and their implementation by coercive measures, between continuity and innovellisation of criminal law, between legal “identity” of the national and universality of international criminal law, etc.). The optimal combination of the opposite characteristic of criminal law makes it possible to more fully reveal the potential of criminal law as a regulator, to use all its possibilities, to achieve the maximum social effectiveness of the criminal law.
- b) Unity as the balance of opposing sides (for example, the balance between stability and the dynamics of criminal legislation, the

sufficiency of punitive content of punishment for achieving its goals and the inadmissibility of inflicting punishment on physical suffering or humiliation of human dignity, the search for a golden mean between humanism to the victim and humanism to the criminal, etc.); or finding an appropriate correlation (for example, between the positive consequences of criminalization and social costs and the losses from the expansion of criminal law into certain social relations).

For optimal resolution of contradictions in criminal law, the legislator uses such criminal-political and technical-legal methods and means as: timely bringing the criminal law into conformity with changing criminal realities; establishment of common grounds and application of means of differentiation of criminal responsibility; combination of normative and individual in the regulation of criminal responsibility; the use of direct and blanket techniques for the presentation of criminal law; the use of absolutely and relatively specific sanctions; etc.

Hegel wrote: “If a contradiction can be found in this or that thing, this in itself is not yet, so to speak, a flaw, a lack or error of this thing” (Hegel, 1971: 68). National industry experts confirm this idea. P.S. Dagel, S.G. Kelina, V.N. Kudryavtsev, for example, writes that to consider the dialectical contradictions in law as something negative, undesirable, harmful, is principally incorrect (Dagel, 1971: 51-59; Kelina, Kudryavtsev, 1988: 18). Consequently, contradictions are not a defect of law, on the contrary, their optimal resolution contributes to its development and improvement.

But it is equally wrong to assume one side of the contradiction is positive, and the other is negative. With each of these opposing sides, which constitute a contradiction in the criminal law, both positive and negative consequences can be associated (for example, the variability of the criminal law allows to constantly maintain its “combat” state, adequacy to actual criminal threats, but at the same time, instability weakens its effectiveness, because it disorients citizens in matters of criminal and punishable). At the same time, each of them is necessary for the existence of both the opposite side, and for the existence and development of criminal law in general.

For example, criminal law should be stable and at the same time it can not stand still, otherwise it will lag behind life, and, ultimately, sooner or later it will be canceled. Consequently, the dynamism of criminal legislation is necessary for the existence of its stability. I.V. Baskova correctly notes that “both stability and dynamism should be equally inherent in criminal law. Stability ensures the certainty and stability of criminal

law regulation, is the basis of legality. Dynamism allows to take into account changes in social relations, makes the law not an obsolete dogma, but a modern means of regulating social relations. The combination of these properties determines one of the main contradictions of law, which is the source of its development” (Baskova, 1989: 8). “For the law-making process, - also writes A.V. Naumov, it is important to establish the correct ratio of dynamism and stability of legislation, a reasonable combination of which is the source of the development of law (now the course of legislative work is characterized by a clear bias toward dynamism to the detriment of stability)” (Naumov, 2008: 265).

To take, for example, the contradiction between the principles of citizens' equality before the law and the fairness (individualization) of responsibility, one side of which presupposes a single and equal basis for criminal responsibility in the form of an act containing all the elements of the offense set forth in the criminal code and its inevitability in case of its and the other party, allows you to take into account the circumstances of the case, the identity of the perpetrator and choose an appropriate measure of responsibility for this particular case for the optimal achievement of the objectives of punishment. Each of these opposites is necessary, since in the absence of this contradiction, criminal law can not function efficiently and fairly.

Thus, the above opposites form a definite unity, they complement each other, presuppose and condition each other. But between them there are also the “struggle” relationships, this confrontation is that the party either denies the other (for example, decriminalization denies criminalization, and depenalization - penalization), or limits the opposite party (in particular, the discretion of the law enforcer in regulating criminally legal relations is limited by the formal certainty of criminal law).

To be a source of development, contradictions must be resolved. In each legal system, at each stage of development of law, inherent contradictions receive a certain permission. The general theory of dialectical contradictions fixes various forms of their resolution: a) “victory” of one of the opposites; B) when both sides of the contradiction, interpenetrating, do not eliminate each other throughout the existence of the phenomenon, etc. Any resolution of the contradiction is an essential qualitative change in the phenomenon. In the development of criminal law, there are both types of resolution of contradictions, but mainly the distribution has the second of them.

Contradictions inherent in criminal law can be subdivided into:

- A) *External contradictions* are the contradictions between criminal law and another system that is outside of it (for example, the contradiction between the relative stability of criminal law norms and dynamically changing criminal realities, the contradiction between the unequivocal nature of state recognition of acts as criminal and punishable in law, and the lack of such uniqueness in their public assessment – is expressed by the interaction of criminal law with subsystems of social life;
- B) *Internal contradictions* are those that are within the criminal law system (for example, the contradiction between the ideas of legality and the availability of the discretion of the law enforcer in the regulation of criminal legal relations, the contradiction between the principles of citizens' equality before the law and the fairness (individualization) of responsibility).

The development of criminal law is determined by external and internal contradictions.

For example, a significant change in the socio-political situation in the country causes new forms of socially dangerous behavior and, consequently, leads to the appearance of inconsistencies in the criminal legislation of the life of modern society, i.e. such an external contradiction, which is resolved by bringing the criminal legislation in line with the criminal challenges of our time.

Impulses to development are also contained in the internal opposite sides (trends) of criminal law, their interaction. For example, as it is known, historically the development of the legal form came from the casuistic construction of legal norms to the creation of abstract formulas. The interaction of the abstract and casuistic way of presenting criminal law norms allowed over time to develop and consolidate in the criminal law normative generalizations of a higher level (general, declarative and definitive norms) that arose on the basis of specific regulations and acted in concert with them.

The search for a balance between two opposites - punitive content of punishment and humanism towards the perpetrator, allows us to establish a fair system of punishments and rules for their application. A.I. Boyko notes absolutely right, that “the humanism of criminal law is dialectically contradictory: it is necessary to protect the social foundations from the excesses of specific people and at the same time treat perpetrators as actual members of the affected society; showing compassion for the criminal, remembering the offense of the victim” (Boyko, 1999: 55-56).

Thus, *the dialectical contradictions of criminal law* are the interactions of these opposite sides and tendencies that characterize the content of criminal law regulation and are in internal unity and struggle, acting as a source of development of criminal law.

Considering the foregoing, *the laws governing the development of criminal law can be defined as essential, necessary, repetitive, sustainable, directed qualitative changes in criminal law, conditioned by inherent contradictions, expressing criminal legal progress.*

Regularities in the development of criminal law, expressing the achievements of the criminal legal culture, are organically linked with the history of development of Russia, are due to the peculiarities of its socio-political situation. In addition to the directions of its own progressive development, these laws, firstly, reflect the existing patterns of social development (democratization of social and political life, the humanization of social relations, etc.), and secondly they are in the stream of laws governing the development of law in general (increasing the level of normative generalizations, increasing development in the law of the properties of the system, the qualities of a holistic education; strengthening the specialization of law, i.e. “division of labor” between normative prescriptions, legal institutions, branches of law; development of the structure of law; development in the interaction of regulatory and individual regulation; improvement of protective legal means and methods, etc.). The legal movement of criminal law takes place on the basis of these objective laws of social and legal development.

Analyzing the changes in the criminal legislation on a broad historical scale, we can definitely establish that *the main laws governing the development of criminal law are:*

1) *full codification of criminal law*

The development of the external form of criminal law went on the way from “multi-law”, i.e. a single action of a set of equal-sized normative acts that regulate criminal and punitive matters, often diverging in content, to the unification of criminal law in a single codified act.

Throughout the history of Russia until the end of the twentieth century, there were many criminal legal sources. And only in part 1 of Art. 1 of the Criminal Code of the Russian Federation in 1996, the legislator provided that “The criminal law of the Russian Federation consists of this Code. New laws providing for criminal liability are subject to

inclusion in this Code. “Thus, the current Criminal Code was officially declared the only source of criminal law in Russia, combining criminal law. This, of course, did not stop scientific discussions on the system of sources of Russian criminal law. But, at least, the main idea was fixed quite clearly: only in the Criminal Code of the Russian Federation the description of the crimes' crimes can be contained. This decision, among other things, has an important educational value. I.A. Tarkhov justly argues in this regard: “It should be remembered that the criminal law is addressed not only to specialists, but also to citizens. A lot of formal sources of criminal law creates for the latter significant difficulties in the assimilation of legal knowledge, generates ignorance of a number of criminal and legal prohibitions and thereby reduces the preventive role of criminal law and the effectiveness of ensuring their rights and freedoms by citizens without recourse to specialists” (Tarkhov, 2003: 82).

2) humanization and liberalization of criminal law

A significant step towards the humanization of criminal law, expressed in the refusal to apply the criminal law by analogy and the recognition of the principle “no crime without specifying it in law” (Nullum crimen sine lege), was made with the adoption in 1958 of the Fundamentals of the criminal legislation of the USSR and Union Republics.

Further progress in this direction occurred at the beginning of the 1990s. Among the most significant steps in the way of humanization and liberalization of criminal law were made with the adoption in 1996 of the Criminal Code of the Russian Federation, one can name: recognition as the primary task of the criminal law for the protection of human and civil rights and freedoms; the inclusion in the Code of norms that take into account the presence of the guilty person when assigning punishments to various diseases (mental disorder that does not exclude responsibility, a serious illness that prevents the serving of punishment); a norm that does not allow criminal liability for innocent harm; expansion of the list of circumstances precluding the crime of the act; the introduction of new types of punishment, not related to deprivation of liberty; and etc.

Analysis of the modern criminal policy of the state confirms that the liberalization of the criminal law is one of its main directions.

3) ensuring compliance of Russian criminal legislation with international and constitutional standards of human rights, freedoms and security

Occurring in the country in the second half of the 80's of XX century. The processes of democratization of social and political life, integration into the international legal field led to the abolition of a number of criminal articles that violated human rights and freedoms.

On the wave of democratic reforms in 1996, Russia adopted a new Criminal Code, based on the Constitution of the Russian Federation of 1993 and generally recognized principles and norms of international law, built in contrast to the Soviet criminal codes on the priority of universal values. The protection of human rights and freedoms from criminal encroachments (traditionally the first place in the hierarchy of values protected by the criminal law, occupied the state-party, class interests) is placed at the center of the corner, and accordingly the special part is opened by the section “Crimes against the person” protecting constitutional rights and freedoms of citizens.

4) introduction and expansion of compromise in criminal law

Under the rules of criminal law that allow compromising, we mean the prescriptions in which the person who committed the crime is guaranteed exemption from criminal liability or commutation of punishment in exchange for the perpetration by such person of acts defined in the law and ensuring the implementation of the criminal legal struggle against crime. Such a compromise can be used to eliminate (mitigate) the harmful consequences of the crime, ensure the rights and legitimate interests of the victims and accused, induce the perpetrators to self-discovery and cooperate with law enforcement bodies, identify latent crimes, increase the detection of registered crimes, save criminal repression, law enforcement forces etc.

The Criminal Code of the Russian Federation in 1996 consistently continues to use the compromise in combating crime. In the General Part, since the adoption of the new criminal code, the idea of a compromise expresses the norms on exemption from criminal responsibility in connection with active repentance (Article 75 of the Criminal Code of the Russian Federation), in connection with reconciliation with the victim (Article 76 of the Criminal Code of the Russian Federation). In addition, in 2011, the Criminal Code of the Russian Federation was supplemented by Article 76.1, which provides for the possibility of exempting a person who first commits an economic offense from criminal liability if this person fully compensated for the damage and transferred a certain monetary compensation to the federal budget.

The current Criminal Code significantly expanded the list of cases of exemption from criminal liability in connection with active repentance, specifically provided for in the articles of the Special Part for specific crimes.

We dare to hope that the processes of democratization of Russian criminal policy and criminal law with respect to crimes, that do not pose a great public danger, have made it possible to overcome the criminal legacy of the totalitarian past and adequately strengthen the responsibility for crimes posing an increased danger to society (terrorism, etc.) , will continue to be the determining areas in the formation of humanistic and fair criminal law, allowing it to fully comply with the constitutional and international standards of human rights and security.

Bibliography

- Baskova, I.V. (1989) *Stability and dynamism of the Soviet criminal law*. Author's abstract. dis. ... cand. jurid. sciences. M.: Moscow state University named after M. V. Lomonosov.
- Boyko, A.I. (1999) Principles of criminal law. U: Petrashev V.N. *Criminal Law. The general part*. Moscow: Prior, p.p. 17-28.
- Dagel, P.S. (1971) Dialectics of legal regulation of public relations. *Jurisprudence. №1*, p.p. 51-59.
- Hegel, G.V.F. (1971) *The science of logic*. Moscow: Mysl.
- Kelina, S.G.; Kudryavtsev, V.N. (1989) *Principles of Soviet criminal law*. Moscow: Nauka.
- Naumov, A.V. (2008) *Russian criminal law. Course of lectures: 3 t. T.1. A common part*. Moscow.
- Sviderskii, V.I. (1985) On Some Features of Development. *Questions of Philosophy. №7*. p.p. 20-35.
- Tarkhov, I.A. (2003) Concept, subject, tasks and system of criminal law of Russia In: Sundurov F.R. *The Criminal Law of Russia. The general part*. Kazan: Kazan state University, p.p. 5-36.

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THE IDEA OF HUMAN RIGHTS AS A MEANS OF CHANGE OF THE PUBLIC MORAL

This paper analyses relations between Public moral and Human Rights. At the beginning a history of differentiation of Public moral is given, starting with the antique morality through Christian moral, till the Secular moral of the present days. The author sees the origin of idea of universal morality for all mankind in the Christian religion. After that, the development of the Human Rights from their origin in the Period of Enlightenment is given, with special attention to the contemporary use of Human Rights for justifying military and political aggression. Considering Public Moral as a social value per se, the author explains ethical sides of such use of the Human Rights and impossibility of ethical justifying for such political action.

Keywords: Human Rights, Public Moral, universal morality, Christianity, ethics

1. The Human Rights and Public moral

Despite the opinion that the Idea of Universal Human rights has its origin in the Modern Era, specifically, the Period of Enlightenment,¹ we can track it down history to the Antique Era. There are indications that, even in the pre-historic model societies (Australian Aborigines, South American natives in the Basin of Amazonia, Papua New Guinea etc.) there existed ideas of universal rights and obligation; not only of man to

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¹ “The notion of human rights that emerged by the end of the Enlightenment—what can reasonably be called the Enlightenment notion—is the notion we have today.” (Griffin 2008: 11)

man not belonging to his society (tribe, family), but to the universe as totality of existence, and so, to the nature itself, including animals, plants, and soil.²

It is widely known that the Ancient Greek culture was based on existence of many city-states called *polis*. They were of very different size and political influence, state organizations, and common values. Most important connections between them were the language, religion, myth, poetry and the Olympic Games. The word “*Agon*” meaning “*competition*” was a common value of the Ancient Greek culture and had a strong impact on every part of life, especially in the politics. To be recognized by his fellow citizens as a man of virtue, and obtain their trust through political power, was the ideal of every Greek man. A man that was not participating in “common thing”, which was antique meaning of word “politics”, was defined by Aristotle as “idiotes”³.

The first ideas of the Universal capabilities of all men, which allow them to have equal rights, belong to the Ancient Greek philosophers called Sophists⁴. They were travelers through many Greek states who had realized that every state had different customs and laws, which indicated that these customs and laws were not established by Gods but by man; and as such can be changed by man himself. One of the most important philosophers of this period, Socrates, proclaimed that every Man has Reason, and that using it is the way of liberating human nature of the boundaries of its present state. So, with the Sophists and Socrates started a cultural reform of the Greek society, to end a century later with its first unification in a political frame of the Macedonian Empire and its descendants; which finally culminated with the Roman world – state.

During the period of first centuries A.D., a political and cultural unification of the Mediterranean basin is under way, transformed by the tradition of Roman law and Hellenistic culture. The most influential philosophers of those time, the Stoics, proclaimed that man is a “Citizen of the World”⁵; meaning that a person transcends boundaries of the nation, language, state and tradition. This perception of man was

² “The old Lakota was wise. He knew that man's heart away from nature becomes hard; he knew that lack of respect for growing, living things soon led to lack of respect for humans, too.” — Luther Standing Bear (https://www.goodreads.com/author/quotes/305599.Luther_Standing_Bear)

³ “The word ‘politics’ derives from the ancient Greek *politēs*, the public person, those interested and participating in public affairs. The antonym of the public person is the private person, the person who lives a purely private life. The ancient Greek word to denote the private person is *idiotes*. The person who chooses to be private is an idiot.” (Critchley 1995: 11 (internet))

⁴ Sophist Antiphone from Athens was first to deny the substantial difference between nobles and ordinary people and Greek and barbarians. (see Copleston 1988: 132)

⁵ Cosmopolites

crucial for obtaining ideological basis for profane unification under the Roman scepter. But a real perception of equity between every person comes with Christianity⁶.

The Christian religion made qualitative change on the perception of man and his position. Giving strong emphasis on free will, and possibility of choice, *contra fatum* (lat. fate) as an inevitable course of things that must happen (what was a basic Stoic standpoint)⁷, the Christian religion transformed antique system of values toward something that most of us now share.

But the most important element that made the Christian religion's standpoint exceptional was the imperative of *love to all*.⁸ In the antique tradition, there was no universal perception of the human race, as the one we have today. The notion “barbarian” in ancient Greek had a meaning of “a man who does not speak same language as we do”, so, he is not sharing our customs and laws. Our duties toward our compatriots were quite different then to the “barbarians”. In time of the Roman Empire this ethnocentric point of view was transformed towards differentiation of “the citizens of the empire”, and “others” which were in a subordinate position.⁹

But, Christianity was first to proclaim the universal equality and unity of all men before the God, without emphasis on age, gender or social position. During the time of Constantine the Great, after the collision between the Roman Empire and Christian Church in the first centuries of the new era, a strong symbiosis emerged between the state, now the Christian Empire, and the Church.

On one side was the Emperor as the guardian of Christian values and laws, ruling under the tutelage of God, and on the other the Church, representing the will of God and guarding the holiness of life of citizens. This “symphony” of secular and spiritual

⁶ „There is neither Jew nor Greek, there is neither slave nor free, there is no male and female, for you are all one in Christ Jesus.“ Galatians 3:28 (<https://biblia.com/bible/Galatians3.28>)

⁷ Ducunt volentem fata, nolentem trahunt. (The fates lead the willing and drag the unwilling) (Seneca Ep. 107, 11, https://en.wikisource.org/wiki/Moral_letters_to_Lucilius/Letter_107)

⁸ And one of them, a lawyer, asked him a question to test him. “Teacher, which is the great commandment in the Law?” And he said to him, “You shall love the Lord your God with all your heart and with all your soul and with all your mind. This is the great and first commandment. And a second is like it: You shall love your neighbour as yourself. On these two commandments depend all the Law and the Prophets.” Matthew 22:35-40 (https://en.wikipedia.org/wiki/Great_Commandment)

⁹ Universal citizenship in Roman Empire was not established until the Emperor Caracala's edict in 212 a.D.

power, both having special and separate duties in fulfilling the Will of God, was preserved as political ideal until the present day in the Orthodox Christian tradition.¹⁰

This idea of Church as universal, brought by Christianity, connecting all the good people of all times under the Will of God, was the first universal standpoint in the known history. It presented the ideological and formal basis of the present idea of Universal human rights. Formally dispersed fragments of ethnicities, states, moral values and political structures were unified by the universal Christian Ideal, which so, became the foundation of all later concepts of universal humanity.

We will now try to elaborate certain qualities of Christianity, which made this new religion very effective from the beginning. First, it was unprecedented ability of Christians to deliberately sacrifice themselves, for their sole trust in God. The holy martyrs of the first centuries witnessed their fate facing tortures and death without hesitation. That was unknown in the human history before, because religious concept of the antique political society as such, bore strong belief that society itself represents the Will of God, and that the ruler of the society should be a representative of the God himself.¹¹ That was one of the reasons why it was so difficult to put a universal concept of Humanity in this pre-Christian period. Christianity, breaking the idea of a Godlike society, appealed to a Godlike person, making it a true revolution of values. Transcendent idea of antique divinity was replaced with Personal ideal of identification of man and God in the institution of Christian Church. It was the first and only time, that imperative of Godlike perfection became Ideal of a man. Possibility of establishing a connection between God and man, in a manner of the Father and the Son, was the main reason for giving universal dignity to the man.¹²

Second, putting the main aim of person's life out of boundaries of life as such, Christianity established strong moral values based on love and self-sacrificing, which was not limited to the members of the society, but the world as a whole. Exactly that Christian ideal of salvation, presented a basis of the idea of universal capacities of all men to be saved by God and connected in a Holy Society. From these two reasons Christianity was able, for the first time in the known history, to provide necessary prerequisites for establishing of the universal values.

¹⁰ St. Nikolaj Žički 2000: 27

¹¹ Hamvas 2012: 228

¹² “For what will it profit a man if he gains the whole world and forfeits his soul? Or what shall a man give in return for his soul?” Matthew 16:26 (<https://biblehub.com/matthew/16-26.htm>)

From these values in the later centuries arises the Public moral, as it is known in various different cultures, which descends from the original Christianity. These cultures, Orthodox, Roman Catholic, Protestant, and in the present–time, Secular society, however hold different types of morals, depending on values which prevail in their type of culture. The Christian Public moral, with its universal values, represents a dominant moral concept of the late centuries of our era, so it would be necessary to explain the chronology of its development through the ages.

2. The differentiations of Christian Public moral

The Unity of Christian Public moral strongly depended on unity of the Church. Established, as it was said before, as a “symphony” between secular and spiritual power, Emperor and Spiritual hierarchy (episcopos of the main centers of the Church (Rome, Constantinople, Antioch, Jerusalem and Alexandria)) and facilitated through the Ecumenical Councils, Christian Public moral was established through dualism of powers and different duties, which a person should fulfill by obeying them. The position of the Emperor as a political leader was facilitated through his appointment by the Church, as a ruler by the Will of God. The Church did not hold any political power, but was obliged to interfere in the political sphere in case of heresy of the political leaders. On the other side, the duty of the Emperor was to support works of the Church and suppress any attempt of corruption of original Fate.¹³

However, all members of the community shared the ideal of the holiness of life, as a basic value. That ideal connected all participants of the Public moral, putting them in the position of equality before God, with a basic purpose of fulfilling their duty toward Him. In the original type of the Christian Public moral, this dualism of different types of power neglected the possibility of subjugating human personality by one of them, allowing immediate relation of the man to the God. Gaining holiness as common aim for all persons of all times was the main universal value of the original Christian Public moral. That kind of Public moral, with the imperative of holiness and a person’s total responsibility towards God, is still preserved in the Orthodox Christian culture.¹⁴

The first decisive differentiation in Christian Public moral comes with the aspiration of the spiritual hierarchy towards the political power, commonly known as the Great

¹³ Ostrogorski 1998: 51

¹⁴ Grozdić 2016: 312

Schism.¹⁵ In 1054 a long process of secession of the Church of Rome (Roman Catholic Church) from the political body of the Roman Empire comes to an end. Prerogatives, previously held by the Emperor now passed to the Episcopo of Rome, which strongly influenced the concept of moral itself.¹⁶ From this time, monism of political and spiritual power (theoretically based on the St. Augustine *De civitate Dei*) directly contested capacity of Free Will of human person, connecting directly absolute moral authority with a total political power, and replacing personal duty to the God with personal duty to the institution. In this type of moral, universal value represents a person's ability to fulfill its obligations to the Institution of the Church, which directly presents the God himself. This immediate subordination of the personal moral integrity to the institution instead of God created prerequisites for establishing of a fanatical type of person. This capacity of man that enthusiastically does “what he should do for the sake of the institution” is still held as one of the main values of Western Christian types of cultures. Replacing the God with the Human Institution that bore political prerogatives, created a special type of absolute obligation of the human person to the impersonal authority. In that type, universal value of Holiness in the original Christian Public moral was replaced with obligation of universal subjugation to the Institution of Church.

The second main differentiation of the Christian Public moral comes with Protestantism. Trying to break the moral supremacy of the Roman Catholic Church in constitution of universal values, Protestantism appealed to the integrity of every person to decide what is right or wrong by their own judgment. Observing the social context¹⁷ of origin of Protestantism, we can say, that the Public moral in Protestant culture was strongly influenced by a lack of resources. That made obvious why the “productiveness”, “work as a way to please the God”, “humbleness”, and “increasing of personal property as a certain sign of God's mercy” created basic values in, sometimes radically opposed, Protestant moves.¹⁸ Restoring an individual's responsibility before God, Protestantism, however, created clear differences from the original Christian values. A possibility of universal community in Protestantism was lost, due to creation of a vast number of different Protestant denominations.¹⁹ So, individualism, as a personal responsibility

¹⁵ Stevanović 2017: 103

¹⁶ Stevanović 2017: 117

¹⁷ Uprising of peasants against the nobles in the name of equality and better life in 1524 was strongly influenced by Protestantism.

¹⁸ Fukuyama 1997: 55

¹⁹ World Census of Religious Activities (U. N. Information Center N. Y. 1989) recognized 23.000 different Protestant denominations (taken from Schaffer 2004: 15)

before God, was often united with the feeling, that fulfilling some special task in its religious community makes someone worthy of the God's Grace.²⁰ Impersonal fanaticism, borne of the Roman Catholic tradition, transforms in Protestantism. Basically constituted as blind obeying of the Church's command, the Protestant type of fanaticism involved capabilities of taking personal decision, including deliberate and active moves in favor of assumed God's Will.

This “productive” and strongly competitive type of person, created a highly unstable society. Protestant societies, in comprehension with Orthodox and Roman Catholic, characterize a lack of universal Public moral. From the early stage of creation of Protestant societies, comes a need for Impersonal Authority with the role of establishing public safety.²¹ So, state and judiciary institutions become the bearers of moral prerogatives, and law become substitute for universal moral values in establishing of right and wrong. It is interesting, that in political movements of Fascism, Nazism and Socialism we can found the same ideal of a strong authority capable of taking any necessary action in the cause of highest good.²²

The Late stage of defragmentation of the Christian Public moral comes with Secularism, making an individual the one and only authority of moral values. Expelling, even a possibility of a “higher authority”, this kind of moral situation creates communities on a base of the “common interest” and control of social levers or political power in personal favor become main aim of social activity.

We can now conclude about the type of societies developed from the Original Christian Public moral. The Orthodox Christian Public moral is based on God's authority and personal moral autonomy in the state of universal values of the community and on the co-operation (not subjugation) between the institutions of the State and Church. The Roman Catholic Public moral is based on the Church's authority in the name of God,

²⁰ Schaffer 2004: 153 – 154

²¹ „Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man.” (Hobbes: 108)

²² „According to the regulation of the Central Executive Committee of July 10, 1934, and the Regulation of the Central Executive Committee and the Council of People's Commissars U. S. S. R. of November 5, 1934, special organs of the Ministry of Interior Affairs (M. V. D. formerly N. K. V. D.) have the right, in an administrative way, to sentence persons "suspected of counter-revolutionary activity," whose guilt cannot be proved and who are socially dangerous, to deportation to distant places of the Union, to expulsion from certain places, to placement in corrective camps (concentration or labor camps). There are no rules of procedure; no inquiry of the suspect is required; no appeal or pardon admitted. It is easily seen that this practice practically allows the executive authorities to deprive any person of liberty or property without any process of law.” (Starosolsky: 360)

with suspension of the personal moral autonomy in favor of that authority, replacing the free human will with a fanatical obedience. The Protestant Public moral is based on personal autonomy in establishing of God`s authority, fanatical activation of person in favor of exclusivity before that authority, lack of universal moral values and active role of impersonal authority in its substitution and keeping of Public safety. The Secular moral situation characterizes an absolute personal moral authority and morally unlimited competition for the own good.

The universally proclaimed Christian value of the holiness of a person ended in the state of tacit universal sanctification of personal will.

3. Constituting of the Universal Human rights and their use in change of the Public moral

Human rights are usually presented as a “child of Enlightenment”. Relying on the Human Reason as a sole authority created in this age in the Western Europe a second paradigm that contrast to the previous religious. The rise of the Protestantism, and the devastating Thirty Year`s War, ending in a Westfall Treaties created a vacuum of moral authority in the Western Europe. We have explained earlier, what changes these events brought to the functioning of the Public moral.

Immanuel Kant highlighted in his “Eternal Peace” the basic prerequisites of the Universal Human Rights based on a moral integrity of a person²³. Leaning on Rousseau and Hume, Kant argued for a Republican state, where citizens would not be the “blind tools” of the will of the rulers. For Kant, the imperative of international politics was “There should be no war!”²⁴, meaning that countries, being in a natural “State of War”, one against another, should, under a Republican way of government gain internal conditions of restraining themselves from the War. The Reason why Republican countries should, by their nature, stay out of war, lays in the fact that its citizens would not easily allow use of State`s resources for actions going against their interest (which war with its devastating consequences certainly is). On the contrary, a Despotic government would easily enter in the State of War because its citizens are considered the “property” of its ruler, and therefore they are at disposal.

²³ Kant 1995: 28

²⁴ Kant 1993: 155

Kant had the opinion that moral integrity of a person, or capacity of having a free will, forbids a possibility of using a person as a tool by any means.²⁵ Making it the final aim of a moral person in achieving of The Good Will,²⁶ Kant makes person a value by itself. From that moral standpoint, he constitutes the rights that every person, as a moral agent, has.²⁷ The universal moral standpoint of basing human rights on existence of the free will as a necessary condition, creates the second paradigm in constituting of universal human rights. This Kant’s “universal morality”, albeit, is not in opposition to the original Christian standpoint, and can be easily integrated in it. The reason why Kant appealed to a moral integrity of a person as the base for inherent rights lies in the universal “dignity” of a person as a moral agent by itself. This universal moral integrity of every human person creates prerequisites for natural rights of every human being that should be respected in the Constitution of every State.

From this moment, we can track two ways of establishment and use of Human rights. First, in the past two centuries, strong effort was made to proclaim and facilitate the Human rights as a basic minimum for peaceful communication between persons, cultures and states. The idea of human rights, as universally accepted values that must be respected by all political subjects, presents a moral basis for the foundation of The United Nations, which was established after the Second World War. The main purpose of this organization was preservation of peace, as basic value for all humanity. After the Universal Declaration of Human rights (1948), series of conventions²⁸ were adopted by the United Nations to clarify and facilitate the institution of Human Rights as such. The members of the United Nations obliged themselves to incorporate values of Human Rights in their political systems and perform acts of government according to them. Institutions of the Ombudsman, as a protector of Human Rights, were established by most states. Numerous non-government organizations, like the Amnesty international and the Helsinki Committees, were established to monitor and help in preserving of Human Rights all over the world. From that point onwards, the institution of Human Rights greatly improved and helped in establishing of a better world for all nations.

²⁵ “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.” (Kant 1981 : 74)

²⁶ Kant 1981 : 23

²⁷ Leaning on the Kant’s establishing of Human Rights, I will try to explain why the idea of Andrea Sangiovani that “For a moral right to count as a human right, it must license direct action to stop violations from happening or continuing.” (Sangiovani: 675) supported by numerous authors is not plausible.

²⁸ Convention on the Elimination of all Forms of Racial Discrimination (1969); International Covenant on Economic, Social and Cultural Rights (1976); Convention on the Elimination of all Forms of Discrimination against Women (1981); Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1987); Convention on the Rights of the Child (1990); (taken from Beitz 2009: ix)

On the other side, the Human Rights were often used like a means to justify the political or military violence against states or political movements. The term “humanitarian intervention” was made to designate a just use of the military force (by its consequences similar to the Act of War) in the name of preserving Human Rights. Such use of the Human Rights in a political conflict put a permanent shadow on its fundamental idea. The main problem for equivalent use of Human rights is a lack of moral authority in its establishment. The very essence of that problem lies in the fact that the institution of state, which provides the basic prerequisites for use of force, could never be moral, but only a political agent. As explained before, this use of a state in a manner of a moral agent is based on a lack of universal Public moral, which is the basic characteristic of the Protestant and Secular cultures. We must now clarify why such use of a political (or military) force by the state could not be morally justified. Political representatives of a state with a legal authority to use the force are not the moral authorities in the same way, because moral authority belongs to every person on a base of the existence of the free will – which is a fundamental condition of their moral responsibility. So, if a political representative uses the force from his moral standpoint he is misusing his personal moral capability (to judge right and wrong) for a public legal authority. This highly illegal and immoral act (misuse of a political power) could not be justified from a universal moral authority, because that assumed universal moral authority (Human rights) does not exist like a moral, but only like a legal authority adopted by a certain state. In that case state sovereignty forbids interference in matters of other sovereign state and interference in a matter of other sovereign state from a presumed universal moral standpoint (that can not exist) represents euphemism for a state aggression from the political interest.

What kind of consequences these facts about Human Rights have on Public moral? As we have seen previously, there are strong differences between values and the way of functioning of different types of Public moral. Nonetheless, the Public moral creates the necessary conditions for the functioning of every society and, establishing its predictability of communication, common values, and understanding of right and wrong, represents the incomparable value per se. On the opposite, degradation of Public moral and accepted common values is certain sign of crisis and disintegration of the society. There are numerous examples that violent change of Public moral leads directly to internal conflict and chaos, weakening all capabilities of a functioning society. As in the previous example of moral justification of “humanitarian intervention” there is a certain kind of hypocrisy in violent change of Public moral of the society in the name of Human Rights. So, in preserving of moral value of Public moral as an integrative factor

of functioning of the society, sovereign government of the state should not allow its violent change through any legal means. Public moral is functioning in the state of perpetual change due to the capacities of the free will of its moral agents. As a product of their deliberate choice, Public moral always presents a wide platform of common values, accepted ways of communication, and criterion of right and wrong. Absence or degradation of Public moral creates an atmosphere of uncertainty, unpredictability and insecurity in a society, leading to its destabilization.²⁹

In the effort of securing stability of the society and prosperity of its citizens, it is therefore one of the imperatives of the state to recognize and preserve Public moral, and not to allow, by any legal means, a violent change against the free will of the moral agents representing it. Misusing of Human Rights in the violent change of Public moral is therefore amoral although could be a legal act, because it deprives moral agents of the certain society of their use of the Free Will, putting them in the state of moral incompetency from the side of the legal State authority.

This “paternalism” of the state in the long term leads to a possible disintegration of the society, because weakening and disappearance of existing Public moral leads to destruction of its main integrative factor. If there is any way of incorporating of Human Rights in Public moral as such, it must not be done by force (even in legal terms), but by deliberate and freely accepted decision of the moral agents representing it. Without that decision and acceptance, the Human Rights could not be used in the right way.³⁰

Literature

- Griffin, James (2008), *On Human Rights*, Oxford: Oxford University Press
https://www.goodreads.com/author/quotes/305599.Luther_Stanley_Bear (visited 24. 09. 2018)
- Critchley, P. 1995. Aristotle and the Public Good [e-book] Available through: Academia website <<http://mmu.academia.edu/PeterCritchley/Papers> (accessed 04. 09. 2018)
- Copleston, Frederick (1988) *Istorija filozofije t.1 Grčka i Rim*, Belgrade: BIGZ
<https://biblia.com/bible/Galatians3.28> (accessed 24. 09. 2018)
https://en.wikisource.org/wiki/Moral_letters_to_Lucilius/Letter_107 (accessed 18. 09. 2018)
https://en.wikipedia.org/wiki/Great_Commandment (accessed 24. 09. 2018)
- Sveti Nikolaj Žički (2000) *Kroz tamnički prozor*, Linz: Pravoslavna crkvena opština LINC
- Hamvas, Béla (2012) *Scientia Sacra 2*, Belgrade: Draslar partner
<https://biblehub.com/matthew/16-26.htm> (accessed 24. 09. 2018)

²⁹ Babic 2005: 124

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- Ostrogorski, Georgije (1998), *Istorija Vizantije*, Belgrade: Narodna knjiga – ALFA
- Grozdić, Borislav (2016) “Shvatanje o izvoru i poreklu državne vlasti – prilog izučavanju političke filozofije Nemanjića”, *SPM 2016/1*, Belgrade
- Stevanović, Aleksandar (2017), “Moralna dekompozicija evropskog čoveka i ulazak u stanje opšte nebezbednosti”, *CONFERENCE PAPERS International Scientific Conference “FREEDOM, SECURITY: THE RIGHT TO PRIVACY”* (ed. Zoran Pavlović), Novi Sad: Autonomna pokrajina Vojvodina, Pokrajinski zaštitnik građana – ombudsman
- Stevanović, Aleksandar (2017), “Srpski pravoslavni etos i ratno stanje”, *Pravoslavlje i rat* (ed. Borislav Grozdić), Belgrade: IFDT – VIC “Obrana”
- Fukuyama, Frensis (1997), *Sudar kultura*, Belgrade: Zavod za udžbenike i nastavna sredstva
- Schaffer, Frank (2004), *Plesati sam*, Trebinje – Vrnjci: Tvrdoš – Bratstvo SV. SIMEONA MIROTOČIVOG
- Hobbes, Tomas (1961), *Levijatan*, Belgrade: Kultura
- George V. Starosolsky, Basic Principles of Soviet Criminal Law, 28 N.C. L. Rev. 359 (1950).
Available at: <http://scholarship.law.unc.edu/nclr/vol28/iss4/1> (accessed 28. 08. 2018)
- Kant, Immanuel (1995), *Večni mir*, Valjevo – Belgrade: Gutenbergova Galaksija
- Kant Immanuel (1981), *Zasnivanje metafizike morala*, Belgrade: BIGZ
- Sangiovani, Andrea (2015) „Why there Cannot be a Truly Kantian Theory of Human Rights”, *Philosophical Foundation of Human Rights* (ed. Rowan Cruft, S. Matthew Liao, Massimo Renzo) Oxford: Oxford University Press
- Beitz, C. R. (2009), *The Idea of Human Rights*, Oxford University Press, New York
- Babić, Jovan (2005), *Moral i naše vreme*, Belgrade: Službeni glasnik

Dragana Ćorić*

THE THEORETICAL DEFINITION OF THE NOTION OF UNLAWFULNESS¹ - A STEP TOWARDS POSITIVE LAW

We see the law as a living and self-supporting organism. The inner architecture of the law is not once and for all given, but in accordance with the needs of society and often in accordance with the political establishment, it is changed and processed differently, and its further construction rarely looks like its first original. Nevertheless, we can agree on something: the one that is “legal” is regulated by legal (state’s) norms, with respecting the appropriate procedure for adopting these norms, and with the participation of the appropriate authority. But, is everything that is “legal” really- legal, and is the unlawfulness really found only outside the law in the sense that these are the relations and consequences of those relations that are not regulated by law, or is it possible to find the unlawfulness within the law?

The main role of the law in country is to regulate and establish the society, the state and the system as a way of behavior of its citizens, and to impose sanctions for non-compliance with the prescribed rules. The unlawfulness would, therefore, be the opposite of what is prescribed as a way of behavior, and the unlawfulness is, for that reason, an integral part of the delict. On the other hand, if we consider law as just what is by law proclaimed as a lawful, we can also see the unlawfulness as the absence of any regulation of a relationship or the consequence of that relationship, which does not mean at the same time - that relationship or that consequence does not exist but simply did not become part of the architecture of positive law.

In this paper, we will highlight the notion of unlawfulness from the point of view of the theory of law and the philosophy of law, using the opinions of some theorist and philosophers, which we found the most significant in this matter, in order to approach practical understanding of the same concept; and relations of positive law and unlawfulness as such.

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¹ In English language there are a lot of terms which mark something that is against the rules of law, such as :illegality, non legality, unrully,unlawfullnes etc. We decided to use the term unlawfullnes in this article, because it is substantially the closest to the phenomena that we want to describe in this article. Although we will use other mentioned terms as they are used by the authors that we cite in article, we stand to the term of unlawfullnes as the most accurate in this sence that we are investigating it.

What the unlawfulness is or is not and its variations

It seems that the question of lawfulness can be raised from the moment when we see that law and its rules are respected in the society. People, especially in these modern times, decide to obey the rules upon other reasons than it is the pure fear of being sanctioned- they even use their own religious and moral standings to oppose to legal norms. Sometimes they succeed, sometimes not- but more of that is that they are creating kind of a hole in the armor of the law, which can lead to full disrespect of the law and the state itself. Some theorists say that obeying the law isn't "strictly closed in the psyche of the individual and that the only sanction is the voice of conscience, but it becomes the thing of greater importance for the society" (Карбоније 1992:141). "We are wondering why the legal rules can be separated from the set of social rules for people's behavior... ". But, when we see it from this perspective, it seems logical. Legal norms are so different from other social norms: we know who wrote them, when, how, what procedure is reserved for their enactment, who will be obligated to realized them and in what manner, who will apply sanctions and how a sentence will be imposed within the prescribed range of sanction (for example, sentence of imprisonment). Other systems of social norms don't have some of mentioned elements, and above all: they are applied only in the part of society, while legal norms and their implementation are mandatory for everybody.

Lawfulness is a kind of request from the state oriented towards citizens in order to adapt daily life to the rules that are prescribed, or just to do their best not to do something that is prescribed as forbidden. Lawfulness of state's norms distinguishes them from other systems of social norms in which there are no sometimes even punishments prescribed, or we don't know who is entitled to execute the sentence. So, we can say that in general the unlawfulness is a negative response to the mentioned request- i.e. contrary to the desired state and behavior in one state (Карбоније 1992:141-142).

In modern literature, we found of lot of opinions on what unlawfulness is, or isn't, and also, on its variations, depending whether the unlawfulness is considered in international or in national laws. One of those considerations is of F. Johns, who talks about five types of non-legalities²: (a) *illegality* (exceeding suppression by, being forbidden by or defiant of international law); (b) *extra-legality* (lying outside international law); (c) *pre- and post-legality* (standing before or in the wake of

² Fleur Johns uses the term non legality, so we are citing it, although is the matter of unlawfulness.

international law's operation); (d) *supra-legality* (surpassing legal grasp or comprehension); (e) *infra-legality* (the marginal, natural, incidental or unworthy of direct notice) (Johns, 2013:16).

When we turn on the side of national law, we mostly found that unlawfulness implies that an action occurred, which according to the legal norm was not to be taken or missed, or an action lead to the consequence that it was not supposed to happen in the first place (Radišić, 2001: 547). Some think that the unlawfulness is also a product of adopted value system that determines which behavior models are acceptable and which consequences of a certain behavior are acceptable or unacceptable. The contrary always represents a situation contrary to the one projected by the legal norm and, as such, is conditionally said to be a negation of the law unlawfulness does not deny the norm and does not call into question the “existence of rights”, because behavior contrary to the legal norm is equally envisaged by the norm and behavior in accordance with it (Келзен, 1951: 64).

Some theorists further talk about so-called quasi-legal or pseudo-law- rules and norms that belong to other systems of regulations, but are not part of the state's legal system. It also makes them unlawful, only from the angle of this particular legal order. Those parallel systems of norms could be rather significant for the citizens, for some reasons- maybe they feel more connected to that non-formal systems, because of their religious or moral, or other feelings. Strictly, if some behaviors, consequences, or prohibitions weren't covered by a legal norm, they should be treated as the – non law. But if there is a slight regulation of above mentioned behaviors, consequences, or prohibitions in non-formal systems of rules and norms, and people are obeying it- should we really consider it as area of unlawfulness? Of course, state's law have the priority, even if those who professionally practice the law have different opinion (Радбрух, 2007: 42). Because judges are holders of law and justice in the state, their understanding of law and the application of law in individual cases must reflect the very essence of the law/ not ever something that is contrary to that essence.

We will say something about notion and definitions of unlawfulness and lawfulness, by stating the opinions of some of the lawyers who have been dealt with this topic and which we consider to be the most important in the context of this paper

Some opinions on lawfulness and unlawfulness

In our theory of law, we emphasize the opinion of Đ. Tasić, who distinguished legal and illegal relations (or states of mind): the first are those that are regulated by law, and others, are either not regulated at all or are regulated by some other kind of social norms, but are not, therefore- regulated by law (Tasić, 1932:18). Since the law comes from the state and that its authority due to the monopoly of physical force is set up as the highest, a system of legal norms has priority in applying to all other systems of social norms. The illegal relations, even when regulated by other social norms, remain outside the scope of law, and therefore, the scope of the state. The law can not regulate all relationships (Stojković, 1941:39) - it selects which ones it will regulate - the ones it considers most important in a certain context. It remains a question as to whether what is left outside the domain of regulation by law does not matter at all, or by leaving the regulation to some other system of social norms of concern and the obligation to implement the rules transferred to another authority other than the state.

According to one of the most famous Yugoslav lawyers from the first half of the 20th century, T. Živanović, unlawfulness is a contradiction to the law. It remains as the question, when the unlawfulness really exists, in what laws it is mentioned as that. Živanovic in his work “The basis of the criminal law of the Kingdom of Yugoslavia” cited several views of his contemporaries from Europe, each of whom detailed in theoretical and philosophical deconstructions, leading to his own opinion on unlawfulness and establishing it as the only correct and sufficiently comprehensive definition of unlawfulness. But, let's start from the beginning. Živanović first states the opinion of some lawyers (Živanović, 1935: 207) that unlawfulness exists only when something is contrary to criminal laws. He immediately rejects this opinion by stating that the unlawfulness is kind of compatibility to everything stated in the criminal codes. Criminal laws contain, therefore, the descriptions of violations of the law and the prescribed penalties for these offenses, and *stricto sensu* they represent a description of unlawful behavior. However, the law does not actually exist here, because anyone who has behaviors described as a misdemeanor will receive the appropriate punishment, and thus, there is no unlawfulness' there is only a compliance with law. He further mentioned the opinion of Binding ,that the unlawfulness is in fact opposing to a certain state norm and that criminal laws establish the right to punishment, while other general norms outside of criminal law establish - the obedience of the citizens, by prescribing the prohibition, commandments and rights and their limits(Živanović, 211).He was ready to agree with that, while those prohibition, commandments and rights are not

prescribed in the criminal code, because within the criminal law they would be in compliance with the law.

Also, very interesting for Živanović is opinion of Mayer who argued that the unlawfulness is a contradiction to a certain cultural norm, upon which the state recognized legitimacy and validity. Why are these norms cultural? Because, as Majer stated, these are the norms that command or forbid something to protect general interests of the whole society, and the general interest makes the general culture of a society and state.

ON the other side. Lizst made a distinction between the formal and material notion of unlawfulness. Formal unlawfulness is thus the unlawfulness that represents the transgression of a certain legal norm, the order or the prohibition of the attack against the legal order, while the material notion of unlawfulness encompasses behavior that is in itself harmful to society, and is not described in the law as such (Živanović, 214). There is further the view that the unlawfulness is always the same regardless of its immediate cause - it is always and only a kind of action that is not in accordance with what is prescribed (Živanović, 208). It is always something unlawful, regardless of the area of the law and the social life in which it appears.

It is also questioned whether there is unlawfulness if there is no awareness of the opposing to the norms regulating actions or omission that could be prevented. Assuming that sense of guilt, as a logical ingredient of unlawfulness, must exist, then not every unlawfulness is at the same time out of law and not unlawfulness for sure. The unlawfulness is a quality of the non-law (Živanović, 210). On the other hand, Živanović pays special attention to the basics of exclusion of the unlawfulness which he calls the grounds for non-unlawfulness. If some of these conditions are fulfilled, then there is no unlawfulness, and therefore the non-law that has been done, becomes legitimate and legal.

“Unlawfulness is the quality that it gives to behavior characteristic for non-law. Unlawfulness is thus the character of every delict “, repeats F.Bačić some 50 years after Živanović (Bačić, 1986: 189). There is no distinction between delicts in criminal or in civil law- unlawfulness exist in both, the same, while there is compliance between unlawfulness and the description of delict.

As we can see, all those theorists have one thing mostly in common-as criminal lawyers, they stood at the point of view that there is no unlawfulness within the criminal law as

such, but that it is in fact a sort of legal list of behaviors of perpetrators. So there is no unlawfulness, except when something isn't regulated at the first place

Derrida's opinion on lawfulness and unlawfulness

Modern theorists have slightly changed their mind about unlawfulness. All earlier mentioned opinions were of lawyers, criminal lawyers, so we thought it would be a great turn to mention what about the unlawfulness thinks- a prominent philosopher, such as Jacques Derrida.

It seems that the “silent war” between “what is” and “what should be” is permanent, and thus the same “silent war” is analogous between justice and injustice, lawfulness and unlawfulness. “What should be” is about better and greater world, states, societies. “What is” is kind a measure of our reality, that we are ready to deal with, and also, a measure of what we should change- only if we want to enter out of this uncomfortable comfort zone. Normativity thus there exists, and it IS (Dobrijević, 2005:205)

“It's hard for me to answer what lawfulness means in an unusual sense,” Derrida says (Derrida, 1995: 17-20). Everything is known about law, or so much knowledge of law is crossed in the horizon of its interpretation and understanding, Derrida continues, that every subsequent sentence about law more contributes to confusion and darkening than the new discovery. About unlawfulness was spoken less, because the phenomenon was implicitly implied and consumed by the notion of law in general. The unlawfulness is understood as the negation of justice, as the system of the antisystem or the indication of internal destruction, “When we talk about non-law, we mean not the absolute vacuum or absence of law, but noticeable decline of legal pressure (la pression juridique)”(Derrida, 24) - just because some things, relations etc, are not that important to the state and it decided not to regulate them. Although we don't like that legal vacuum, it is I a was needed, because it reminds us, as Derrida says, on “the necessity of society's hygiene” (Derrida, 24).

When law exists, it must exist always, in any period of time, until it is abolished by other norms. But, according to law, and according to the rules of counting time in law, weekends, holidays are not periods of time when law can be practiced- It seems that on these days law is on vacation. But, is the unlawfulness also on vacation as well? Our everyday life reminds us that it is not true. (Sibinović, 2005: 209-217). So called calendar of practicing law- meaning, when law could be practiced by the authorities

says that there is certain time for law when it should be practiced. So, we can raise a question, were that certain periods of time reserved for- unlawfulness or not?

On the other hand, it does not apply to the citizens who are vindicated to respect the law every day (on weekends, holidays...), even if the state authorities eventually do not work. Similar to all this is lawfulness, because it is the consequence of existing law; it is also a quality which only state's norms and regulations have and a criteria upon whom all systems of social norms are validated and given a priority. We come to the conclusion that for the notion of lawfulness, very important is social interest and obligation to take care of respecting lawfulness in various ways: the society controls whether the law is realized, what actions should be taken while investigating disrespect of the law, and what could be the outcomes of the event which brings into question existence and realization of law.

Everything that is unlawful, says Derrida, whether is not regulated by law, or not regulated at all, can be a part of the term of non-law. Everything that is contrary to the positive law of a community, regardless of the manner in which it is exercised or the manifestation of that opposition, is irrelevant to the current law. The positive law, thus, deconstructs all that is not itself. And also mystifies its own foundations: state's force against violaters of positive law, and the authority, which arises from the state's force (Деррида, 2001: 35). Even Machiavelli said that there are two ways to rule the state. The first way is to fight against all perpetrators and to establish everything with the help of law. That way is characteristic for a man. Another way of ruling, by force is an animal way. The first mode of ruling (by law) is not sufficient; it is rather helpless, without any force to guarantee the respect of the law. Derrida finally agrees with Machiavelli, "that it is therefore necessary that the ruler (monarch) should rule with help of two mighty weapons, law and force" (Derrida, 1987).

On the contrary, lawfulness is the main quality of existing law, whether it is just or unjust. Only just by existing, positive law and all its content gain that quality of lawfulness. We must also have in mind that law is mightier than the simple regulation- regulations are consumed by the law. Behavior that is contrary to this positive law is part of non-law, mentioned earlier: But we also had examples of law reacting even when there was breach of other social regulations, which are strictly considered as non-law. So, was it -lawful or unlawful reaction of state's law? When writing about Nelson Mandela (Derrida, 2008), Derrida investigates another interesting thing- is the unlawful situation - a call for disrespect of the law in whose creation the people of South Africa did not participate? Disrespect of law is truly unlawful act. But is the call for

disrespect of something that disrespects the citizens- also disrespect, or could be treated – as lawful and legitimate act?³ Is it something that Radbruch was talking about, and is there now a possibility to get out of the trap set by the concepts of lawfulness and unlawfulness, just by calling and justifying that something is unfair and that we are not actually breaking the law, but saving our own soul? This short overview doesn't allow us to go deeper in this deconstruction of everything that is legal system set on, but, we hope that it is enough for the readers of this article to make them think different – about the unlawfulness itself.

Some concluding remarks

After this short overview of opinions on unlawfulness of some prominent theorists, we can say that:

- unlawfulness could be inner or external quality of positive law, because the unlawful content could be the very content of the law itself, or just a feeling of unlawfulness given to law by unsatisfied citizens;
- Unlawfulness is deconstructive term - it demolishes the law as system of specific norms, which very hardly accepts changes in its own content and thus preserves its own exclusivity in relation to other social norms;
- Unlawfulness sometimes doesn't exist, because, although someone committed a crime, his behavior is in compliance with a description of the delict- insofar as it is in compliance with the mentioned delict, it can not be an unlawful act, but only-lawful act.
- Unlawfulness is a term which belongs not only to criminal law, but to all areas of law, especially to the theory and philosophy of law.
- Unlawfulness is not easy to define; it could be found in secret places, not only in criminal codes, but also in minds of people who are not willing to obey the law, just because of their own feeling of justice.

³ Similar is said by Noam Chomsky while debating with Michel Foucault: there are some situations when it is even good to break state's commands (Chomski, Fuko, 2011:64)

Literature

- Vačić, Franjo, *Krivično pravo*, Pravni Fakultet u Zagrebu, 1986.
- Čomski, Noam, Fuko, Mišel; *O ljudskoj prirodi: pravda protiv moći*, Karpos, Beograd, 2011.
- Derida, Žak: *Sila zakona, mistični temelj autoriteta*, Novi Sad, 1995
- Дерида, Жак: *Насиље и метафизика*, Плато, Београд, 2001.
- Dobrijević, Aleksandar: *Dekonstrukcija i normativnost*, u zborniku: GLAS I PISMO-ŽAK DERIDA U ODJECIMA, priredio: Petar Bojanić, Institut za filozofiju i društvenu teoriju, Beograd, 2005
- Fleur Johns, *Non-Legality in International Law: Unruly Law*, Cambridge: Cambridge University Press, 2013
- Карбоније, Ж. *Правна социологија*, Издавачка књижарница Зорана Стојановића, Сремски Карловци, Нови Сад, Титоград, 1992.
- Келзен, Ханс: *Општа теорија права и државе*, Београд, 1951.
- Радбрух, Г. *Правни и други афоризми*, Досије, Београд, 2005.
- Радишић, Јаков, „Противправност као засебан услов грађанске одговорности”, у зборнику: *Критика у правној науци. Зборник у част професора Стевана Врачара поводом његове 75. годишњице*, *Анали Правног факултета у Београду*, 1–4/2001
- Dorđe D. Sibinović: *Sila zakona protiv sile nepravda*, u zborniku: GLAS I PISMO-ŽAK DERIDA U ODJECIMA, Priredio: Petar Bojanić, Institut za filozofiju i društvenu teoriju, Beograd, 2005
- Стојковић, Славко, *Енциклопедија права*, Београд 1941
- Тасић, Ђорђе, *Увод у правне науке*, Београд, 1931.
- Живановић, Тома, *Основи кривичног права Краљевине Југославије*, Београд, 1935.

Links

- [https://pescanik.net/zvijer-i-suveren/Jacques Derrida, Séminaire La bête et le souverain, volume 1 \(2001-2002\), Paris 2008. Preveo s francuskog Mario Kopic Peščanik.net, 27.12.2009.](https://pescanik.net/zvijer-i-suveren/Jacques Derrida, Séminaire La bête et le souverain, volume 1 (2001-2002), Paris 2008. Preveo s francuskog Mario Kopic Peščanik.net, 27.12.2009.)
- <https://pescanik.net/divljenje-nelsona-mandele-ili-zakoni-refleksije/Jacques Derrida: Admiration de Nelson Mandela ou les lois de la réflexion, u: Psyché: Invention de l'autre, Paris: Galilée, 1987, str. 453-475. S francuskog preveo Mario Kopic>

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THE “MISLABELLING OF REALITY” IN THE CONTEXT OF PREVENTIVE MEASURES IN ITALY CONCERNING DANGEROUS PERSONS

In 2011 the new “Anti-Mafia Code” came into force (Act. 159/2011), bringing together the legislation on anti-Mafia action and preventive measures concerning individuals and property and repealing Act no. 1423/1956.

The Italian Constitution does not provide for personal preventive measures (*misure di prevenzione personali*). The relevant provisions of Articles 25 and 27 on afflictive measures only set out rules on penal sanctions (*pene*) and security measures (*misure di sicurezza*).

In many judgments, the Constitutional Court affirmed “the principle according to which the orderly and peaceful development of social relations must be guaranteed not only by a system of norms punishing illicit acts but also by a system of preventive measures against the danger of such acts in the future”.

The personal preventive measures are applied under the 159/2011 Act against persons suspected of crimes before their conviction and in the event of their acquittal or of a *sentenza di proscioglimento* pronounced in accordance with Article 530 § 2 of the Code of Criminal Procedure for insufficient or contradictory evidence.

The first step to impose a preventive measure consist in to establish that the individual posed a “current danger”, which was not necessarily linked to the commission of a specific offence, but rather to the existence of a complex situation of a certain duration indicating that the individual had a particular lifestyle that prompted alarm for public safety.

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1. A short historically view and normative conditions

Preventive measures (*ante delicta*) against individuals date back to the nineteenth century in Italy. They were already in existence prior to the unification of Italy in 1861, and were subsequently reincorporated in the legislation of the Kingdom of Italy by the Pica Act (no. 1409/1863), and later by the 1865 Consolidated Public Safety Act (Testo Unico di Pubblica Sicurezza).

In 1948 the Italian Constitution came into force, placing emphasis on protection of fundamental freedoms, in particular personal liberty (Article 13) and freedom of movement (Article 16), as well as the principle of legality in relation to criminal offences and security measures (Article 25, paragraphs 2 and 3).

At the beginning of his activities the Italian Constitutional Court held that art. 16 Cost. (*Every citizen has the right to reside and travel freely in any part of the national territory, subject to the general restrictions that may be laid down by law for health or security reasons. No restrictions may be imposed for political reasons*) doesn't concern solely physical integrity because this would be too restrictive; it thus appears rational and in keeping with the spirit of the Constitution to interpret the term 'security' as meaning a situation in which the peaceful exercise of the rights and freedoms so forcefully safeguarded by the Constitution is secured to citizens to the greatest extent possible. Security therefore exists when citizens can carry on their lawful activities without facing threats to their physical and mental integrity. 'Living together in harmony' is undeniably the aim pursued by a free, democratic State based on the rule of law.¹

The Italian Constitutional Court held therefor that as a result, when determining the different categories of individuals concerned, the legislature had to use different criteria from those employed to define the constituent elements of a criminal offence (and could also have recourse to elements of presumption); the criteria applied had to correspond to objectively identifiable types of behavior. The approach to be adopted in defining preventive measures was different from, but no less strict than, the approach to defining criminal offences and penalties. Nevertheless, the Constitutional Court concluded that the Act contained a sufficiently precise description of which types of conduct were held

¹ Corte cost. sent. 23.6.1956, n. 2, in www.cortecostituzionale.it

to represent a “danger to society” in the case of “idlers, those who are unfit for work and vagrants” and other categories of individuals².

Basically the prerequisite for imposing a preventive measure in respect of a specified individual was a finding that the individual posed a “current danger”, which was not necessarily linked to the commission of an offence, although this might be a relevant factor. What was important, in the Court of Cassation’s view, was the existence of a complex situation of a certain duration indicating that the individual’s lifestyle raised an issue in terms of public safety. The assessment of this “current danger” was therefore “an assessment on several levels, taking into account various types of behavior noted in the individual, which do not necessarily constitute grounds for a prosecution but nevertheless provide an indication of his or her danger to society”.

The most common opinion held that the assessment of dangerousness for the purposes of applying a preventive measure did not involve a mere assessment of subjective danger but corresponded to the assessment of “facts” which could be examined from a historical perspective and were themselves “indicators” of whether the individual concerned could be included in one of the criminological categories defined by law.

An individual “being examined in proceedings for the application of a preventive measure” was not found “guilty” or “not guilty” of a specific offence, but was deemed “dangerous” or “not dangerous” in the light of his or her previous conduct (as established on the basis of various sources of information), which was regarded as an “indicator” of the possibility of future conduct likely to disrupt social or economic order; this assessment was to be made on the basis of precise legislative provisions “categorizing” the various forms of dangerousness.

The Italian Constitutional Court set aside the law in respect of one category of individuals which it found not to be defined in sufficient detail, namely those “whose outward conduct gives good reason to believe that they have criminal tendencies” (see judgment no. 177 of 1980, paragraph 55 above). In respect of all other categories of individuals to whom the preventive measures are applicable, the Constitutional Court has found that simply belonging to one of the categories of individuals referred to in section 1 of the Act 159/2011 was not a sufficient ground for imposing a preventive measure; on the contrary, it was necessary to establish the existence of specific conduct indicating that the individual concerned posed a real and not merely theoretical danger.

² Corte cost. sent. 23.3.1964, n. 23, in www.cortecostituzionale.it

Preventive measures could therefore not be adopted on the basis of mere suspicion, but had to be based on an objective assessment of the “factual evidence” revealing the individual’s habitual behavior and standard of living, or specific outward signs of his or her criminal tendencies³.

2. Critic aspects of personal preventive measures.

One second critic aspect of the preventive measures was the indeterminate obligation to lead an honest and law-abiding life and to “not give cause for suspicion”. The European Court of Human Rights, held that “duty for the person concerned to adapt his or her own conduct to a way of life complying with all of the above-mentioned requirements” is just as indeterminate as the “obligation to lead an honest and law-abiding life. In the Court’s view, this interpretation does not provide sufficient guidance for the persons concerned. Secondly, the “duty of the person concerned to comply with all the prescriptive rules requiring him or her to behave, or not to behave, in a particular way; not only the criminal laws, therefore, but any provision whose non-observance would be a further indication of the danger to society that has already been established” is an open-ended reference to the entire Italian legal system, and does not give any further clarification as to the specific norms whose non-observance would be a further indication of the person’s danger to society⁴.

The Court therefore considers that this part of the Act has not been formulated in sufficient detail and does not define with sufficient clarity the content of the preventive measures which could be imposed on an individual, even in the light of the Constitutional Court’s case-law.

Anyway, the equality of prevention measures compared to punishment consist for the first into relation to the “current danger” posed by the individual concerned and not to the current danger posed by the *actus reus*.

For these reasons several different factors had to be taken into consideration to try to justify a limitation of individual freedom. They including previous criminal record, ongoing investigations and current activities, the individual’s standard of living and means of subsistence, and the persons with whom he or she associated. It follows that

³ Cass., S.UU. 30.11.2017 n. 111, Gattuso.

⁴ ECHR (Grand Chamber), 23.2.2107, De Tomaso vs. Italia, 43395/09

the assessment required objective aspects, a sufficient factual basis and up-to-date evidence and information.

However, an interference will be considered “necessary in a democratic society” for a legitimate aim if it meets a “pressing social need” and is proportionate to the legitimate aim pursued. To that end, the reasons adduced by the national authorities to justify it must be “relevant and sufficient”. Furthermore, with regard to the proportionality of such measure, the measure will be justified only as long as it effectively furthers the aim initially pursued. A measure restricting an individual’s freedom of movement may become disproportionate and breach that individual’s rights if it is automatically extended over a lengthy or undetermined period.

The main issue is that, in the crime prevention system, personal freedom of individuals can be restricted on the basis of presumptions and independently of the commission of a crime, by imposing orders aimed at facilitating the control and supervision of the organs responsible for protecting public safety.

This obviously provided scope for the instrumentalization of preventive measures for the purposes of “punishing” those who had been cleared of accusation in criminal proceedings. In these circumstances, preventive measures were nothing but a “second-class” criminal punishment, “penalties based on suspicion”.

Being based on a highly indeterminate, probabilistic judgment on the future conduct of the suspected person (*Prius ergo est suspicio*), they targeted the suspected person regardless of any evidence of past criminal offence, on the basis of alleged “typologies of offenders”: for example the terrorists.

These measures had a general and special preventive purpose, like any ordinary criminal penalties. In practice, they were also based on the socially reprehensible nature of the suspect’s conduct, a factor that likewise forms the basis for any criminal penalties.

This obviously provided scope for the instrumentalisation of preventive measures for the purposes of “punishing” those who had been cleared of accusation in criminal proceedings. In these circumstances, preventive measures were nothing but a “second-class” criminal punishment, “penalties based on suspicion” (*pene del sospetto*)⁵. Even

⁵ See PELISSERO M., *I destinatari della prevenzione praeter delictum: la pericolosità da prevenire e la pericolosità da punire*, in *Rivista italiana di diritto e procedura penale*, 2017, 439 ss.

after the reform approved by Act no. 159/2011, a *probatio minus plena* sufficed to put people under the radar of the criminal justice system, with its arsenal of restrictive measures in them foregone.

In fact, such measure had nothing to do with the subject matter of the basic offence, and moreover their punitive effects are exacerbated by their application while criminal proceedings were still pending (*doppio binario*), on the basis of the facts being investigated in these proceedings. In this context, preventive measures served the purpose of circumventing stricter time requirements for the applicability of interim measures (*misure cautelari*) according to the ordinary rules of criminal procedure

In the light of the above, preventive measures concerning individuals, as provided for in the Act. No. 159/2011, are criminal in nature. All the traditional criteria deriving from the *Engel and Others* line of case-law are satisfied. This case visibly reflects the excessively punitive nature of the preventive measures in Italy, in so far as the list of applicable measures is too broad and not exhaustive and the duration for which they may be applied is too long (five years, but subject to extension). Furthermore, the interference with the suspect’s fundamental freedoms is so severe that the guarantees of the criminal limb of Article 6 are necessary. The situation is particularly acute in Italy since these measures could be imposed even after an acquittal in criminal proceedings, in especially in mafia proceedings.

The European Convention of Human Rights, it is protected the inviolable right of each individual to personal liberty (see art. 5, § 1, ECHR), but it is also provided for that the individual can be legitimately deprived of this right if it is fulfilled one of the requirements listed in point a) to f) of art. 5 ECHR.

3. Conclusions

In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5, the starting-point must be a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is nevertheless one of degree or intensity, and not one of nature or substance⁶. Furthermore, an assessment of the nature

⁶ Ibid., §§ 92-93; see also *Nada v. Switzerland* [GC], no. 10593/08, § 225, ECHR 2012; *Austin and Others v. the United Kingdom* [GC], no. 39692/09, 40713/09 and 41008/09, § 57, ECHR 2012; *Stanev v. Bulgaria* [GC], no. 36760/06, § 115, ECHR 2012; and *Medvedyev and Others v. France* [GC], no. 3394/03, § 73, ECHR 2010.

of the preventive measures provided for by the 2011 Act must consider them “cumulatively and in combination”. Finally, the Court has also held that the requirement to take account of the “type” and “manner of implementation” of the measure in question enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell⁷.

The Jurisprudence of the Court of Human Rights is contradictory. On the one hand, in *Guzzardi* the Court held that the preventive measures imposed on the applicant in accordance with the 1956 Act involved a deprivation of liberty. On the other hand, in the post-*Guzzardi* Italian cases, starting with the unfortunate judgment in *Raimondo*, the Court found that the measures in question did not amount to deprivation of liberty, but merely to a restriction on freedom of movement. I am of the view that the Court should revert to the fundamental principles of the *Guzzardi* approach, as reiterated explicitly in *Ciulla*⁸.

The *De Tommaso* case shows that the accumulation and combination of measures imposed in the present case and in *Guzzanti* case entailed a deprivation – and not simply a restriction – of liberty, especially in view of the requirement not to return home after 10 p.m. and not to leave home before 6 a.m.

In practice, this requirement remained in place for 221 days, coupled with the following other obligations: to live in a particular town; to report once a week to the police authority responsible for his supervision; not to associate with persons who had a criminal record and who were subject to preventive or security measures; not to keep or carry weapons; not to go to bars, nightclubs, amusement arcades or brothels (*osterie, bettole, sale giochi* and *luoghi onde si esercita il meretricio*); not to attend public meetings of any kind (*di qualsiasi genere*); and to lead an honest life (*vivere onestamente*)⁹. Lastly, the applicant was also subjected to a restriction relating to telephone communications.

⁷ *Ibid.*, § 92; see also *Engel and Others v. the Netherlands*, 8 June 1976, § 59, Series A no. 22, and *Amuur v. France*, 25 June 1996, § 43, *Reports of Judgments and Decisions* 1996-III.

⁸ ECHR, *Ciulla v. Italy*, 22 February 1989, 11152/84, § 40, This case referred to a provision on *detenzione provvisoria*, which was later repealed. I further note that this approach was also confirmed *mutatis mutandis* in a recent German case (see *Ostendorf v. Germany*, no. 15598/08, 7 March 2013).

⁹ Recently the Supreme Court (Corte di Cassazione), Sez. I, sent. 9 aprile 2018 (dep. 10 luglio 2018), n. 31322, Pres. Mazzei, Est. Barone, in *Diritto penale contemporaneo*, 19.6.2018 rev. Amarelli G., considered the constitutional problems with the requirement of clarity which is the expression of the principle of legal certainty fundamental to Community law

In conclusion and at the end of a proportionality balancing test, the Court considers that in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others” (art. 2, Additional Protocol no. 4 ECHR), the right to personal liberty may suffer of limitations.

However, to ensure full respect for the rights guaranteed by the Convention, the European Court of Human Rights requires a concrete ascertainment of each case of application of depriving and/or limiting personal freedom measures, which cannot only consider the legal definition adopted by national law. In other words, to avoid the so-called “label fraud”, to distinguish between restricting measures and measures involving deprivation of personal freedom (a difference of degree and intensity, not only of nature or content), it is necessary to use quantitative criteria regarding the type, duration, effects, and manner of implementation of the imposed sanction or measure. By virtue of these assumptions, the ECtHR has repeatedly considered the rules restricting personal freedom to be compatible with the Convention, but with emphasis on the need for action by the judicium. More specifically, as regards Italian experience, that is relevant in here, in *Raimondo v. Italia* case (1994), ECtHR established that the disposed preventive measure has provoked a limitation of personal freedom compatible with art. 2 of Protocol no. 4 ECHR. The same conclusion was reached by the same Court in other cases – issued against Italy with respect to preventive measures –, analyzing which it is possible to define a personal preventive measure as “restricting” or “depriving” of liberty, i.e. compatible or not with art. No. 2 of Protocol no. 4 ECHR

Bibliography

- Corte cost. sent. 23.6.1956, n. 2, in www.cortecostituzionale.it
Corte cost. sent. 23.3.1964, n. 23, in www.cortecostituzionale.it
Cass., S.UU. 30.11.2017 n. 111, Gattuso.
ECHR (Grand Chamber), 23.2.2107, De Tomaso vs. Italia, 43395/09
Pelissero Marco, *I destinatari della prevenzione praeter delictum: la pericolosità da prevenire e la pericolosità da punire*, in *Rivista italiana di diritto e procedura penale*, 2017, 439 ss.
ECHR 2012 *Nada v. Switzerland* [GC], no. 10593/08.
ECHR 2012 *Austin and Others v. the United Kingdom* [GC], no. 39692/09, [40713/09](#) and [41008/09](#)
ECHR 2012 *Stanev v. Bulgaria* [GC], no. [36760/06](#)
ECHR 2010 *Medvedyev and Others v. France* [GC], no. [3394/03](#).
ECHR *Engel and Others v. the Netherlands*, 8 June 1976.
ECHR *Amuur v. France*, 25 June 1996, in *Reports of Judgments and Decisions* 1996-III.

ECHR 1989 *Ciulla v. Italy*, 22 February 1989, 11152/84

ECHR 2013 *Ostendorf v. Germany*, no. 15598/08

Corte di Cassazione, Sez. I, sent. 9 aprile 2018 (dep. 10 luglio 2018), n. 31322, Pres. Mazzei, Est.

Barone, in *Diritto penale contemporaneo*, 19.6.2018 rev.

Amarelli Giuseppe, *Ulteriormente ridotta la tipicità del delitto di violazione degli obblighi inerenti alla misura di prevenzione: per la Cassazione anche il divieto di partecipare a pubbliche riunioni contrasta con il principio di determinatezza*, in *Diritto penale contemporaneo*, 19.7.2018.

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THE UNIFORM APPLICATION OF LAW- EU STANDARDS AND CHALLENGES IN SERBIA

The uniformity of case law remains an imperative in process of strengthening the rule of law all around the world. In spite of differences in status that case law has in the hierarchy of the sources of law in particular country, from the perspective of citizens, uniform application of law ensures the equality before law and the possibility to, based on earlier decisions in identical or similar cases, predict the outcome, duration and costs of the decision-making process. That possibility is essential for access to justice. In parallel, from the angle of judges, uniform application of law is an important border line between their freedom of judicial discretion and possibility and/or obligation to follow earlier decisions in similar cases. In the context of achieving EU standards in the process of accession negotiations with EU, a decision of authorities on how to regulate conditions, processes and means to ensure the uniform application of law does not depend anymore only from legal tradition and wishes of legal professionals and stakeholders. This became obvious also for Serbian authorities in the process of constitutional changes aimed at strengthening independence of judiciary, where balancing judicial independence and uniformity of case law appears as a one of the greatest challenges.

Keywords: case law/ free EU standards/ free judge opinion/ judicial discretion/ rule of law/ access to justice

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1. Uniform application of law and the Rule of Law principle

Without any doubt, the process of application of law significantly overcame simple “put the facts under the legal provision” mechanism. It opens numerous questions related to qualitative elements of the Rule of Law concept, usually interpreted through the supremacy of law over arbitrary power and the universal application of law by the courts. Probably the best explanation of the qualitative requirements of the written laws was given by Radbruch (Radbruch, 1946:107) in form well-known as the Radbruch Formula (*Radbruchsche Formel*). Analyzing the role and competences of the judge in case he deciding in certain case where there is a conflict between a statute and what he perceives as just, Radbruch argued that “the conflict between justice and the reliability of the law should be solved in favour of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered “erroneous law”. He admitted that is impossible to draw a sharper line of demarcation between cases of legal injustice and statutes that are applicable despite their erroneous content, but clearly stated that “where justice is not even strived for, where equality, which is the core of justice, is renounced in the process of legislation, there a statute is not just 'erroneous law', in fact is not of legal nature at all.” He concluded that positive law cannot be defined otherwise as a rule that is precisely intended to serve justice. Based on Radbruch Formula, numerous modern authors attempted to find a balance between equality before law and justice.¹ In interpretation of Fuller, there are eight requirements of the rule of law. Laws must be general (specifying rules prohibiting or permitting behavior of certain kinds); Laws must also be widely promulgated or publicly accessible, that ensures citizens know what the law requires; Laws should be prospective (specifying how individuals ought to behave in the future rather than prohibiting behavior that occurred in the past); Laws must be clear in order to enable citizens to identify what the laws prohibit, permit, or require; Laws must be non-contradictory among themselves; Laws must not ask the impossible; Nor should laws change frequently; Finally, there should be congruence between what written statute declare and how officials enforce those statutes. (Murphy, 2005: 239-262) According to Fuller, law is “the enterprise of subjecting human conduct to the governance of rules”. When lawmakers respect the eight principles of the rule of law, their laws can influence the practical reasoning of citizens. Citizens can take legal requirements and prohibitions into consideration when deliberating about how to act.

¹ See more in: F. Hayek, *The road to Serfdom*, Routledge Classics, 2001.

They can predict how judges will interpret and apply rules, enabling them to form reliable expectations of the treatment different actions are likely to provoke.²

Nevertheless, fulfillment of certain quality requirements of laws is not an absolute guaranty that these laws will be uniformly applied as Fuller a bit naïve anticipated.

For the citizens, as participants or potential participants in court proceedings, is of the crucial importance to anticipate the key elements of the judicial procedure:

- Major outcome of the proceeding based on relevant regulations and earlier case law in similar cases;
 - Indicative duration of the procedure;
 - Indicative costs of conducting the procedure.

A legal system which guarantees this to its citizens can be evaluated as a system with high level of legal certainty and equality before law.

It seems that the issue of uniform application of law should be seen mostly in the context of three questions:

- How (if any) the case law is ranked in the hierarchy of the sources of law in particular country?
- Where is the border line between internal independence of a judge and a need to ensure equality before law?
- To what extent is case law accessible?

2. EU standards on the uniform application of law

The uniform application of the law and the harmonization of case law are issues where there is no uniformity in regulation. These differences are mostly related to the type of

² He also considers a moral component of the rule of law, arguing that the rule of law provides some normative grounds for thinking that citizens have a moral, but conditional obligation to obey the law. “Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted”(242-243)

legal system of the country concerned, as well as to legal tradition. In common law countries this is done, mostly, by the rule of precedent. In continental or civil law systems, freedom of judges in interpretation of legislation is more limited. Additional factor can be also the potential obligation to align its legal system with international standards. The last mentioned is typical for candidate countries in the process of accession negotiations with EU.

The European standards in this regard are created mostly by the Council of Europe, on three parallel tracks- through recommendations of the Committee of Ministries as well as through opinions of the Venice Commission and the Consultative Council of European Judges (hereinafter: CCJE).

From the angle of the CCJE, there are formal, semi-formal and informal mechanisms with regard to the role of courts in achieving consistent case law. There, appeal procedures appear as a formal mechanism; Semi-formal mechanisms include e.g. regularly scheduled meetings of judges within a court, or with judges of different courts of the same level or with judges of a hierarchically senior court; informal consultations among judges can be qualified as informal mechanism. These semi-formal and informal mechanisms are intended to promote the uniform application of the law, but conclusions drawn in these contexts cannot infringe the independence of the individual judge. The CCJE recommended introduction of “filtering criteria” in order to enable access to supreme court only for cases of precedential value to be adjudicated by a supreme court. “At the same time, these are also the only criteria which may ensure that all such cases can reach a supreme court. Therefore, a supreme court can effectively perform the function of stating rules that should be effective in future cases in all areas of law. Other selection criteria, such as the value of a claim in civil cases or the severity of the sentence at stake in criminal matters, cannot serve these purposes.” (CCJE, Op. No. 20, par. 17-22) It should be mentioned that this is not an innovative approach, having in mind the guidelines included in the Recommendation CM/R (95) 5 of the Committee of Ministers to member states concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases (Article 7 (c)), that says: “Appeals to the third court should be used in particular in cases which merit a third judicial review, for example cases which would develop the law or which would contribute to the uniform interpretation of the law. They might also be limited to appeals where the case concerns a point of law of general public importance. The appellant should be required to state his reasons why the case would contribute to such aims”.

In parallel, the CCJE recognized importance of the appellate courts in systems where access to supreme court is limited. “Consequently, in the CCJE’s view, it cannot be automatically imposed on a supreme court to intervene as soon as there are divergent decisions on the level of appellate courts. It can be expected in numerous cases that the uniform application of laws should in due time be achieved on the level of appellate courts.” (CCJE, Op. No. 20, par. 25)

However, the main position of the all relevant bodies is that consistency in the case law needs to be achieved through the decisions of higher courts establishing a coherent and consistent jurisprudence and not through a higher court issuing general directives or instructions to lower courts. Recommendation CM/Rec (2010)12, par. 23 stipulates that “superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law.”

This issue has also been treated from the aspect of internal judicial independence, that, from the angle of the Venice Commission, means that “every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts.” (CDL-AD (2007)003, par. 61)

The Venice Commission particularly dealt with this issue from the aspect of the powers of higher courts in creation of the case-law of the lower ones. “Giving to the Supreme Court the powers to supervise activities of general courts (Article 51, § 1) seems contrary to the principle of independence of those general courts. While the Supreme Court must have powers to overrule, or to amend, judgments of lower courts, it should not supervise them.” (CDL-INF (1997)06, par. 6). In the opinion on the draft of the Constitution of Ukraine, the Venice Commission says: “According to the system of judicial independence high courts ensure consistency of case-law in the entire territory of a country through their decisions in individual cases. Lower courts will have, even when contrary to the *Common law* heritage as a part of the *Civil law* system they are not formally obligated by judicial precedents, the tendency to follow the principles developed in decisions of higher-instance courts, in order to avoid their decisions being vacated on appeal. Additionally, special procedural rules may ensure consistency between different judicial powers. This draft basically proceeds from this principle. It provides to the Supreme Court (Art. 51.2.6 and 7) and, in a narrower sense, to the plenum of the Supreme Specialized Courts (Art. 50.1) a possibility to send

“recommendations/explanations” on the issues of application of the legislation to lower courts. This system probably does not stimulate emergence of the truly independent judiciary in Ukraine but implies the risk that judges behave as civil servants who are liable to orders of their superiors. Another example of hierarchical approach in the draft involves broad powers of the President of the Supreme Court (Art. 59). It seems that he is exercising these particularly significant powers on his own, without any need to address the plenum or the presidency.” (CDL-INF (2000)5 under the title „Establishing of strictly hierarchical judicial system”)

The Venice Commission concludes that individual accountability of a judge, exclusively based on the outcome of the proceedings further to the application to the ECHR, is contrary to the principle that allows a judge to freely interpret the law and assess evidence in individual cases, in compliance with the European standards. In line with those standards, a wrong decision may be contested through appellate procedure and through individual accountability of a judge, except in case of gross negligence of the judge. „Disciplinary liability of a judge should cover substantial violations of the code of professional conduct that have impact on the reputation of the judiciary. Disciplinary liability of a judge should not include the contents of their decisions or judgments, including differences in legal views among courts; or cases of judicial error; or of criticism of courts. .” (CDL-AD (2007)003, par. 40) On the same page stands the CCJE, saying that, “legal knowledge, including that of the case law, is an aspect of judicial competence and diligence; nevertheless, a judge acting in a good faith, who consciously departs from the settled case law and provides reasons for doing so, should not be discouraged from triggering a change in the case law. Such departure from the case law should not result in disciplinary sanctions or affect the evaluation of the judge’s work, and should be seen as an element of the independence of the judiciary.” (CCJE, Op. No. 20, par. 39)

It seems that the most important step forward with respect of defining the borderline between internal independence of a judge and a need to ensure uniform application of law was made by CCJE in several opinions, but mostly in the Opinion No. 20 adopted in 2017.

The CCJE, in its Opinion no. 10, has stated that “Regardless of whether precedents are considered to be a source of law or not, or whether they are binding or not, referring to previous decisions is a powerful instrument for judges both in common law as well as in civil law countries.” Consequently, the CCJE anticipates taking case law into consideration when rendering decisions as useful and important. More articulated, the

CCJE stated in its Opinion no. 20 (2017) that: “...while judges should in general apply the law consistently, it is of paramount importance that when a court decides to depart from previous case law, this should be clearly mentioned in its decision. It should explicitly follow from the reasoning that the judge knew that the settled case law was different concerning the relevant matter and it should thoroughly be explained why the previously adopted position should not stand. Only then can it be established whether the departure was conscious (whether the judge consciously departed from the case law in an effort to ultimately change it) or whether the court neglected or was simply unaware of the previous case law. In addition, only in such manner can a genuine development of law be achieved. Failing compliance with these requirements can be considered arbitrary and the individual’s right to a fair trial would be violated.” Contrary, when relying on case law, due consideration should be given to the context and circumstance of the case wherein they were adopted. (CCJE Op. No. 20, par. 32-37)³

The case law development is not, in itself, contrary to the proper administration of justice since a failure to develop and adapt the case law would risk hindering reform or improvement. Changes in society may trigger the need for a new interpretation of the law and thus overruling of a precedent. Moreover, decisions from supranational courts and treaty bodies (such as the Court of Justice of the EU or the ECtHR) often result in the need to adjust the domestic case law as well. The need for improving a previous interpretation of the law might be the other reason for departing from the case law. This, however, should happen only when there are pressing needs to overrule. It is the view of the CCJE that considerations of legal certainty and predictability should support a presumption that a legal question, on which there already is a well-established case law, shall not be reopened. “Thus, the more the case law regarding a certain issue is uniformly settled, the greater is the burden on a judge who departs from such case law to provide persuasive reasons.”⁴ *Sahin and Sahin v Turkey*, App. No. 13279/05, 20 October 2011, par. 58. and CCJE Op. No. 20, par 30-31.

³ See also: The Recommendation k) from the same Opinion and the CCJE Opinion No. 11(2008) on the quality of judicial decisions, para 49.

⁴ See: *Sahin and Sahin v Turkey*, App. No. 13279/05, judgment on 20 October 2011 CCJE Op. No. 20, par 30-31.

3. ECtHR and uniform application of law

The European Court of Human Rights, in a number of judgments, emphasized problems that occur because of uncoordinated case-law. Thus, in the case *Živić v. Serbia*, the European Court concluded that uncoordinated case-law results in a deep and persistent legal uncertainty, which further leads to do the violation of Article 6 of the Convention.⁵ Somewhat more extensive stand was taken in the case *Vinčić and others v. Serbia*. Institutionally unresolved inconsistent adjudication of claims brought by many persons in identical situations creates the state of continued uncertainty, which in turn must have reduced the public's confidence in the judiciary, such confidence, clearly, being one of the essential components of a State based on the rule of law.

The ECtHR tried to define rules and conditions when conflict of decisions constitutes breaching of the Art.6. Thus, deciding in *Şahin and Şahin v. Turkey*, the Court stated that, under certain circumstances, conflicting decisions of domestic courts, especially courts of the last instance, can constitute a breach of the fair trial requirement enshrined in Article 6(1) of the ECHR. “Thereby it has to be assessed whether (1) “profound and long-standing differences” exist in the case law of the domestic courts, (2) whether the domestic law provides for machinery for overcoming those inconsistencies, (3) whether that machinery has been applied and, (4) if appropriate, to what effect. The CCJE welcomes the development which emphasizes the close link between the uniformity and consistency of case law and the individual’s right to a fair trial. “(CCJE, Op. No. 20, par. 8) Failing compliance with these requirements can be considered arbitrary and the individual’s right to a fair trial would be violated.”⁶

In such a situation the judicial uncertainty in question has in itself deprived the applicants of a fair trial.⁷ In the above-mentioned judgment *Şahin and Şahin v. Turkey*, the Court points out that once identified, conflicts of case-law should, in principle, be settled by establishing the interpretation to be followed and harmonizing the case-law, through mechanisms vested with such powers.⁸ ECtHR has held that conflicting court decisions or judgments are an inherent trait of any judicial system “which is based on a

⁵ *Živić v. Serbia*, App. No. 37204/08, judgment: on 13 September 2011, § 46-47.

⁶ *Brezovec v. Croatia* App. No 13488/07, judgment on 29 March 2011.

⁷ *Vinčić and others v. Serbia*, applications Nos. 44698/06, 44700/06, 44722/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 3326/07, 3330/07, 5062/07, 8130/07, 9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07, 4022/08, 4021/08, 29758/07 and 45249/07, judgment: on 01/12/2009, § 56.

⁸ *Nejdet Şahin and Perihan Şahin v. Turkey*, App. No. 13279/05, judgment: on 20 October 2011, § 79.

network of trial and appeal courts with authority over the area of their territorial jurisdiction.”⁹

The ECtHR has analyzed consistency of case law also from the aspect of public confidence in judiciary and found that consistency of case law “guarantees, inter alia, a certain stability in legal situations and contributes to public confidence in the courts.” However, it went on to state that if there were persistent conflicting decisions, this could create “a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law.”¹⁰

The reasons for the judgment must not be just a mere formality. „Judges should provide clear reasons for their decisions in a language that is clear and understandable”.¹¹ When the reasons for a judgment are in question, it is also necessary to mention certain positions of the European Court of Human Rights. Namely, in the decision *Taxquet v. Belgium*¹², the Court took the stand concerning the issue of the reasons for the guilty verdict by a jury, but thereby giving its understanding of reasons for a judgment in general. In the last judgment in this criminal matter, the Court held that the verdict by the lay jury does not have to contain reasons for the verdict, because the Convention on the Protection of Human Rights and Fundamental Freedoms does not require a jury to provide reasons for its decision and, therefore, that thereby there was no violation of Art. 6 of the Convention. All that is required is that the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness.

However, when it comes to criminal proceedings conducted before professional judges, who decide on guilt, the Court notes that the accused’s understanding of his conviction stems primarily from the reasons given in the judicial decisions. In such cases, the national courts must indicate with sufficient clarity the grounds on which they base their decisions. Reasoned decisions also serve the purpose of demonstrating to the parties that

⁹ *Cupara v. Serbia*, App. No. 34683/08, judgment on 12 July 2016.

¹⁰ See: *Albu and others v. Romania*, App. No. 34796/09, judgment on 12 May 2012 and *Nejdet Şahin and Perihan Şahin v. Turkey*, App. No. 13279/05, judgment: on 20 October 2011.

¹¹ *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on independence, efficiency and responsibility of judges*, § 59-65.

¹² *Taxquet v. Belgium*, App. No. 926/05, judgment on 13 January 2009 and 16 November 2010, taken over from:

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101739#{%22itemid%22:\[%22001-101739%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101739#{%22itemid%22:[%22001-101739%22]}), accessed in June 2017.

they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defense. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case, therefore, courts are not obliged to give a detailed answer to every argument raised in the proceedings, it must be clear from the decision that the essential issues of the case have been addressed.¹³ The reasons by which the court was guided when handing down the judgment must be specified to the accused, at least concerning the basic items, and this cannot be satisfied by mere publishing of the judgment, when the court will in brief outline announce the reasons it was guided by in handing down the judgment. In other words, as it is noted “reasons for a judgment must in a clear, concrete and logical way shed light upon the interpretation of facts and the law...and for a judgment to accomplish its purpose, must be explained so as to convince the parties and anybody else in its objectivity and properness by the power of its arguments”.¹⁴ In this respect Austrian experiences may be of great importance in this area.¹⁵

4. Sources of law according to the Constitution of the RS and the role of case-law

The problem of uniformity in application of law has been recognized by European Commission in the Screening Report¹⁶ and consequently addressed in the AP CH23. The EC recommended (recommendation 1.3.9.) the Serbian authorities to “improve consistency of jurisprudence through judicial means (consider simplification of the

¹³ Thaman, S. (2011) Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in *Taxquet v. Belgium*. *Chicago-Kent Law Review*, vol. 86, No. 2, p. 625; Doobay, A. (2013). The right to a fair trial in the light of the recent ECtHR and CJEU cases. *ERA Forum*, p. 6. When this judgment is in question it is interesting to mention its impact on the national legislation of Belgium. Namely, the original judgment of the European Court was made to the prejudice of Belgium, because the Court held that Article 6 of the Convention had been violated, and that the judgment handed down by the jury must include the reasons for it. After that, the Belgian legislator responded and introduced in the legislation the provision according to which the jury is obliged to formulate the basic reasons for its decision (Thaman, 2011: 624). Otherwise, a similar solution is also contained in the Spanish legislation. However, after that, the European Court took a completely opposite stand.

¹⁴ Bejatović, S. at al. (2013) *Priručnik za primenu Zakonika o krivičnom postupku (Manual for Application of the Criminal Procedure Code)*. Belgrade: Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, pp. 327-328.

¹⁵ Knežević, M. (2017) Project “Judicial Efficiency”, component 1 – standardization of case-law, comparative law report, part one: Austria, Novi Sad.

¹⁶ Screening Report for Chapter 23, available on: [https://www.mpravde.gov.rs/files/Screening-report-chapter-23-serbia%20Official%20\(3\).pdf](https://www.mpravde.gov.rs/files/Screening-report-chapter-23-serbia%20Official%20(3).pdf), last accessed on September 14th 2018.

court system by abolishing courts of mixed jurisdiction and possibility to file an appeal before the Supreme Court of Cassation based on legal grounds against any final decision) and by ensuring complete electronic access to court decisions and motivations and their publication within a reasonable amount of time.”

In order to address this recommendation, Serbian authorities include activity 1.3.9.1. in the AP CH23 which says: “Conduct analysis of the normative framework which regulates: the issue of binding of jurisprudence, right to legal remedy and jurisdiction for deciding on legal remedy; publishing judicial decisions and judicial reasoning taking into account the views of the Venice Commission.”

There is a good reason to approve decision to address it in such a way. It seems that the formulation of Article 145, which stipulates that court decisions are based on the Constitution and Law, the ratified international treaty and regulation passed on the grounds of the Laws, calls for a more detailed analysis, both in the light of improvement of access to justice and legal predictability. Namely, first the question of harmonization of this provision with Article 16 of the Constitution arises, which prescribes that „Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly. Ratified international treaties must be in accordance with the Constitution.”¹⁷ Analysis of the two provisions makes it pretty obvious that the framer of the Constitution did not have a consistent approach in the determination of the hierarchy of the legal acts in the RS, since he/she, in Article 16, insists on the harmonization of ratified international treaties with the Constitution, but not also of the generally accepted rules of the international law although the term that undisputedly calls for a more precise interpretation is in question. In addition, as it can be seen from the above-mentioned provision, Article 145 does not recognize generally accepted rules of the international law as the basis of court decisions. Therefore, it would be appropriate to eliminate this constitutional vague wording and/or confusion already on the occasion of initial amendments of the Constitution.

When it comes to the role of case-law as the source of law, it is clear that the Serbian Constitution does not recognize case-law as the source of law. This is result of the interpretation of the principle of the freedom of judicial discretion as unlimited freedom that allows a judge to hand down completely different decisions in cases of identical or

¹⁷ See more in: Škulić, M. (2009) *Krivično procesno pravo (Law of Criminal Procedure)*, Pravni fakultet Univerziteta u Beogradu (Faculty of Law of the University in Belgrade), Belgrade, pp. 28-31.

almost identical factual description. In this way, the equality of citizens before the law is threatened and the legal predictability is degraded. In other words, the principle is disrupted that laws of a country must be equally valid for all, except if objective differences justify the diversity, as Tom Bingham puts it.¹⁸ This practically implies application of laws in the manner that will treat all the citizens in its territory in the same manner.¹⁹

Finally, within thus set general framework, the legislator is faced with the issue on how to ensure the basic preconditions for raising case-law to certain level of binding and how to improve its availability.

5. The status of the uniform application of law in the context of constitutional amendments

In order to establish an adequate normative framework for uniform application of law, the Serbian authorities include this issue on the list of topics that require different treatment in the Constitution itself. The Draft Constitutional Amendments²⁰ brought provision that addresses the hierarchy of the sources of law as well as uniform application of law (a bit confusing) together with principle of the independence of the judiciary as well as the principle of legal certainty.

According to this provision, “a judge shall be independent and shall perform his/her duties in accordance with the Constitution, ratified international treaties, laws and other general acts”. Commenting this provision, the Venice Commission stated that, “despite all the controversies around this solution, its main positive goal is the requirement that even an ordinary judge, not only a constitutional judge, should see the act on which s/he adjudicates within the context of the constitution, as a structural and axiological keystone in the system of law.” The Commission especially focused on the sentence “*other general acts*”, and concluded that itself, not a problem if the wording “*other general acts*” refers solely to secondary legislation, such as regulations issued by the

¹⁸ More about this: Bingham, T., *The Rule of Law*, London, Penguin books, 2011.

¹⁹ Blanuša, A. (2017): Ujedačena sudska praksa kao temelj pravne sigurnosti i pospešujući faktor za direktne strane investicije, u (Uniform case-law as the foundation of legal security and stimulating factor for direct foreign investments, in): Bejatović, S.; Vukadinović, R., Turanjanin, V.: Pravna sigurnost kao pospešujući faktor za direktne strane investicije (Legal certainty as the stimulating factor for direct foreign investments), Kragujevac, 2017, p. 259.

²⁰ See:

<https://www.mpravde.gov.rs/files/Draft%20Amendments%20to%20the%20Constitution%20of%20Republic%20of%20Serbia.pdf>, last accessed on September 10th 2018.

executive as authorized by law. (CDL-AD (2018)011, par. 25-27) The Commission here practically underlines necessity to keep judges subordinated only to constitution, laws and international treaties, but not to act of the executive power other than secondary legislation.

Somehow, the issue of the position of generally accepted rules of international law was “resolved” by left them out from the text. Despite the relatively frequent raising this issue by several authors in last ten years, the Commission has not found it worthy of analysis.

The main focus of the Commission with this regard was on the way that legislator choose to deal with uniform application of law, namely, with the sentence where legislator states that: “The method to ensure uniform application of laws by the courts shall be regulated by law.” The Venice Commission confirmed that there is concern in Serbia regarding a lack of legal certainty due to inconsistent case law, but emphasized that this may have many reasons, not only a lack of effort by the judges to ensure that their decisions take the existing case law into account. From that point of view, the Commission welcomed the decision of the legislator to underline the importance of ensuring consistency in the case law in the Constitution, but expressed concerned about its wording used in order to do it and by the intentions of the phrase “*method to ensure...*”. The special concern of the Commission refers to possibility of establishing some special body in charge of harmonization of case law, as was planned in the NJRS 2013-2018 (the well-known Certification Commission) The Commission see that as the task in the exclusive responsibility of judiciary.

At the same place, Venice Commission recalled earlier mentioned relation between the internal independence of judges and necessity to ensure uniform application of law and legal certainty.

Referring to its previous opinion, Commission recalled that “the need to unify practice should, in principle be solved by an appeals procedure that could be designed to also solve problems that usually, only or mostly, occur in different categories of small claims cases.” (CDL-AD (2013)005, par. 105). The Venice Commission therefore recommended deleting the third paragraph of the proposed Amendment that refers to regulation of the harmonization of case law by law. This position is even a stronger in part of the Opinion which deals with the role of the Supreme Court, where Commission welcomed the definition of the Supreme Court of Serbia as the highest court in Serbia, but criticized the way on how the role of this Court is regulated. Namely, the

Amendment X says that the role of the Supreme Court is to ensure the uniform application of the law by the courts, but without any indication how this is to be done. Having this in mind, Venice Commission suggested adding specific wording in the Amendment: “The Supreme Court of Serbia shall ensure uniform application of the law by the courts *through its case law*.”(CDL-AD (2018)011, par. 55-56)

However, Commission stated that, if it is felt that a reference to the need to ensure proper harmonization of case law should be included in the Constitution and if the reference to the role of the Supreme Court in Amendment X is not considered sufficient, then the first paragraph of this Amendment could make reference to taking into consideration or having due regard to the case law. (CDL-AD (2018)011, par. 36).

6. Accessibility of case law as a precondition of the uniform application of law

The importance of publishing and availability of the case law have been underlines by CCJE that an adequate system of reporting case law is essential for ensuring uniform application of law. “At least judgments of the supreme courts and appellate courts should be published in order to make them known not just to the parties to the individual case but, so as to enable them to rely on these judgments in future cases, to other courts, lawyers, prosecutors, academics and general public.” This can be done in paper and/or electronic form. The CCJE welcomes the practice to publish summaries of decisions, including factual background, so as to make the search for precedents easier. (CCJE Op. No. 20, par 40-42.)

The Serbian legal system entered in the most intense phase of judicial reform as well as in the screening phase without comprehensive, centralized, systematic and accessible data basis of case law. This makes the uniform application of law more complicated and prevents the judges in accessing previous decisions in similar cases. In parallel, this also made it difficult for the citizens, as participants or potential participants in court proceedings, to anticipate the key elements of the judicial procedure: major outcome of the proceedings based on relevant regulations and earlier case law in similar cases; indicative duration of the procedure; indicative costs of conducting the procedure.

Similar problems existed for lawyers, from whom the parties are often awaiting answers to these questions. Finally, an important advantage of easily accessible regulations and case law exists also in raising the quality of training for future judges, public

prosecutors, lawyers and civil servants responsible for law enforcement. Also, their role in harmonization

of case law is recognized by CCJE which concludes that the role of lawyers and public prosecutors in ensuring uniform application of laws is very important. “They should engage in a proper research of the case law and submit arguments for the applicability or, respectively, the inapplicability of previous decisions.” (CCJE, Op. No. 20, par. 47)

The Venice Commission also recognized the sharing of case law by national courts as important for uniform application of law. The Commission concluded that the methods of doing so may vary, but cooperation between courts in this process is key and very effective if a suitable mechanism exists that enables it. (CDL-AD (2018)011, par. 35)

The AP CH 23 addressed an issue of accessibility of the case law through the activity 1.3.9.4. which obliges the Serbian authorities on improving access to regulations and case law, through establishment and promotion of comprehensive and widely available electronic databases of legislation and case law, with respect to the provisions governing data confidentiality and personal data protection, and bearing in mind the provisions of the Law on publishing laws and other regulations, the Law on Judicial Academy and the Law on Courts.

In parallel, the AP CH23 addressed above-mentioned recommendation also through the activity 1.3.9.2. which stipulates: “Defining rules which regulate anonymization of judicial decisions in different areas of law prior to their announcement in accordance to rules of European Court for Human Rights.”

The main idea of this activity was to establish uniform rules and methodology of the anonymization of court decisions in line with relevant international data protection standards. Following this AP CH23 provision, the SCC established the working group for drafting the rules on anonymization. The working group defined the list relevant European standards, not only of the European Court of Human Rights, but also the EU Court of Justice and national courts of EU member states and EU legislation regulating data protection²¹. Amended rules should also serve as a model for other courts that their decisions are published on the website, or otherwise making available to the public.

²¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 / EC (General data Protection Regulation; Directive (EU) 2016/680 of the

The Supreme Court of Cassation anonymize its decisions in accordance with the Rulebook on the replacement and omission (anonymization and pseudonymization) of data in court decisions since January 1, 2017. Since April 1, 2018 for courts of appeals shall start applying the rules on the anonymization of their court decisions.

One of the main obstacles in more progressive development of the case law databases is related to shared (and insufficiently clearly defined) responsibility for their establishment and maintaining between the Public Company Official Gazette, the Supreme Court of Cassation and the Judicial Academy. As a result, all the above entities worked on the development of bases in parallel, resulting in an uneven methodological approach and resource wasting, both financial and human.

The legal information system of the Republic of Serbia (hereinafter: LIS), as a unique database in electronic form, was established on January 1, 2014 on the basis of the Law on Publication of Laws and Other Regulations and Acts²². The management of this system was entrusted to the Public Company “Official Gazette”. The RS Government Regulation on the LIS prescribes the way in which the LIS is established and managed, as well as its content, manner of management, exchange and submission of data and documentation, its access to that system and how it is used. In accordance with the Regulation, the LIS contains: selected court decisions and legal positions of the Constitutional Court, courts of general and special jurisdiction, as well as judgments of the ECtHR relating to the Republic of Serbia; references to the official gazettes in which the regulations relevant for rendering court decisions are published; references to official and unofficially scrutinized texts of the applicable regulations that are relevant for rendering court decisions; references to other acts that are important for rendering court decisions.

The database is available free of charge to all courts and prosecutors’ offices; the State Attorney’s Office; the Judicial Academy; the Ombudsman; the Data Protection Commissioner; the Ombudsman’s offices of municipalities, cities, city of Belgrade and city municipalities as well as to the precisely listed entities, according to the

European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977 / JHA; Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offenses and serious crime)

²² Law on Publication of Laws and Other Regulations and Acts, “Official Gazette”, No. 45/13.

Government's decision. However, beyond this list, access to databases is not free of charge, which significantly limits the positive effects of its existence.

In the middle of 2018, 23,832 court decisions, legal opinions and conclusions of courts of general and special jurisdiction, were published in the court practice, including the sentence contained in the court bulletins for which public announcement in the LIS was made by the Official Gazette, as well as the decision of the Constitutional Court and the ECtHR. The number of available decisions in the database increases by 2,500-3,500 new decisions annually.

The basis of court decisions of the Supreme Court of Cassation contains the case-law of this court, as well as the former Supreme Court of Serbia, appellate courts and courts of the republican rank (Administrative Court, Commercial Appellate Court and Misdemeanor Court of Appeal) containing over 5000 anonymized decisions.

The third relevant case law database (e-JURIS) was established by Judicial Academy. e-JURIS is an educational e-ACADEMY module designed to facilitate judges and prosecutors to search the case law of the ECtHR and better understand the legal concepts that the Court applies.²³ Currently, there are 115 verdicts of the ECtHR related to the Republic of Serbia in the Serbian language. The database also includes tools that allow search for judgments by document collections, using filters, or by keyword. The search method has been harmonized with the instruments for searching the case-law of the ECtHR in Strasbourg - HUDOC. The publication can also be accessed by scanning the QR code. The database is intended for users already familiar with the ECtHR and the ECtHR case law. Compared to the HUDOC database, search is facilitated by the search instruments in Serbian. Each ECHR judgment located in e-JURIS is presented through 4 data groups: 1. Details - basic information on the decision taken from the HUDOC database with a brief summary of the judgment; 2. Verdict - the text of the verdict in Serbian and English; 3. Comments - a part reserved for a network of experts; 4. Source - review the judgment directly in the HUDOC source database that opens in a separate window on the right half of the screen (e-frame). The second part of the e-JURIS module is a cross-linking system that is conceived as an instrument for quick reference and training. It allows, without the prior knowledge of the ECHR, to come up with a case from the ECHR practice that may be relevant for solving the problem with which judges and prosecutors encounter in a specific case, in other words, to come up to

²³ Case law relevant from the aspect of human rights protection is available at the Internet address <http://e-case.eakademija.com/>, last accessed on August 18th 2018.

the legal concepts applied by the ECHR in similar cases. All that is required to start the search is an article of the national law under which the established facts can be qualified.²⁴

In order to overcome the problem of the parallel existence of the case law databases, the SPC signed the Memoranda of Cooperation with the Judicial Academy on August 21st 2015, which regulates exchange of decisions between their electronic databases.

By summarizing the facts about all three parallel systems, it is obvious that they continue to show serious deficiencies, reflected in an insufficient number of available decisions (SCC and e-JURIS bases) or limited access for free users and users who pay for annual LIS subscription (which is relatively high- approximately, the amount of average monthly salary).

7. Follow up and expected steps

In addition to what has already been said about actuality of this topic in the context of constitutional changes in Serbia, just a day before submission of this paper, the new Draft Amendments to Serbian Constitution²⁵ was published.

The revision of the previously published Draft which was subject of the Venice Commission Opinion, touched also the part dealing with uniformity of case law. Thus, the legislator chose the more instructive, instead of semi obligatory way to guide following the previous case law, using following wording: “A judge shall be independent and shall rule in accordance with the Constitution, ratified international treaties, laws and other general acts, *taking into account the harmonized case law.*” It seems that this wording does not corresponding to the intention of the legislator to instruct judges to consider need to have uniform case law. A bit different formulation: “A judge shall be independent and shall rule in accordance with the Constitution, ratified international treaties, laws and other general acts, *taking into account the need of harmonization of case law.*”

²⁴ See more in: Report No. 2/2018 on the implementation of the Action Plan for Chapter 23, available on: <https://www.mpravde.gov.rs/files/Report%20no.%202-2018%20on%20implementation%20of%20Action%20plan%20for%20Chapter%2023.pdf>, last accessed on August 24th 2018.

²⁵ Draft Amendments to Serbian Constitution, available on: <https://www.mpravde.gov.rs/obavestenje/20887/radni-tekst-ustavnih-amandmana-u-oblasti-pravosudja-uskladjjen-sa-preporukama-venecijanske-komisije.php>, last accessed on September 14, 2018.

In accordance with previously mentioned suggestions of the Venice Commission, the legislator also amended the part dealing with competence of the Supreme Court and defined it using following wording: “The Supreme Court of Serbia shall ensure uniform application of the law by the courts *through the harmonization of case law*.” From such a formulation, the role of the Supreme Court in harmonization of case law is more clear than it used to be in previous text.

According to planes of the competent ministry, the next step is official initiation of the procedure for changing Constitution. It is important to mention that in spite of constitutional amendments, a visible progress in respect improving normative framework in this field can be expected after legislative amendments after adoption of the new Constitution. Having in mind importance of this topic, it seems valuable to regulate it by separate law which should include all relevant aspects: the competent authorities, mechanisms of harmonization, accessibility, training, etc.

Sources

Action Plan for Chapter 23, available on:

<https://www.mpravde.gov.rs/files/Action%20plan%20Ch%202023.pdf>, last accessed on September 14th 2018.

Bejatović, S. at al. (2013) *Priručnik za primenu Zakonika o krivičnom postupku (Manual for Application of the Criminal Procedure Code)*. Belgrade: Association of Public Prosecutors and Deputy Public Prosecutors of Serbia.

Bingham, T. (2011) *The Rule of Law*, London, Penguin books.

Blanuša, A. (2017) Ujednačena sudska praksa kao temelj pravne sigurnosti i pospešujući faktor za direktne strane investicije, u (Uniform case-law as the foundation of legal security and stimulating factor for direct foreign investments, in): Bejatović, S.; Vukadinović, R., Turanjanin, V.: *Pravna sigurnost kao pospešujući faktor za direktne strane investicije (Legal certainty as the stimulating factor for direct foreign investments)*, Kragujevac.

Doobay, A. (2013) The right to a fair trial in the light of the recent ECtHR and CJEU cases. *ERA Forum*.

Draft Amendments to Serbian Constitution, available on:

<https://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php>, last accessed on September 14, 2018.

European Commission for Democracy Through Law (Venice Commission) Serbia Draft Amendments to the Constitution of the Republic of Serbia, CDL-REF(2018)015, Strasbourg, 26 April 2018.

European Commission for Democracy Through Law (Venice Commission) Opinion on Draft amendments to Laws on the Judiciary of Serbia (CDL-AD(2013)005).

- European Commission for Democracy Through Law (Venice Commission) Opinion on the Draft Constitution of the Nakhichevan Autonomous Republic (Azerbaijan Republic), CDL-INF(1997)6 approved by the Commission at its 33rd Plenary Meeting (Venice, 12 - 13 December 1997).
- European Commission for Democracy Through Law (Venice Commission), Opinion on the Draft Law on the Judiciary and the Draft Law on the Status of Judges of Ukraine adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).
- Hayek, F. (2001) *The road to Serfdom*, Routledge Classics.
- Knežević, M. (2017) Project “Judicial Efficiency”, component 1 – standardization of case-law, comparative law report, part one: Austria, Novi Sad.
- Murphy, C. (2005) *Lon Fuller and the Moral Value of the Rule of Law*, Law and Philosophy, No.24, 239–262.
- Radbruch, G. (1946) *Gesetzliches Unrecht und übergesetzliches Recht*, Süddeutsche Juristenzeitung.
- Recommendation CM/Rec(2010)12 on Judges: independence, efficiency and responsibilities, adopted by Committee of Ministers of the Council of Europe on 17 November 2010.
- Recommendation CM/Rec (95) 5 of the Committee of Ministers to member states concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases (Adopted by the Committee of Ministers on 7 February 1995 at the 528th meeting of the Ministers' Deputies)
- Report No. 2/2018 on the implementation of the Action Plan for Chapter 23, available on: <https://www.mpravde.gov.rs/files/Report%20no.%202018%20on%20implementation%20of%20Action%20plan%20for%20Chapter%2023.pdf>, last accessed on August 24th 2018.
- Screening Report for Chapter 23, available on: [https://www.mpravde.gov.rs/files/Screening-report-chapter-23-serbia%20Official%20\(3\).pdf](https://www.mpravde.gov.rs/files/Screening-report-chapter-23-serbia%20Official%20(3).pdf), last accessed on September 14th 2018.
- Škulić, M. (2009) *Krivično procesno pravo (Law of Criminal Procedure)*, Pravni fakultet Univerziteta u Beogradu (Faculty of Law of the University in Belgrade), Belgrade, pp. 28-31.
- Thaman, S. (2011) Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in *Taxquet v. Belgium*. *Chicago-Kent Law Review*, vol. 86, No. 2.

ECtHR Decisions

- Albu and others v. Romania, App. No. 34796/09, judgment on 12 May 2012.
- Brezovec v. Croatia App. No 13488/07, judgment on 29 March 2011.
- Cupara v. Serbia, App. No. [34683/08](#), judgment on 12 July 2016.
- Sahin and Sahin v Turkey, App. No. 13279/05, judgment on 20 October 2011 CCJE Op. No. 20.
- Taxquet v. Belgium, App. No. 926/05, judgment on 13 January 2009 and 16 November 2010, taken over from:

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101739#{%22itemid%22:\[%22001-101739%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101739#{%22itemid%22:[%22001-101739%22]}), accessed in June 2017.

Živić v. Serbia, App. No. 37204/08, judgment on 13 September 2011.

Vinčić and others v. Serbia, applications Nos. 44698/06, 44700/06, 44722/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 3326/07, 3330/07, 5062/07, 8130/07, 9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07, 4022/08, 4021/08, 29758/07 and 45249/07, judgment: on 01/12/2009, § 56.

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PRINCIPLE OF LEGALITY: NEW DIMENSIONS OF AN OLD RULE

Principle of legality is one of the first rules taught in law schools, often stated, but rarely properly explained. Its two components expressed by the two latin adagium “nullum crimen sine lege” and “nulla poena sine lege” tend to be reshaped in the light of the nowadays standards in the matter of legislating and applying the law to concrete situations. Due to the increasing role of case-law in interpreting rules in force, on the one hand, and the mandatory feature of supra-national provisions, on the other hand, even the Continental System, once recognized for its rigidity and traditionalism, seems to become more flexible and opened to interpretations. The consequence of this trend is that we are facing a deeper and a wider meaning of the principle of legality than 70 years ago.

Keywords: *principle of legality, ECHR case-law, nullum crimen sine lege, nulla poena sine lege, criminalizing rule, rule of law, foreseeability of law.*

Motto:

Les juges ne sont que la bouche qui prononce les paroles de la loi, des êtres inanimés qui ne peuvent ni en adresser la force ni la rigueur.

Charles de Montesquieu
(L'esprit des Lois, 1749, Livre XI, Ch. III. p. 127)

I. General aspects of the principle of legality

Principle of legality was called many ways in the doctrine, every scholar trying to propose a better name in order to underline the importance of this principle for the Rule of law in general and for Criminal law in particular. Thus the principle of legality was described as “a cornerstone of criminal justice systems around Europe” (Peristeridou,

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2015, p. 3), “core value” (Crişan, 2010, p. 2), “fundamental right” (Crişan 2010, p. 2), “fundamental defense in criminal law prosecution” (Van Schaack, 2009, p. 101), “fruit of illuminist thinking” (Caringella, Levita, 2016, p. 5), and so on. Usually, the principle of legality is presented as “the core of the rule of law” and its two components – *nullum crimen sine lege* (no crime in the absence of a law describing it) and *nulla poena sine lege* (no punishment in the absence of a law providing it) – analyzed separately. In fact some scholars refer to it as containing two separate rules or principles (Murphy, 2010, p. 192).

From a philosophical point of view, legality is a component of the normative realm, and within that realm of the governmental virtue domain, and within that domain legality as a term is defined as the system of laws and regulations of right and wrong behavior that are enforceable by the state through the exercise of its policing powers and judicial process, with the threat and use of penalties, including its monopoly on the right to use physical violence. (Erhard, Jensen, Zaffron, 2009, p. 37) Legality is presented by Erhard, Jensen and Zaffron as an element of a social model based on integrity, which incorporates phenomena of morality, ethics and legitimacy (Erhard, Jensen, Zaffron, 2009, p. 7).

On the other hand, there are some authors who claim that the principle of legality has changed, meaning its content and scope of the principle have evolved over time, while the courts have transformed the principle’s very constitutional justification. (Lim, 2013, p. 17)

II. New dimensions of the principle of legality

1) The international criminal law dimension

The International Criminal Court Statute contains specific provisions on the principle of legality: *nullum crimen sine lege* - Art. 22 - and *nulla poena sine lege* – Art. 23.¹ But

¹ Rome Statute of the International Criminal Court adopted on 17th July 1998, entered into force on the 1st July 2002.

Art. 22 Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

before reaching this point, there was a long struggle in International criminal law case-law between moral standards, reprobable conducts, legitimacy of international courts, the need of punishment and legal boundaries.

In international criminal law the principle of legality is associated with the principle of non-retroactivity, the principle of specificity, and the prohibition of analogy. The principle of non-retroactivity states that the law proscribing a given act must have existed before the act in question occurred, banning the retroactive application of the law. The principle of specificity requires that the definition of the proscribed act be sufficiently precise. The prohibition of analogy requires the definition to be strictly interpreted. However, in international criminal law things are approached a little bit different than in domestic law or even in ECtHR case-law

The scholars emphasized that in international criminal law the consequence of absolute fidelity to law is that some perpetrators can never be brought to justice, allowing for the “inner morality of the law” to prevail over principle of legality (Arajärvi, 2011, p. 4). And that is because international criminal law has a main customary component which is recognized and analyzed in the doctrine (Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, 3 May 1993, para. 34; Fuller, 1974, pp.33-38; D’Amato, 1971, p. 12). This customary component had a dramatic influence on the decisions and application of International criminal law to specific cases with great influence on the principle of legality features. International law is often uncodified and imprecise, leaving the judge with wide discretion to determine the specific substance of law to be applied to the facts at hand, and this may pose the risk of over-stepping the principle of legality (Arajärvi, 2011, p. 3).

As argued in the doctrine, starting with the post-World War II proceedings and continuing with the ad hoc international tribunals, international criminal law “failed to fully implement this principle” (Van Schaack, 2009, p. 101).

The principle of legality principle was the “apple of discord” at Nuremberg and Tokyo Tribunals debated on the issue of their legitimacy because the pre-existence of the crime of aggression and crimes against humanity was doubtful. It was under debate if there

3.This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Art. 23 *Nulla poena sine lege*

A person convicted by the Court may be punished only in accordance with this Statute.

was a previous direct criminalization (before 1945) on war crimes. In the Nuremberg Judgement (International Military Tribunal for the Trial of German Major War Criminals, Judgment of 30 September and 1 October 1946) the interpretation it was clear oriented through the moral standards and not to the legal ones.

The Judgment of the International Military Tribunal for the Trial of German Major War Criminals held that the legality principle was not binding upon it as a matter of strict law observing that” In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all International Law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.” (International Military Tribunal for the Trial of German Major War Criminals, Judgment of 1 October 1946, p. 52).

Scholars have noticed that the international criminal law tribunals were boldly applying new norms to past conduct (Van Schaack, 2009, p. 101). “This was not the demure application of a judicial gloss to established doctrine. (Van Schaack, pp. 101-102).

The principle of legality is somehow subordinated to the moral boundaries in International criminal law even though the principle of legality was obstinately evoked. In the early cases (such as Nuremberg and Tokyo), tribunals repeatedly rejected the defense through a series of interpretive devices, analytical claims, and methodological choices, being argued that the principle of legality “simply does not apply in international criminal law with the same force and effect as it does in the domestic order, given differences in the ways domestic and international law criminalize conduct” (Van Schaack, 2009, p. 102). Other arguments on the subsidiarity of principle of legality were the following: “some international crimes existed primarily in customary law, which does not lend itself to a robust principle of legality principle; there are generative provisions (e.g.,”other inhumane acts”) which constitute delegations to engage in normative judicial creativity within the bounds of *ejusdem*

generis. As a result of this persistent indeterminacy in international criminal law, judges undertook more active judicial interpretation, improvisation, and innovation.” (Van Schaack, 2009, p. 102).

In conclusion, if in national law and ECtHR case-law the principle of legality is a strong principle and subject of a continuous an increasingly broad interpretation, in international criminal law principle of legality is viewed as a flexible principle of justice subsumed to moral and retributive standards. The doctrine stated that “the courts balanced considerations of fairness towards an accused against other objectives: the condemnation of brutal acts, ensuring individual accountability, victim satisfaction and rehabilitation, the preservation of world order, and deterrence” (Van Schaack, 2009, p. 102).

From this point of view, there is no unfair treatment of an accused if he/she is held criminally liable under an international criminal law provision that entered into force after the conduct took place and could have not been anticipated. The explanation for this ratio is that specific individual conduct has seriously affected the rights and legitimate interests of other persons (being qualified as *malum in se*) and must be punished even if international legal provisions are insufficient or underdeveloped. “Blameworthiness is not negated when an individual is sanctioned in the absence of positive law under these circumstances.” (Van Schaack, 2009, p. 103).

A new era started with the entry into force of the Rome Statute, the international criminal law tradition of directly applying customary law by resting it on pertinent case law and relevant State practice was replaced with an essentially code-based approach to criminal law that comes quite close to the legality principle in its broadest form (Kreß, 2010, p. 5). The Rome Statute codifies the applicable customary law in statutory definitions (Art. 6–8 Rome Statute) and precludes their retroactive application (Art. 11 and art. 24 Rome Statute). The Rome Statute also explicitly prohibits judges from applying the law by analogy to the detriment of the accused and requires that ambiguities be resolved in favor of the accused (Art. 22 (2) Rome Statute). These imperatives were highlighted by the International Criminal court in case *Prosecutor v Lubanga Dyilo*: “The Chamber considers that the Defense is not relying on the principle of legality, but on the possibility of excluding criminal responsibility on account of a mistake of the law in force. Having regard to the principle of legality, the terms enlisting, conscripting and using children under the age of fifteen years to participate actively in hostilities are defined with sufficient particularity in (...) Rome Statute and the Elements of Crimes, which entered into force on 1 July 2002, as entailing criminal

responsibility and punishable as criminal offences. Accordingly, there is no infringement of the principle of legality if the Chamber exercises its power to decide whether Thomas Lubanga Dyilo ought to be committed for trial on the basis of written (*lex scripta*) pre-existing criminal norms approved by the States Parties to the Rome Statute (*lex praevia*), defining prohibited conduct and setting out the related sentence (*lex certa*), which cannot be interpreted by analogy in malam partem (*lex stricta*)”. (ICC, *Prosecutor v Lubanga Dyilo*, para. 30-303)

2) *The ECtHR case-law dimension*

Article 7 of the ECHR and its requirement of *nullum crimen, noella poena sine lege* play a major role in ECtHR preoccupation of setting a trend of wider interpretation of this principle. As a matter of fact, ECtHR has underlined the importance of the principle of legality in criminal law several times. For example, in case of *Kafkaris vs. Cyprus*, the Court stated that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection (...). It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (ECtHR, *Kafkaris v Cyprus* Judgment 12 February 2008 para 137).

ECtHR has made a major preoccupation in circumscribing the sphere of the adagium, “only law can define a crime and prescribe a penalty” trying to impose a broad interpretation of common terms such as “law” and “penalty”.

a) The term “law” was considered a concept which comprises statute law as well as case-law, the Court understanding this term in its substantive sense and not in its formal sense, as a provision in force as the competent courts have interpreted it. (Kafkaris v Cyprus, para 139) So the Court chose a generous view of the term “law”, not limiting its application to acts of legislatures (Murphy, p. 3).

In *Custers, Deveaux and Turk v Denmark*, the ECtHR analyzed whether executive orders, issued by Danish authorities with responsibility for Greenland, could be assimilated with the notion of “law” and managed to determine whether the relevant order had “sufficient legal basis in domestic law”. In the end the Court declared that it “will not question the national courts” interpretation of domestic law unless there has been a flagrant non-observance or arbitrariness in the application of the said provisions” (ECtHR, *Custers, Deveaux and Turk v Denmark* Judgment 3 May 2007, para 84). The order was concluded to be legally issued.

b) *The term “penalty” was also a subject for ECtHR interpretation.*

In case *Welch v UK* a confiscation order was subject of interpretation of the Court. The Court had to determine if the confiscation order could be seen as penalty and tried to establish criteria in order to determine if measures like it may or may not be considered as penalties. In this case Mr. Welch was convicted of drug-related offences and argued that a confiscation order made against him constituted a retrospective criminal penalty. The order allowed broad powers of seizure of his assets and breach of the order could result in incarceration. The British Government claimed that it was not a criminal penalty as it was concerned with the prevention of future drugs trafficking (ECtHR, *Welch v UK* Judgment 9 February 1995, paras 22-25). The Court set out the meaning of the term by establishing the following criteria: whether the measure follows conviction for a criminal offence; the nature and purpose of the measure in question; its characterization under national law; the procedures involved in the making and implementation of the measure; the severity of the measure (*Welch v UK* para 28). “To render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a “penalty” (*Welch v UK* para 27).

In conclusion, in case of *Welch*, the combined using of these criteria has set the interpretation that the confiscation order was a criminal penalty. Also, because it was applied retrospectively, there was a breach of Art. 7 of the Convention.

In other cases, such as *Jamil v France* (ECtHR *Jamil v France* Judgment 25 May 1995) or *Ibbotson v United Kingdom* (ECtHR, *Ibbotson v United Kingdom* Decision of the European Commission of Human Rights 21 October 1998) the Court has emphasized that the most important of these criteria, the starting point of an evaluation of an official measure to determine whether it constitutes a criminal penalty or not is the previous criminal conviction.

But sometimes, the balance between the purpose of some preventive measures and the protection of fundamental rights is very difficult to maintain. In case *Gillan and Quinton v the United Kingdom* (ECtHR, *Gillan and Quinton v the United Kingdom* Judgment 12 January 2010) two persons attending a protest at an arms fair were stopped and searched by the authorities under a provision of UK Terrorism Act 2000 which does not require the police officer to have a reasonable suspicion of unlawful activity. This measure (stopping and searching) has breached, in the interpretation of the Court, Article 8 Convention because it was not in accordance with law, as the powers of the

police were not sufficiently circumscribed nor subject to adequate legal safeguards against abuse (*Gillan and Quinton v the United Kingdom* para 87).

c) *Accessibility and foreseeability of the law.*

In Court’s case-law, it was repeatedly noted that the definition of both the offence and the penalty must be accessible and foreseeable (*Kafkaris v Cyprus*, para 140). Acceding to this interpretation, the law must be sufficiently clear for individuals to conduct themselves in accordance with its commands (accessibility), and secondly, where there is judicial development of the law, any changes must be predictable (foreseeability) (Murphy, p. 9). An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed (...) a law may still satisfy the requirement (...) where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. “ (*Kafkaris v Cyprus*, para 140).

In case *Cantoni v France* (ECtHR, *Cantoni v France*, Judgment 22 October 1996) things were no longer seen as clear since there are always “grey areas at the fringes of the definition of the law” and Article 7(1) ECtHR simply requires that the law is “sufficiently clear in the large majority of cases”. That is why “the applicants must have known on the basis of their behavior that they ran a real risk of prosecution” (*Cantoni v France*, paras 32-5). The same in case *Custers & Others*, where the Court declared that it was predictable that “the applicants risked being sentenced to a fine” (ECtHR, *Custers & Others v Denmark* Judgment 3 May 2007, para 81) and also in *Coeme & Others v Belgium* (ECtHR, *Coeme & Others v Belgium* Judgment 22 June 2000, para 150) it was held that “the applicants could not have been unaware that the conduct that they were accused of might make them liable to prosecution”.

In our opinion the foreseeability of the “risk of prosecution” and the foreseeability of law are two separate elements and the Court could have been more attentive with the inconsistencies of its language.

The Court was also criticized by other authors because it “favors solving a problem before it to laying down general statements of law” (Murphy, p. 15) and “has limited its definitions to achieve satisfactory results” (Greer, 2006, p. 241), but we must add that this happens only in some cases (such *Cantoni v France* and *Custers & Others*) when

the Court hazards in putting into balance difficult and quite incompatible notions such as risk and foreseeability of the law.

3) *The historical and national dimension*

Principle of legality has constitutional significance in many national systems (Beth Van Schaack, p. 101). And despite the phenomenon of legal acculturation, there are specific influences in each State, due to the constitutional identity and historical and legislative development of that state or region.

The legality principle in its comprehensive sense is rooted in the social contract doctrine. Feuerbach was the first to use the Latin adagium *nullum crimen, nulla poena sine lege*. In the view of social contractalist Charles de Montesquieu, judges were only those through whose mouth the law spoke, and they could neither address the law's force or rigor. However if the law is unclear, judges necessarily have to address such considerations, and give their interpretation of its obscure parts. The fundamental “principles of legality” emerged from such social contract theorists, and since then constantly developed (Sautenet, 2000, para 1).

The first codifications of the legality principle were triggered by the separation of powers doctrine and the goal of limiting judicial power. Cesare Beccaria who stated that “if the power of interpreting laws be an evil, obscurity in them must be another, as the former is the consequence of the latter. This evil will be still greater if the laws be written in a language unknown to the people; who, being ignorant of the consequences of their own actions, become necessarily dependent on a few, who are interpreters of the laws, which, instead of being public and general, are thus rendered private and particular” (Beccaria, 1819, p. 26).

In common-law system Magna Carta Libertatum was the act which provided in art. 39

that” No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land” (Magna Carta Libertatum 1215, art. 39). It was emphasized that, in spite of this guarantee, Magna Carta did not exclude customary law as the basis of criminal provisions and the Star Chamber operated for 200 years until 1641 and punished certain behavior considered morally reprehensible irrespective of positive or common law (Kreß, p.3). Lord Blackstone placed himself in an opposite position

towards the retroactivity of law, declaring that the judges are “not delegated to pronounce a new law, but to maintain and expound the old one,” and that when courts are called upon to overturn an existing precedent, they “do not pretend to make a new law, but to vindicate the old one from misrepresentation” (Allen, 2010, p.107). But this has led to the concept of the retroactive operation of court decisions. Despite a strong current against retroactivity of law, the British Parliament occasionally enacted ex post facto criminal laws well into the 19th century, abolishing the doctrine of residual judicial discretion to create common law crimes much later, in 1973 (Knüller Publishing, Printing and Promotion Ltd v Director of Public Prosecutions, Judgment of House of Lords from 14 June 1972). Nowadays common law states have statutory definitions of crimes, but the terms used by legislators are explained and interpreted through case-law.

In Islamic law the Koran states that God does not punish humans before having sent a Messenger to warn them. The sacred books of Islam, Koran and Sunnah, contain the definition of certain crimes (*hudud, qesas, diyya*) and also their punishment. Sharia – “the way to follow” (David, Brierley, 1978 p. 421) - does, however, recognize punishment in the discretion of Islamic judges for certain crimes () contrary to the *nullum crimen sine lege* principle.

The *fikh* is a doctrinal system based on the authority of sources which are either revealed or of recognized infallibility. Muslim law is considered to be immutable. Islam recognizes no authority as having the power to modify it, that is the rulers of Muslim states cannot create law or legislate, but only to set administrative rules within limits defined by Muslim law (David, Brierley, p. 427).

Some Islamic States still apply Sharia, but countries have adopted the legality principle introduced by colonial powers (Kreß, p.3).

In the United States in 1776, art. 7 and 6 of Virginia Declaration of Rights and art. 15 of Maryland Constitution provided the principle of legality. The actual constitution of US

Explicitly bans in art. I, section 9, clause 3 the retroactivity of criminal law: “No bill of attainder or ex post facto Law shall be passed”.

In Europe, first codification in a modern criminal code was in Austria, Part I Art. 1 Austrian Criminal Code (*Constitutio Criminalis Josephina*) enacted by Joseph II in 1787. Then, in 1810 French Penal Code, provided it in Art. 4. The Bavarian Penal Code

1813 - Strafgesetzbuch für das Königreich Bayern - stated on the principle of legality in its Art. 1 and the same, Art. 2 of the Penal Code of the German Empire 1871 - Strafgesetzbuch für das Deutsche Reich (Kreß, p.3).

Later, in 1935, Art. 2 Penal Code of the German Empire was amended by the German National Socialists allowing punishment also for acts deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling. This provision was abolished in 1946 (Kreß, p. 4).

In Russia the Soviet Penal Codes of 1922 and 1926 permitted the criminalization of socially dangerous acts through a false analogy. The principle of legality was reintroduced in 1958 by art. 6 of the Fundamental Principles of Criminal Legislation of the USSR and the Union Republics. Still, in practice, there was admitted the possibility of judging and punishing minor offences by non-professional Comrades' Courts. Nowadays, Art. 54 of the Constitution of the Russian Federation of 1993 provides and guarantees the principle of legality (Kreß, p.4).

4) The domestic interpretative dimension. A Romanian approach – decisions of Romanian Constitutional Court and their influence on the principle of legality

In continental Systems, principle of legality is a cornerstone of the modern criminal law and it was codified as seen before, in the Criminal Code provisions or in the Fundamental Law. However, sometimes, the provisions of statutory law in Continental systems are not the only source of the principle of legality interpretation. The constitutional Courts have a very important duty that is to determine, when requested, the compatibility of a certain legal provision with the Constitutional standards.

In Romanian the supremacy of the Constitution and laws was elevated to rank of constitutional principle, enshrined by Article 1 paragraph (5) of the Fundamental Law, according to which observance of the Constitution, of its supremacy, and the laws shall be mandatory in Romania. “It was thus established a general obligation imposed on all subjects of law, including the legislative authority, which must make sure that legislative work is done within the limits and in accordance with the Fundamental Law of the State and, in the same time, must ensure the quality of legislation. This because, in order to respect the law, the law must be known and understood and to be understood it must be sufficiently precise and foreseeable as to provide legal certainty to its recipients” (Predescu, Safta, 2009, p. 1).

According to art. 147 of the Romanian Constitution, in cases of unconstitutionality, the law or orders shall be returned for reconsideration. Upon the passing of 45 days from the publication of the decision in the Official Gazette of Romania, if the legislator does not intervene, the legal norm established as unconstitutional ceases any effects for the future.

Art. 29 of the Law no. 47/1992² on the organization and functioning of the Constitutional Court provides: The Constitutional Court decides on the exceptions raised before the courts on the unconstitutionality of a law or ordinance or a provision of a law or an ordinance in force in connection with the case at any stage of the dispute and whatever its subject was. An exception may be raised at the request of one of the parties or, ex officio, by the court. An exception may also be raised by the public prosecutor in the court in the cases in which he/she participates. The provisions found to be unconstitutional by a previous decision of the Constitutional Court may not be censored again in regard with their constitutionality.

There are two types of solutions in this case (which also depart from the provisions of the law): decisions of admission of the exception of unconstitutionality, which lead to terminating for the future of the effects of the norm declared unconstitutional and decisions of rejection of the exception of unconstitutionality, in which case the rule of law subject to constitutional control remains unchanged. However, in the last 10 years there has been an increase in the number of decisions that are not categorical as to the finding of unconstitutionality but rather interpret or orientate the interpretation of the courts in the sense of observing the constitutional standard.

Although the Romanian doctrine clearly shows that the Constitutional Court does not have the role of a positive legislator, even when it finds the unconstitutionality of non-criminalization of an act (CCR, Decision no. 224/2017), nor when it finds the unconstitutionality of the decriminalization of an act (CCR, Decision no. 62/2007), the implications of these decisions and of this practice of the Constitutional Court on the principle of legality are major.

A first decision that we are considering is Decision no. 62/2007³, which stated that the provisions of Law no. 278/2006⁴, which abolished the offenses of insult and

² Republished in the Official Monitor of Romania, Part I, no. 807/ 3 December 2010.

³ Published in the Official Monitor of Romania, Part I, no. 104/12 February 2007.

⁴ Published in the Official Monitor of Romania, Part I, no. 601/12 July 2006.

defamation. Thus, by Decision no. 62/2007, the CC determined the inapplicability of the text by which the rules of criminalization of acts of insult and defamation were repealed by the previous Romanian Criminal Code. The decision was harshly criticized in the doctrine at that time, pointing out that “by its own decision, the Constitutional Court exceeded by far the provisions of the text of incrimination, even as it considered it to be interpreted, because art. 205 and art. 206 of previous Criminal Code referred to not just insult or defamation committed through the press, but by any other means of committing.” (Popescu, 2007, p. 6.) Normally, the rules of criminalization of insult and defamation should have come back into force, but this has not happened. The echo effect, however, occurred because the new Romanian Criminal Code no longer criminalizes the two acts.

One of the most controversial decisions of the CCR was Decision no. 265/2014⁵, by which the CC stated that the provisions of art. 5 of the Criminal Code which regulated the application of lenient criminal law during the trial are constitutional only if they do not allow the combination of more lenient provisions from successive laws, prohibiting the application of the so-called *lex tertia* in the activity of judges. Through this decision, which has been also harshly criticized (Dumitrache, *Lumea Justiției*, 23 Mai 2014), the CCR just erased more than 60 years of criminal doctrine that favored the application of the lenient law to autonomous institutions (eg recidivism, multiple offenses, conditional release etc.) independent of the punishment established for the new offense committed.

Decision no. 363/2015⁶ on the constitutionality exception of art. 6 of the Law no. 241/2005⁷ on combating tax evasion deals with the standard of the law foreseeability. The Court found that these provisions (“It is an offense and it is punished by imprisonment from one year to six years in detention, retention and failing to deposit, intentionally, within 30 days, of amounts representing withholding taxes or contributions”) do not comply with the requirement of law foreseeability, since, besides they do not define themselves the notion of “withholding taxes or contributions”, they do not refer to a legal statute in connection with them, concretely indicating the legal provisions which could determine the category of taxes or withholding contributions, which would also include the tax for the transfer of the real estate property from the personal patrimony.

⁵ Published in the Official Monitor of Romania, Part I, no. 372/20 May 2014.

⁶ Published in the Official Monitor of Romania, Part I, no. 495 /6 July 2015.

⁷ Published in the Official Monitor of Romania, Part I, no. 672/27 May 2005.

By another decision, namely Decision no. 603/2015⁸, the Constitutional Court held that “the expression” commercial relations “in the provisions of art. 301 par. (1) Of the Criminal Code criminalizing the act of conflict of interest does not meet the requirements of clarity and foreseeability, not allowing to determine the exact meaning of the criminalizing rule. The decision has the effect of restricting the incriminated conduct by the said provision, with the consequence of the exclusion from the sphere of the criminal offense of the normative variant consisting in “the act of a civil servant who, in the exercise of his duties, has performed an act or participated in the decision making directly or indirectly through which a benefit was obtained for a person with whom the public servant was in commercial relations.”

By Decision no. 405/2016⁹, the Constitutional Court upheld the objection of unconstitutionality of the provisions of criminalization of the act of abuse of service (Article 297 of the Penal Code) and found that “these are constitutional insofar as by the expression *the acts are defectively performed* is understood *the acts are performed with the breach of law*, emphasizing, once again the standard of foreseeability of the law.

In essence, in the arguments of the decision, the Court held that “the failure or defective performance of an act must be considered only by reference to service duties specifically provided by primary statutes - laws and ordinances of the Government. This is because the adoption of secondary regulatory acts that come to detail the primary legislation is done only within the limits and according to the rules ordering them”. The Court notes that “the criminal offense is the most serious form of violation of social values, and that the consequences of criminal law enforcement are the most serious, so the establishment of safeguards against arbitrariness by clear and predictable rules by the legislator is mandatory.”

One of the last controversial decisions is Decision 418/2018¹⁰ which declared the provisions of art. 29 para. (1) letter c) of the Law no. 656/2002¹¹ on the prevention and sanctioning of money laundering, as well as for the establishment of measures for the prevention and combating of the financing of terrorism, which have the following content: “It is a crime of money laundering and is punished by imprisonment from 3 to 10 years: [. ..] the acquisition, possession or use of goods, knowing that they come from

⁸ Published in the Official Monitor of Romania, Part I, no. 845 /13 November 2015

⁹ Published in the Official Monitor of Romania, Part I, no. 517 /8 July 2016.

¹⁰ Published in the Official Monitor of Romania, Part I, no. 625/ 19 July 2018.

¹¹ Published in the Official Monitor of Romania, Part I, no. 904 /2 Decembrie 2002

committing offenses.” It was pointed out that the criminal norm of art. 29 paragraph (1) letter c) of the Law no.656 / 2002 is too general and ambiguous, not clearly and concretely indicating what constitutes the incriminated conduct, namely the meaning of the phrase “acquisition, possessing or using goods knowing that they come from an offense”. For these reasons, it is clear that the criticized text is unpredictable, resulting in the misappropriation of the offense under consideration, since any possession or use of any property knowing that it originated in committing crimes could form the constitutive content of the offense. By way of example, it is shown that, according to the criticized text, the use of a stolen amount of money for the purchase of food constitutes the crime of money laundering. On the other hand, the High Court of Cassation and Justice previously ruled on the aforementioned provision by the Decision no. 16 of 8 June 2016¹² stating that: “1. The actions listed in Article 29 (1) (a), (b) and (c) of the Law No. 656/2002, such as the change or transfer, hiding or concealment, acquisition, possession or use of goods, are alternative modalities of committing a single offense of money laundering. 2. The active subject of the money laundering offense may also be an active subject of the offense from which the goods originate. 3. The offense of money laundering is an autonomous offense, and is not conditional upon the existence of a conviction for the offense from which the property comes.” Therefore, in paragraph 2 of the Decision no. 16 of 8 June 2016, the High Court of Cassation and Justice has established that the provisions of Article 29 paragraph (1) of the Law no. 656 / 2002 also criminalize the acts of “self-laundering of money”, without distinguishing between normative modalities from the aforementioned legal provisions. The High Court interpretation was not agreed by the CCR, the latter indicating that considering as a distinct offense (namely the money laundering offense provided for in Article 29 (1) c) of the Law no. 656/2002, of any act of acquisition, possession and using of goods originating in the commission of crimes, in charge of the active subject of the offense from which the goods originate, implies a double criminal prosecution for the same deeds.

Thus, the provisions of Article 29 paragraph (1) letter c) of the Law no. 656/2002 on the prevention and sanctioning of money laundering, as well as for the introduction of measures for the prevention and combating of terrorist financing in the interpretation given by the Decision of the High Court of Cassation and Justice no. 16 of June 8, 2016, violates the requirements of clarity, precision and foreseeability, which result from the principle of the rule of law imposed by the constitutional provisions of art.1 paragraph

¹² Published in the Official Monitor of Romania, Part I, no. 654 / 25 August 2016.

(5), but also violates the principle of legality of crime and punishment, as it is governed by Article 23 paragraph (12) of the Romanian Constitution and Article 7 of the ECHR.

By these decisions, we have tried to configure a specific dimension of the principle of legality, showing how the case-law of the Constitutional Court of Romania sets the sphere of interpretation of the principle of legality by eliminating certain provisions which do not meet the requirements of the Constitution, or by imposing interpretation trends, sometimes even against the explanatory decisions of the Romanian High Court of Cassation and Justice, which are also compulsory.

III. Concluding remarks

Despite its age and its "doctrinal" erosion, the principle of legality remains a hot and current issue. We have attempted to demonstrate in the present article that, like social relations are constantly evolving, legal norms, including criminal ones, are a "living" matter permanently connected to the changes and needs of the social life.

There is no exception to the principles of law, the principle of legality, despite its declared immutable character, suffers changes of approaching and perception, acquiring new valences and new dimensions. Some of them are determined by the globalization trends - the international criminal law dimension and the European case-law dimension - others are influenced by the individual rhythm of development, evolution and acculturation of each state.

References

- Allen, Steven W... *Toward a Unified Theory of Retroactivity* (2010). New York Law School Law Review, vol. 54: 105-144.
- Arajärvi, Noora. *Between Lex Lata and Lex Ferenda? Customary International (Criminal) Law and the Principle of Legality* (2011). Tilburg Law Review: Journal of International and European Law, Vol. 15, No. 2: 163-183. SSRN: <https://ssrn.com/abstract=1968443>, accessed 10.07.2018.
- Beccaria, Cesare. *On Crimes and Punishment I* (1819). Translated from Italian by M.D.Voltaire, translated from the French by Edward D. Ingraham. Second American edition. Philadelphia Philipp H.Nicklin.
<https://play.google.com/books/reader?id=FRDtZqosmnEC&hl=ro&pg=GBS.PA26>, accessed 12.09.2018.
- Cantoni v France*, Judgment 22 October 1996. www.echr.coe.int, accessed 14.09.2018.

- Caringella, Francesco; Luigi Levita. *I principi Del diritto penale* (2016). Dike Giuridica Editrice, Barletta.
- Coeme & Others v Belgium* Judgment 22 June 2000, www.echr.coe.int, accessed 14.09.2018.
- Constitution of the United States. <https://www.law.cornell.edu/constitution/articlei#section9>, accessed 12.09.2018.
- Crișan, Iulia. *The principles of legality”nullum crimen, nulla poena sine lege” and their role* (2010). Effective Justice Solutions, Effectius Newsletter, Issue 5.
- Custers & Others v Denmark* Judgment 3 May 2007. www.echr.coe.int, accessed 14.09.2018.
- Custers, Deveaux and Turk v Denmark* Judgment 3 May 2007. www.echr.coe.int, accessed 14.09.2018.
- D’Amato, Anthony. *The Concept of Custom in International Law* (1971). Cornell University Press.
- David, René; Brierley, John E.C... *Major legal systems in the world today* (1978). 2nd edition. Free Press.
- Dumitrache, Elena. *Contre pe aplicarea globală a legii penale mai favorabile* (2014). Lumea Justiției, 23 mai 2014. www.luju.ro, accessed 16.09.2018.
- Erhard, Werner H.; Jensen, Michael C.; Zaffron, Steve. *Integrity: a positive model that incorporates the normative phenomena of morality, ethics and legality* (2009). <http://ssrn.com/abstract=920625>, accessed 11.09.2018.
- Fuller, Lon. *The Morality of Law* (1964). Yale University Press;
- Gillan and Quinton v the United Kingdom* Judgment 12 January 2010. www.echr.coe.int, accessed 14.09.2018.
- Greer, Steven. *The European Convention on Human Rights: Achievements, problems and prospects* (2006). Cambridge University Press.
- Ibbotson v United Kingdom* Decision of the European Commission of Human Rights 21 October 1998. www.echr.coe.int, accessed 14.09.2018.
- International Military Tribunal of Nuremberg, Judgment of 1 October 1946. *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22* (22nd August, 1946 to 1st October, 1946). https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf, accessed 13.09.2018.
- Jamil v France* Judgment 25 May 1995. www.echr.coe.int, accessed 14.09.2018.
- Kafkaris v Cyprus* Judgment 12 February 2008. www.echr.coe.int, accessed 14.09.2018.
- Kreß, Claus. *Nulla poena nullum crimen sine legeI* (2010). Max Planck Encyclopedia of Public International Law. Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press.
- Lim, Brendan. *The Normativity of the Principle of Legality* (2013). 17 Melbourne University Law Review 372. <http://www.austlii.edu.au/au/journals/MelbULawRw/2013/17.html>, accessed 10.09.2018.
- Magna Carta Libertatum 1215. <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation>, accessed 12.09.2018.

- Montesquieu, Charles. *L'esprit des Loix* (1749), 1749, Barillot, & Fils.
http://classiques.uqac.ca/classiques/montesquieu/de_esprit_des_lois/partie_1/de_esprit_des_lois_1.htm.
- Murphy, Cian C... *The principle of legality in criminal law under ECHR* (2010). European Human Rights Law Review, Vol. 2. SSRN: <https://ssrn.com/abstract=1513623>, accessed 10.09.2018.
- Peristeridou, Christina. *The principle of legality in European criminal law* (2015). Dissertation to obtain the degree of Doctor at Maastricht University, on the authority of the Rector Magnificus, Prof. dr. L.L.G Soete in accordance with the decision of the Board of Deans, to be defended in public on Friday 11 December 2015. Available at <https://cris.maastrichtuniversity.nl/ws/files/728007/guid-62d84558-50bc-4711-9cd2-29525c99e05c-ASSET1.0>, accessed 10.09.2018.
- Popescu, C. L... *Reincriminarea insultei și calomniei* (2007). Noua revistă de drepturile omului nr. 1.
- Predescu, Ion; Safta, Marieta. *The principle of legal certainty, basis for the rule of law landmark case-law* (2009). Buletinul Curții Constituționale nr. 1. www.ccr.ro, accessed 15.09.2018.
- Prosecutor v Lubanga Dyilo*, Decision on the Confirmation of Charges ICC-01/04-01/06, 29 January 2007. https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF, accessed 15.09.2018.
- Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, 3 May 1993. <http://www.un.org/icty/legaldoc-e/index-t.htm> accessed 14.09.2018.
- Rome statute of the International Criminal Court adopted on 17th July 1998, entered into force on the 1st July 2002.
- Sautenet, Vincent. *Crimes Against Humanity And The Principles Of Legality: What Could the Potential Offender Expect?* (2000). Murdoch University Electronic Journal of Law, Volume 7, Number 1. March 2000.
- The Judgment of the International Military Tribunal for the Trial of German Major War Criminals, 30 September and 1 October 1946. https://www.loc.gov/r/frd/Military_Law/NT_major-war-criminals.html, accessed 12.09.2018.
- Van Schaack, Beth. *The principle of legality in International criminal law* (2009). American Society of International Law, Vol. 103, No. 1, March 2009; Santa Clara Univ. Legal Studies Research Paper No. 03-11. SSRN: <https://ssrn.com/abstract=1758060>, accessed 10.09.2018.
- Welch v UK* Judgment 9 February 1995. www.echr.coe.int, accessed 14.09.2018.

Dragica Popesku*

CONFLICT BETWEEN PERSONALITY RIGHTS AND FREEDOM OF EXPRESSION

The European Convention on Human Rights equally guarantees freedom of expression, as well as the right to respect for private and family life, while allowing the restriction of freedom of expression for the protection of reputation or rights of others, which include personality rights, in addition to human rights guaranteed by this Convention. The Constitution of the Republic of Serbia guarantees freedom of expression and freedom of the media, as well as inviolability of personal psychological integrity, confidentiality of letters and other means of communication, and protection of personal data, among other human and minority rights. However, these rights and freedoms may be restricted by law if the restriction is allowed by the Constitution for the purposes permitted thereby, to the extent necessary for the constitutional purpose of the restrictions to be satisfied in a democratic society and without prejudice to the substance of the protected right. In limiting human and minority rights, all state bodies, and courts in particular, are obliged to take into account the essence of the rights which are restricted, as well as the importance of the purpose of the restriction, the nature and extent of the restriction, the relationship of the restriction and its purpose, and the existence of a way that the purpose of the restriction may be achieved by a smaller limitation of rights.

The conflict between personality rights and the freedom of expression in connection with disclosure of information, as a conflict between two or more identically guaranteed rights, is resolved by allowing or denying the right to a reply, correction or revocation to persons whom the information relates to. This conflict can be solved by restricting the right to information at the disposition of the editor-in-chief, or by the court's decision if the editor-in-chief of a public medium is ordered to publish a reply or correction of the published information, regardless of the existence of his guilt as a respondent, or in the litigation over a claim for publishing a revocation of information in which case the guilt of the author of the information i.e. the responsible editor/editor-in-chief/editor of the section must be determined, for the damage incurred due to the publication of the information.

Civil law protection of personality rights from violations in mass media is predominantly carried out through special provisions of the Law on Public

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Information and Media, as well as through general provisions of the Law on Obligations and the Law on Civil Procedure. According to special provisions, the means of this protection are publishing a reply and correction of information, prohibition to republish information; right to share in profit of the founders of the media outlet; publication of information on the outcome of criminal proceedings and monetary compensation of damages, which is carried out per special provisions of the Law on Public Information and Media, but also in accordance with general regulations. Other means of legal protection of personal goods under general regulations are the unjust enrichment claim and the declaratory claim to proclaim violation of rights. The mentioned legal means of protection are the legal answer to the problem which was created by the conflict of a personal good, as a potentially or already threatened interest, and published information, which attacks the personal goods as objects of the personality rights.

Keywords: *human rights, personality rights, freedom of expression, civil law protection, conflict of law.*

1. Human rights and personality rights

Human rights represent a set of principles, standards and norms that serve to protect man, his dignity and the provision of living conditions that enable him to develop and satisfy his spiritual and biological needs (Avramov, Kreća, 2003: 313 and further).

Personality right (right to person) represents a set of legal norms which regulate relationships between people regarding personal goods, as objects of these rights; this right includes several personality rights. The objects of *personality rights* are certain personal goods *linked to man: as a biological being* (the right to life and the right to physical integrity – life, health, physical wholeness); *as a social being* (the right to a name, which also includes a pseudonym, a nickname, a title, an artistic name, which are all labels for recognizing a person); and *linked to man's mental integrity – mental health* (Finžgar, 1988: 9-12; Avramov, Kreća, 2003: 313; Gavela, 2000: 27-31).¹ This right falls within *subjective civil rights* (Avramović, Stanković, 1996: 698),² as the right

¹ Gavela considers that the term “personality rights” might lead to the belief that these are the rights of the persons prominent in society, and proposes the term personal, non-material rights, to make it obvious that these are rights of each person. Contrary to this, Finžgar considered exactly personality rights to be a better term, as he has titled his work cited herein, because personal rights include family rights, and some personal property rights, such as easement, while personality rights represent the rights of one's own person.

² A *subjective right* is an *authority* the right holder on the basis of objective law; there are property, obligational, personal, copyright and other authorities. A subjective right it is not just an individual authorization, such as the right to use things, the right to the prohibition of use etc. but also a *set of related authorities* which concern a right – personal right implies the right to undisturbed enjoyment of the right, e.g.

holder's authority³ to enjoy and achieve his personal good, as the object of personality rights, and to require from others not to be disturbed therein. The right holder, who is the subject of personality rights, may request compulsory enforcement from a competent authority, in order to exercise the rights to his personal good, and he is entitled to *enjoy* his personal goods (to use them and to *dispose* of them) (Stanković, Vodinelić, 2005: 124) and to *protect* them. The right holder may dispose of a certain personal good *factually and legally*, with consent, a waiver or transfer of rights to another person, for a fee or free of charge (Stanković, Vodinelić, 2005: 124-125).

Personal goods are non-material in nature, but their violation creates the right to compensation. They begin by birth of a natural person or by registration of a legal person, and cease by their death or deletion from the register. Right holders may not renounce personal goods, because they are recognized by the norms of public authority (legal order) (Gavela, 2000: 41). However, there is a difference in the possibilities of exercising and protecting these rights in relation to the right holders, as well as the types of personality rights (Popesku, 2016: 47-51), because according to our regulations, monetary compensation of damages, as satisfaction, may only be awarded to a natural person.

2. Violation of personality rights by publishing information in the media

The basis of all personality rights of the person is *human dignity*, which the Constitution of the Republic of Serbia⁴ places among human rights and freedoms. The reputation of the state is proportionate to the respect for human dignity of its residents, and the dignity of individuals has a return effect on the state legal order.⁵ It postulates life

to private life, to prohibit anyone to disturb one's privacy, to allow certain persons to use certain aspects of one's privacy (image, voice, private correspondence, private life information, use of own personal good, etc.). Subjective civil rights are *dominion rights* (authority rights) which authorize the right holder to carry out his will directly on the object of the right (to use a personal good, to enjoy it); *request* (demand) *rights*, which authorize the right holder to demand a certain person to execute an active or passive act (to hand over a personal record, to pay a fee for its use, to revoke an offensive claim, etc.); *participation* (involvement) *rights*, which authorize the right holder to participate in the management of a thing (good), to make a business decision; *transformative rights* (legal powers, shaping rights), which authorize the right holder to change the legal situation by a declaration of will – to waive a right, to fire someone, to determine the amount of compensation, etc.).

³ Which may be both a natural person and, in certain situations, a legal person.

⁴ See Article 23 of the Constitution of the Republic of Serbia („Official Gazette of RS, no. 98/2006).

⁵ See Vračar, 1983, p. 163-181 – Human dignity, as a social manifestation of a specific trait of humans, as individuals, but also groups and formed communities, is a civilizational-cultural and historical fact, which influenced the appearance of the state legal order; condition for and consequence of human freedom, self-affirmation and self-determination of personality, as a sociological phenomenon and a human measure of social forms and institutions in which a person lives, because of the interdependence of human dignity and the

worthy of man, as a human being; thus this human right applies only to natural persons. Personal dignity is the basis of all other personality rights, and thus the right to preserve the physical integrity of the person (prohibition of beating, physical punishment), mental integrity (prohibition of insulting, humiliation, discrimination), the right to freedom and security (prohibition of slavery, servitude and forced labor), the right to respect for private and family life, the right to free development of personality, etc. Personal dignity can be harmed by the same actions which harm honor and reputation – incorrect, incomplete or inaccurately conveyed information, but also by providing accurate information from the intimate sphere of personality, i.e. actions which violate the right to privacy.

Article 23 Paragraph 1 of the Constitution of the Republic of Serbia prescribes the inviolability of human dignity, which everyone is obliged to respect and protect. It can be violated by false, but also offensive statements about a person, because human dignity is also violated due to loss of reputation in society or loss of a personal sense of honor. Therefore, the right to human dignity, as a constitutional category, is guaranteed as a special type of personality right. Also, the European Convention on Human Rights indirectly protects human dignity as a fundamental human right by prohibition of torture (Article 3), ban on slavery and forced labor (Article 4), the right to liberty and security (Article 5), the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), prohibition of discrimination (Article 14), etc.

The Law on Public Information and the Media,⁶ in Article 79, defines personal dignity as a right that includes the right to honor, reputation and piety, although it has a far wider spectrum (Vračar, 1983: 163-181).⁷

3. The conflict between personality rights and the freedom of expression

reputation of state law institutions, because the reputation of the state is often the reflection of its authority, which depends on the dignity of its own citizens.

See the Constitution of the Republic of Serbia, Art. 23-28.

See Art. 3-4 of the European Convention on Human Rights (ECHR).

⁶ Law on Public Information and Media (Official Gazette of RS, nos. 83/2014, 58/2015, 12/2016).

⁷ This right is “requirement of identity and proof of integrity of a person, as a true measure of man and his individuality”, as the author points out, and further explains it as an essential, constitutive characteristic of a person, embedded in the entire social being of man, as a substantial component, on which his character in the environment he belongs to depends.

All mentioned personality rights, i.e. the right to personal dignity, the right to honor and reputation, the right to piousness, the right to authenticity, the right to privacy in all its respects (the right to a private life and the right to personal records in natural persons and the right to trade secret in legal persons), the right to a name (the right to a company name in legal persons), are often targets of violation via information in the media.

The essence of the legal problem of the conflict between personality rights and the freedom of expression is the identical legal power of rights in conflict. Namely, the Constitution guarantees freedom of the press, as well as certain personality rights, which are also guaranteed by international acts, such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights. These, as well as generally accepted rules of international law and ratified international treaties, are directly applicable, as an integral part of our legal system.

The court determines whether there is a justified (legitimate) interest of the public to learn certain information published in the mass media through a method of *qualitative and quantitative assessment* between the threatened interest (personal good, like honor and reputation,⁸ privacy, human dignity) and the justified public interest for publishing the information (Vodinelić, 1978: 343-364, esp. 353-360).⁹ This is performed by a *qualitative* assessment of the ranks of the threatened interest and the interest that is sought to be achieved by informing the public, i.e. by assessing the hierarchy of interests which are not protected by acts of the same legal power.

Also, if the interests are protected by acts of the same legal power, the court determines the existence of justified public interest by *quantitative* assessment of the representation of opposing values and their intensity, taking in regard all circumstances of the particular case. It is therefore not enough for the position of a personal good (e.g. personal dignity), to be in a higher rank than the interest for publishing the information, but the *representation* of these interests in the particular case is important, i.e. whether one or more interests, of one or more persons (also applies to legal persons) is threatened or achieved. The relationship between the *intensity* of the threatened interest (personality rights) and the interest that is sought to be achieved by publishing

⁸ This right is guaranteed by Art. 23 and 25 of the Constitution, through the right to inviolability of human dignity and inviolability of psychic integrity, and it is protected by the provisions of Article 200 of the Law on Obligations.

⁹ Qualitative and quantitative measurement of interest; criterion of cumulation of interest and intensity: whether one or more are achieved or threatened, and how many interests of one or more persons.

information is important. The proportion between the quality (rank) of interest and quantity of interest is examined, by cumulating the represented threatened interests and their intensity and the interests which are sought to be achieved by publishing information. Therefore, the freedom of expression, guaranteed by the European Convention and the Constitution of our country, may be restricted in order to protect the right to authenticity (identity) of a person, as a personal good and a threatened interest protected by a legal act of a lower rank (the Law on Public Information and Media)¹⁰, if the representation and intensity of that interest at the given moment are higher in relation to freedom of expression (Popesku, 2014: 38-46).

4. Civil law protection of personality rights against information in the media

The means of civil law protection of threatened personal goods which are in conflict with the freedom of expression in accordance with the Law on Public Information and Media are predominantly the reply to information and correction of information, claim for monetary compensation of damages (material and non-material), claim for profit sharing, claim for prohibition of republishing information, claim for publishing information on the outcome of criminal proceedings. These represent a restriction of freedom of expression.

4.1. Right to reply to information

This right arised due to the need of the reply and correction of information to co-exist as two independent legal remedies, which at one time had a mutually suspensive effect when the right to reply was not claimable, and there was no direct claim for exercising the right to correction.

Under the provision of Article 83 Paragraph 3 of the Law on Public Information and Media, it is envisaged that the proceedings on the publication of the *reply to information*, shall be limited only to establishing the facts regarding the obligation of the editor-in-chief to publish the reply, so it is sufficient for the person who the information suitable to violate his right and interest relates to claim that the information is incorrect, incomplete or inaccurately conveyed. The Court assesses only the information's ability to violate the right and interest of the respondent, i.e. the plaintiff, and determines whether, pursuant to Article 98 of the Law on Public Information and

¹⁰ See Article 79 of the Law on Public Information and Media.

Media, the formal conditions on which the editor-in-chief's obligation to publish the response depends are fulfilled.

4.2. *Right to a correction of information*

In proceedings on the publication of a *correction of information*, pursuant to Article 84, Paragraph 2 of the Law on Public Information and Media, the court determines in detail the violation of the plaintiff's rights and interests and whether the primary information is correct, complete and accurately conveyed. This is the difference between provisional protection by the reply to information and reactive protection provided by the correction of information.

4.3. *Value judgments*

The aforementioned means may not be used to react to value judgments whose truth or accuracy cannot be ascertained, which also may not be disputed, nor may they be replied to or corrected by correction of information. Namely, value judgment is someone's opinion on a certain matter, like a personal attitude about a case, a phenomenon, a personality. Therefore, it is not subject to proving its truthfulness, but according to the assessment of other subjects it may be correct or incorrect.

Information is true if it is congruent with actual facts. The obligation of journalistic due diligence, as stipulated by Article 9 of the Law on Public Information and Media, requires the delivery of true information, in order to protect both the individual and the public interest. It is therefore the duty of a journalist not to publish information for which he could not obtain the assurance that it is true (correct) according to the circumstances of that case, and according to the standard of obligation of journalistic due diligence, which shall not be applied to value judgments.

In our law, factual statements which can be proven incorrect and/or incomplete or inaccurately conveyed may be replied to. I consider that a value judgment which is a product of ignorance of facts, and thus an inaccurate estimate of the actual situation, could be the subject of a reply. After all, replies to or corrections of factual allegations from information which include both factual and value judgments, as mixed statements, are very common.

According to Article 98 Paragraph 14 of the Law on Public Information and Media, publication of a reply to information (in the sense of Article 100 of said Law and the correction) shall not be allowed if the publication of the content of the reply may

provoke a ban on the distribution of that information, criminal or civil law liability; unauthorized and offensive statements may be reacted to by a claim for damages or a claim for non-publication of information.

4.4. Revocation

Correction of information as an institute is not regulated by the provisions of the Law on Obligations, but is referred to, pursuant to the provision of Article 199 of the Law on Obligations, as a form of non-monetary compensation for non-material damage, such as withdrawal of a statement – revocation, in which case the violator’s guilt is one of the elements for determining civil liability for damage. In media litigation, revocation of information is rarely used, although it does represent a means of defense against violation of personality rights for the right holder, to remove the cause of the violation contained in incorrect and incomplete information, as does the correction. The basic function of these institutes is reaction to information, by a claim for removal of invalid information, which concurrently informs the public on correct and complete information. Therefore, they may constitute a form of non-monetary compensation for non-material damages, i.e. a type of satisfaction, in the sense of the general provision of Article 199 of the Law on Obligations, in the event of a harmful consequence; the request for the *publication of judgment* by a claim for *proclaiming* a violation of rights, which is prescribed by the Civil Procedure Act has the same purpose.¹¹

Contrary to revocation, correction of information, as a means of protecting personality rights from violations in the media regardless of the violator’s guilt, is statuated by the provisions of the Law on Public Information and Media, which is a *lex specialis*.

Although I consider that, in the case of publication of information which contains a value judgment arising from the assessment of objective facts, it would be possible to allow the reply to information, as well as correction and revocation of information, our law recognizes only the correction and revocation of incorrect (false), incomplete and inaccurately conveyed factual claims. Therefore, the right to reply or correction is not prescribed by law for value judgments of an offensive or other unacceptable character, which are products of someone's opinion, as a subjective attitude.

¹¹See Article 194 of the Law on Civil Procedure (“Official Gazette of RS”, nos. 72/2011, 49/2013 (CC ruling), 74/2013 (CC ruling), 55/2014).

Although revocation is *de lege lata* a form of non-monetary compensation for non-material damage, the liability for which is determined by the violator's guilt and the unlawfulness of the act, if it were *de lege ferenda* statuated by special provisions, as correction is, whether the violating act is harmful, allowed or unlawful, would be of no influence for submitting a reactive claim, since the reactive claim does not have a restitutive character (restoring the state before the violation). It has the function to prevent resumption of the violation after it has been established that the information is untrue, and the violation of (or threat to) the right is interrupted by correction or revocation of the statement by the offender (Vodinelić, Krneta, 1978: 929).

4.5. Delicts

In continental law, thus also in our country, the concept of the delict is different from *common law*, where a particular act is considered a civil wrong if there is an individual tort with already defined elements – the tortuous act. According to our law there is no special delict for defamation (violation of reputation), so general provisions of the Law on Obligations and special provisions of the Law on Public Information and Media apply, if that personal good is violated by information published in the media.

The European Court of Human Rights has not taken an explicit position on the right to publication of reply or correction of information. The problem exists because of the responsibility of the respondent state for the violation of rights committed by private individuals, since an application to that court may be filed only against a state, while the disputed information is disclosed and replied to, as a rule, by private persons. Therefore, an interpretation of Article 10 of the European Convention has been suggested, based on the justification of the restriction of freedom of speech, in order to protect the reputation or rights of others.

5. Other means of protection of personality rights

Civil law protection of personality rights is envisaged by general provisions of the Law on Obligations, which is a *lex generalis*, and pursuant to Article 157 of this Law, it may be demanded that a court or other competent authority order cessation of an action by which the integrity of human person and family life is violated and other rights pertaining to his person, by threatening the payment of a certain amount of money, determined as a lump sum or per time unit, to the benefit of the person suffering damage. In addition, the provision of Article 156 of the Law on Obligations regulates the request for the elimination of the risk of damage, which can be applied to the

personality rights, so that everyone may demand from another that he eliminates a source of danger threatening considerable damage to him or to an unspecified number of persons, as well as to refrain from an activity causing disturbance or danger of loss, should the ensuing disturbance or loss be impossible to prevent by adequate measures. In addition, the violated person has the right to compensation for material damage caused by an insult to honor or spreading of false statements concerning his past, knowledge, ability or anything else of the kind by another person who is aware or should have to be aware that these are untrue, pursuant to Article 198 of the Law on Obligations. The right to fair monetary compensation of non-material damage shall be exercised by the damaged party under Article 200 of the Law on Obligations in the event of violation of reputation, honor, liberty or personality rights, as well as for fear.¹² According to Article 210 of the Law on Obligations, condictional protection of violated rights is also possible, by requiring the restitution of property acquired without ground and, should this be impossible, compensation in the value of benefits gained.

Civil law protection of personality rights from violations in mass media is also carried out through general provisions of the Law on Civil Procedure, by a claim for proclaiming the violation of rights, which is a form of declaratory protection.

6. Types of claims

6.1. Claim as an initial civil action

A claim, as an initial civil action for the initiation of civil proceedings, is a written submission, containing the assertion of the right holder that his right has been violated, through which he, personally or via an authorized person, requests of the court to provide him with the protection of the right, in relation to the respondent, which is accomplished by court via demand set in the claim (*petitum*) (Poznić, 1982: 183-186).¹³

According to the type of substantive law they protect (Jakšić, 2006: 218),¹⁴ claims are divided into *reivindicative* (property claim for restitution of individually designated items), *paulian* (for rescinding legal transactions), *publician* (for regaining things based on a stronger ownership basis for possession), *condictions* (for restitution due to

¹² It has been stated that the right to non-monetary compensation of non-material damage due to violation of personality rights is regulated by Article 199 of the Law on Obligations.

¹³ Compare: Jakšić, 2006, p. 217-218; Stanković, Vodinelić, 2005, p. 230; Keča, 2011, p. 163-168; Stanković, 2004, p. 317-331; Poznić, Rakić-Vodinelić, 2010, p. 234-237; see Avramović, Stanković (1996), p. 742, 743.

¹⁴ Types of claims based on the type of substantive law in francophone and Anglo-Saxon law – possessory, inheritance, petitory (to obtain a certain right).

acquiring without ground), *negatory* (for the protection of (property) rights in the event of disturbance of the owner in the exercise of rights), *petitory* (for the acquisition of a certain right), *confessory* (petitory claims for the protection of easement), *possessory* (possessional) and others (Poznić, 1982: 186; Stanković, 2004: 331-332; Avramović, Stanković, 1996: 20, 138-139, 299, 387, 485-487, 599, 620-621). In protecting personality rights from violation in the media, mostly petitory, quasi-negatory and conduction actions are used.

According to the type of protection sought, claims are divided into *condemnatory*, *constitutive* and *declaratory* claims. *Condemnatory* claim (for condemnation to performance), demands the court to order certain conduct to the respondent, to perform something, forbear or avoid. *Constitutive* (transformative) claim demands changing the content of a right or termination of a civil law relationship (e.g. termination of a contract, etc.). *Declaratory* claim (claim for determination) demands the court to determine the existence or non-existence of a legal relationship or the authenticity or non-authenticity of an instrument (Stanković, Vodinelić, 2005: 230),¹⁵ and, in accordance with Article 194, Paragraph 3 of the applicable Law on Civil Procedure, the existence or non-existence of facts, if so provided by law or other regulation.¹⁶

In the process of protecting personality rights from publication of information in mass media, in addition to a declaratory claim for proclaiming a violation of the right via information, constitutive (e.g. for termination of a contract on use of personal records), and condemnatory claims are also used, which include both negatory and quasi-negatory actions (for protection of rights in case of disturbance of the right holder in the exercise of rights). Claims for acquiring without ground (condictions), claims for compensatory damages (for restitution or satisfaction) are also condemnatory claims, as are claims for removal (reactive), which include the claim for publication of revocation, or correction.

6.2. Claim for publication of a reply to information

It is regulated by provisions of the Law on Public Information and Media and it is condemnatory (condemnation to performance of publication), but not reactive, because

¹⁵ See Avramović, Stanković, 1996, p. 109, 294, 297.

¹⁶ Regarding the protection of personality rights, the provision of Article 194, Paragraph 4 of the Law on Civil Procedure provides that a claim to determine a violation of personality rights may be submitted irrespective of whether a request for compensatory damages or some other request have been made, in accordance with a special law.

the reply does not remove the state of violation of the right, since the violation of personality rights is not a condition for using this means, which does not lead to meritorious protection of personality rights, as a claim for publication of correction or revocation does, in which case a petitory action is brought. It is used to obtain the right to remove the violation via damaging information and it is thus determined whether the right of the plaintiff is violated by information and whether the information is incorrect or incomplete.

6.3. Negatory claim (*actio negatoria*)

A claim to negate the rights of the respondent, negatory action (*actio negatoria*)¹⁷ is usually used in case of disturbance of the plaintiff's property rights, in order to confirm the non-existence of rights of others, due to the plaintiff's absolute property right. It may also be used to protect personality rights, in cases of publication of information or personal records in the mass media. The respondent journalist is then obliged to prove the merit of his right to interference, and the plaintiff, as the holder of personality right, which is absolute, does not prove the unlawfulness of the interference action, but the act itself, considering that the disturbance of the right can also be carried out by unlawful omission of an action.

The right holder may also use this claim for protection from verbal harassment in opposing his rights and asserting that there is a right of the person who disturbs him therein. It may be used in cases of asserting that incorrect or incomplete information in the media has disturbed a person in the peaceful enjoyment of his rights, when the person who disturbs (interferes with) the right holder's exercise of his right, is demanded to cease the action of disturbance, establish the previous state and refrain from future similar disturbance.

¹⁷ See: negatory action, in Avramović, Stanković, 1996, p. 387; Rašović, 2006, 941-966.

The purpose of the claim is in the content of the property right and in the authorization of the right holder to exclusively use and protect it against groundless disturbance. Therefore the owner (but also the co-owner, joint owner, assumed owner) in litigation over this claim, as the plaintiff, does not prove the absence of the right of the respondent to harassment, because the property right presupposes the plaintiff's absolute authority (this may also be applied to personality rights). A negatory claim is also brought against a person who admits that he does not have the right to interference; property is also disturbed by illicit imissions, which are disturbances that do not constitute a right themselves, but permanently or periodically limit the property right. The owner who denies the right to interference to third parties needs not be the actual holder of the thing. If the respondent who interferes is the holder, the owner shall submit a reivindicative claim against him, and if the owner is also the holder of the thing, a possessory claim may be used – for disturbance of possession.

Negatory action may be brought irrespective of the occurrence of damage and the guilt of the person who disturbs the right. The request contained in this claim may also be contained in a provisional measure. Whether it is a delict or unlawful exercise of a right (abuse of rights) is not of influence, but whether the claim is submitted at the time of the disturbance; if it has ceased, the holder of personality rights may submit it, if there is a risk of repetition of the same act of disturbance (Avramović, Stanković, 1996: 388).

6.4. *Quasi-negatory claim (actio quasinegatoria)*

In the event of repeated disturbance by publishing incorrect, incomplete or incorrectly conveyed information, a quasi-negatory action is used in media law. It contains a request to prohibit the intended or repeated violation of personality rights, thereby seeking or preventing certain conduct of a person. The quasi-negatory action is then personal in legal nature, but it may also be an obligation claim if the respondent did not abide by the provisions of the contract on the use of a personal good. The quasi-negatory action for the protection of personality rights (e.g. in case of publication of a personal record) may be preventive and reactive and has the function of protecting subjective rights in the event of violation, in order to prevent the unauthorized use of a personal record or personal data (as a reactive reivindicative action in violation of property rights, which may also have the function of tendering the performance with due receivables, which serves its normal exercise – e.g. the right holder’s request for a fee for the use of the good to be paid or for the record to be returned) (Avramović, Stanković, 1996: 196).

6.5. *Claim for removal (reactive claim)*

This claim is aimed at removing a violation of or threat to a right. In a petitory action brought by the claim for the publication of correction or revocation, for the right to remove the violation caused via damaging information, it is determined whether the right holder’s personality rights have been violated and whether the information is incorrect or incomplete. A precondition for this claim is that, at the time of its submission, the right has been violated or that there was a risk thereof (Vodinelić, Krneta, 1978: 929). In this case, the reactive claim also has a preventive effect in relation to the possible consequence.

Furthermore, reactive protection is also achieved in an action brought by a quasi-negatory claim (claim for omission), in order to prohibit republishing of information, because the court ruling on the prohibition previously determines that the damaging information is incorrect or incomplete, in which way, in addition to the preventive, final

protection of personality rights it is achieved in the merits (Vodinešić, 2003: 106-108). Concurrently, the unlawfulness of the act of violation is not a condition for submitting a reactive claim (for correction), because it is used for removing the consequence caused by the violation and not punishing the violator, as in a claim for compensatory damages. Therefore, neither the perpetrator's guilt nor the occurrence of the damage are of any consequence for a reactive lawsuit.

Conclusion

Civil law protection of personality rights from violations in the mass media is carried out predominantly through special provisions of the Law on Public Information and Media and general provisions of the Law on Obligations and the Law on Civil Procedure. According to the special provisions of the Law on Public Information and Media, the means of this protection are publication of reply and correction of information, the prohibition to republish information; the right to share in profit; publishing information on the outcome of criminal proceedings; and monetary compensation of damages, which is carried out according to the special provisions of said Law, but also in accordance with the general provisions of the Law on Obligations, which provide for non-monetary compensation for damages in the form of revocation, correction of information and publishing court rulings.

Our law recognizes the correction and revocation of incorrect, incomplete and incorrectly conveyed assertions of facts. Value judgments, even those which are offensive or otherwise unlawful, are considered to be products of someone's subjective opinion, in relation to which the right to reply or correction is not allowed by law, but which may be reacted to by other means of protecting personality rights.

Literature

- Constitution of the Republic of Serbia, Official Gazette of RS, no. 98/2006
- Convention for the Protection of Human Rights and Fundamental Freedoms, Official Journal of Serbia and Montenegro – International Treaties, no. 9/2003
- International Covenant on Civil and Political Rights, Official Journal of SFRY, no. 7/1971
- Law on Public Information and Media, Official Gazette of RS, nos. 83/2014, 58/2015 and 12/2016
- Law on Obligations, Official Journal of SFRY, nos. 29/1978, 39/1985, 45/1989, 47/1989, Official Journal of FRY, nos. 31/1993, 22/1999, 23/1999, 35/1999, 44/1999
- Law on Liability for Violations of Human Rights, Official Gazette of RS, nos. 58/2003 and 61/2003
- Law on Civil Procedure, Official Gazette of RS, nos. 72/2011, 49/2013 – CC ruling, 74/2013 – CC ruling and 55/2014
- Law on Personal Data Protection, Official Gazette of RS, nos. 97/2008, 104/2009 – oth. law, 68/2012 – CC ruling and 107/2012
- Avramov, S. and Kreća, M., (2003) *Međunarodno javno pravo*. Belgrade: Službeni glasnik, p. 313-314.
- Avramović, S., Stanković, O. (1996) *Leksikon građanskog prava*. Belgrade: Nomos, p. 20, 138, 139, 299, 387, 485, 486, 487, 599, 620, 621, 698, 742, 743.
- Finžgar, A. (1988) *Prava ličnosti*. Belgrade: Službeni list SFRJ, p. 9, 43-44.
- Gavela N. (2000) *Osobna prava, I deo*. Zagreb: Faculty of Law in Zagreb, Institute for Civil Law and Family Law – Postgraduate Study for Research in Civil Law – Selected Topics, p. 41
- Jakšić, A. (2006) *Građansko procesno pravo*. Belgrade: Faculty of Law, p. 217-218.
- Keča, R. (2011) *Građansko procesno pravo*, Četvrto izdanje. Belgrade: University of Belgrade Faculty of Law, JP Službeni glasnik, p. 163-168.
- Popesku, D. (2016) “Povreda prava ličnosti od povreda u masmedijima”, *Compensation Proceedings and Insurance – Contemporary Challenges*. Belgrade: Intermex, p. 47-51.
- Popesku, D. (2014) *Zaštita prava ličnosti od povreda u masmedijima*. Belgrade: Poslovni biro, p. 38-46.
- Poznić, B. (1982) *Građansko procesno pravo*, Osmo izmenjeno i dopunjeno izdanje. Belgrade, p. 183-186.
- Poznić, B., Rakić-Vodinelčić, V. (2010) *Građansko procesno pravo*, Šesnaesto izmenjeno i dopunjeno izdanje. Belgrade: Savremena administracija a.d., p. 234-237.
- Rašović, Z. (2006) “Negatorna tužba”, *Archive for Legal and Social Sciences*, no. 1-2/2006. Belgrade, p. 941-966.
- Stanković, G. (2004) *Građansko procesno pravo*, Šesto izmenjeno i dopunjeno izdanje. Belgrade: IP Justicijan, p. 317-331.
- Stanković, O., Vodinelčić, V. (2005) *Uvod u građansko pravo*, Treće izmenjeno i dopunjeno izdanje. Belgrade: Nomos, p. 124-125, 230.
- Vodinelčić, V. (2003) *Pravo masmedija*, Belgrade: Faculty of Business Law.

- Vodinelić, V. (1978) “Prekoračenje slobode informisanja i povreda ličnosti (problem protivpravnosti)”, *Archive for Legal and Social Sciences*, no. 3/1978. Belgrade, p. 343-360.
- Vodinelić, V., Krneta, S. (1978) Lična prava. In: Stanković, O., Perović, S., Trajković, M. (ed.) *Enciklopedija imovinskog prava i prava udruženog rada (I-III)*, vol. I, Belgrade: Službeni list SFRJ, pgs. 904-936.
- Vračar, S. (1983) “Ljudsko dostojanstvo i državno-pravni poredak”, *Annals of the Faculty of Law in Belgrade*, 1-4/1983, p. 163-181.

Zubiydat Magomadova*

ILLEGALITY AND UNCERTAINTY

This article will consider the ratio of illegality and uncertainty; the essence of the principle of legality in the field of criminal law will be examined, the thesis of certainty as an inalienable and essentially necessary attribute of legality will be put forward. The certainty of the criminal prohibition is complex and can not be absolute, proceeding from the essence of the legal norm as a result of the generalization of patterns present in the society. At the same time, the article focuses on the uncertainty produced by the legislator consciously for the sake of achieving political goals, such uncertainty undoubtedly has a negative character and is an element and an aid to illegality (as an illustration of this statement, recent examples of the amendments of the Criminal Code of the Russian Federation are cited).

В данной статье будет рассмотрено соотношение незаконности и неопределенности; будет исследована сущность принципа законности в сфере уголовного права, выдвинут тезис об определенности как неотъемлемом и сущностно необходимом атрибуте законности. Определенность уголовно-правового запрета имеет комплексный характер и не может быть абсолютной, исходя из сущности правовой нормы как результата обобщения закономерностей, существующих в обществе. При этом, в статье делается акцент на неопределенности, продуцированной законодателем сознательно в угоду достижения политических целей, которая несомненно носит негативный характер, и является элементом и подспорьем незаконности (в качестве иллюстрации данного утверждения приводятся относительно недавние примеры редакций Уголовного кодекса Российской Федерации).

Keywords: *certainty, uncertainty, legality, illegality, criminal prohibition, criminal legislation.*

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На нынешнем этапе существования человечества уже невозможно представить бытие общностей людей вне регламентации всех сторон их жизни законом (в широкой интерпретации этого понятия). Пройдя довольно длительный путь своего становления, сам закон (как форма выражения правовых предписаний) претерпел как внешние, так и содержательные изменения; сегодняшние условия экзистенции людей, которые стремительно изменяются, также привели к изменению концептуальной роли закона и усложнению его сущности.

Идея законности применительно к уголовно-правовой сфере базируется на сформированной в римском праве формуле **nullum crimen, nullum poena sine lege** – нет преступления, нет наказания без указания на то уголовного закона.

Классическая трактовка принципа законности, сложившаяся в российской науке уголовного права, сводится к следующему:

1. преступность, наказуемость деяния и иные уголовно-правовые последствия его совершения определяются только уголовным законом;
2. лицо, признанное виновным в совершении преступления, несет обязанности и пользуется правами, установленными законом;
3. содержание уголовного закона следует понимать в точном соответствии с его текстом (Келина, Кудрявцев, 1988: 76).

В свою очередь, указанные положения нуждаются в дальнейшем их пояснении. Установление уголовной ответственности за те или иные общественно опасные деяния должно быть выражено в ясной форме, не предполагающей двусмысленностей, а именно – уголовный запрет должен быть определенным. Потенциальный адресат должен смочь предвидеть наступление негативных для себя последствий в виде наказания в случае преступного поведения; таким образом и осуществляется функция общей превенции.

Следовательно, закономерно предположить, что определенность является неотъемлемым атрибутом законности, притом сущностно необходимым.

Однако, важно отметить, что определенность не может быть абсолютной. Это связано с тем, что уголовно-правовой запрет является результатом обобщения, некой моделью, что и предопределяет высокую степень его абстракции – “...как в остальных искусствах, так и в государственном устройении невозможно изложить

письменно все со всей точностью. Ведь законы неизбежно приходится излагать в общей форме, человеческие же действия единичны” (Аристотель, 2015: 70).

Сознательно избранная законодателем неопределенность находит свое выражение через использование оценочных понятий, установление относительно определенных санкций. Такой дискурс позволяет норме права быть динамичной, „долго живущей“, кроме того, относительно определенные санкции способствуют индивидуализации наказания. Такое состояние норм права является естественным и целесообразным.

Тем не менее, столь благая мысль сталкивается на практике с неадекватным исполнением, которое связано с различного рода причинами: ошибки юридической техники (которые, к сожалению, неминуемы); скоростность принятия новых норм в угоду достижения каких-либо политических целей, намеренное создание неопределенных норм для „выборочного“ использования при необходимости; редакция уголовного закона как „демонстрация“ решения властью тех или иных проблем, имеющих в обществе. Все указанные обстоятельства в отдельности и в совокупности приводят к неопределенности уголовно-правовых норм.

Тенденциозность некоторых изменений, внесенных в Уголовный кодекс Российской Федерации, может быть проиллюстрирована следующими примерами:

1. Редакция статьи 148 Уголовного кодекса Российской Федерации

Произведенная редакция статьи 148 Уголовного кодекса многими специалистами связывается с резонансным делом Pussy Riot. Такой вывод небезоснователен:

1. *темпоральный аргумент* - Акция в храме Христа Спасителя имела место быть **21 февраля 2012 г.**; **17 августа 2012 г.** был оглашен обвинительный приговор (действия участниц “панк молебна” были квалифицированы по ч. 2 статьи 213 Уголовного кодекса, предусматривающей ответственность за хулиганство по мотивам религиозной ненависти или вражды, а также мотиву ненависти в отношении какой-либо социальной группы); проект поправок был внесен в Государственную Думу Федерального Собрания Российской Федерации **26 сентября 2012 г.**; изменения статьи 148 вступили в силу с **1 июля 2013 г.**

2. *сущностный аргумент* – адвокатское сообщество выразило несогласие с квалификацией действий фигуранток дела в открытом письме, опубликованном на сайте Новой газеты 2 августа 2012 г. (подписано 35 адвокатами, в том числе заслуженным юристом России Генрихом Падвой и Юрием Шмидтом – экс-адвокатом Михаила Ходорковского); позиция адвокатов сводилась к отсутствию в действиях участниц акции состава преступления; авторы письма, среди прочего, ссылались на то обстоятельство, что в Уголовном кодексе “нет статьи об ответственности за “оскорбление религиозных чувств граждан” ... “такую ответственность ... предусматривает часть вторая статьи 5.26. Кодекса об административных правонарушениях” (Адвокатское сообщество публично выступило в поддержку Pussy Riot (ОТКРЫТОЕ ПИСЬМО) (2012, 2 августа), Новая газета, доступно по ссылке: <https://www.novayagazeta.ru/news/2012/08/02/58359-advokatskoe-soobschestvo-publichno-vystupilo-v-podderzhku-pussy-riot-otkrytoe-pismo>, дата обращения (28.09.2018.); однако, **такая формулировка была внесена в Уголовный кодекс как раз-таки Федеральным законом от 29.06.2013 г. № 136-ФЗ, вступившим в силу 1 июля 2013 г.**
3. *статистический аргумент* – согласно официальным данным Судебного департамента при Верховном суде Российской Федерации, а именно отчетам о числе осужденных по всем составам преступлений Уголовного кодекса Российской Федерации за период с 2014 г. по 2017 г. по части 1 статьи 148 было осуждено: 2014 г. – 1; 2015 г. – 1; 2016 г. – 5; 2017 г. – 4 (согласно сводным статистическим данным о состоянии судимости в России за период с 2014 по 2017 гг., представленным на официальном сайте Судебного департамента при Верховном суде Российской Федерации).

Следовательно, исходя из приведенных выше аргументов, позволительно утверждать, что редакция статьи 148 Уголовного кодекса, во-первых, была произведена в отсутствие на то объективных причин (в нарушение необходимых условий криминализации деяния - для признания того или иного деяния последнее должно иметь такое качество как распространенность, при этом статистические данные говорят сами за себя); во-вторых, носит политизированный характер.

В качестве дополнительного основания нашим рассуждениям приводим следующее высказывание выдающегося теоретика уголовного права Таганцева Н.: “Устойчивость правовых норм проверяется по преимуществу условиями их исторического развития. Право создается народной жизнью, живет и видоизменяется вместе с ней; поэтому понятно, что прочными могут оказаться только те положения закона, в которых выразились эти исторически сложившиеся народные воззрения; поэтому понятно, закон не имеющий корней в исторических условиях народной жизни, всегда грозит сделаться эфемерным, сделаться мертвой буквой” (Таганцев, 2001: 28).

Бабаев М. и Пудовочкин Ю. произвели удачную классификацию так называемых “мертвых норм” Уголовного кодекса; одна из разновидностей описывается ими следующим образом: **„мертворожденные“ нормы** ... причины такой патологии ... содержание самой нормы, отражающее незнание законодателем объективных потребностей и реальной практики уголовно-правовой борьбы с преступностью, слабую криминологическую экспертизу законопроектных предложений, позволяющее оценить эту норму как социально необусловленную, ненужную и лишнюю в законе. Это, как правило, **„нормы-двойники“**, **криминализирующие ранее уже объявленными преступными деяния, а также нормы, принятые в демонстрационных целях при отсутствии реальной потребности в использовании уголовно-правового инструментария для решения той или иной проблемы с заведомым пониманием того, что она в действительности работать не будет**“ (Бабаев М., Пудовочкин Ю., 2014: 163).

2. Редакция статьи 110 Уголовного кодекса Российской Федерации включение в последний новых статей – 110.1 и 110.2

В начале 2017 г. в России в ведущих СМИ (Берг Е. (2017, 17 февраля), доступно по ссылке: <https://meduza.io/feature/2017/02/17/gorodskaya-legenda-chto-stoit-za-igroy-siniy-kit-i-vspleskom-interesa-k-suitsidalnym-pablikam>, дата обращения 28.09.2018; Милкус А. (2017, 11 февраля), доступно по ссылке: <https://www.kp.ru/daily/26642.7/3660934/>, дата обращения 28.09.2018) начала массово тиражироваться информация о так называемых “группах смерти”, орудующих в популярных социальных сетях “ВКонтакте” и “Инстаграм”. На авансцену вышла игра „Синий кит“, финальная цель которой заключалась в совершении самоубийства. Данные обстоятельства привели к панике среди населения России. В качестве одного из средств борьбы (скорее, даже основного) было в очередной раз выбрано внесение изменений в уголовный закон, дабы

продемонстрировать „активность“ власти. Итогом законодательной инициативы явилось дополнение Уголовного кодекса рядом уголовно-правовых норм, ужесточающих уголовно-правовую ответственность за доведение до самоубийства (статья 110), а также криминализирующих такие деяния как склонение к совершению самоубийства (статья 110.1) и организация деятельности, направленной на побуждение к совершению самоубийства (статья 110.2); изменения вступили в силу 7 июня 2017 г. Интересен и примечателен тот факт, что спустя лишь полтора месяца, 29 июля, нормы статей 110.1 и 110.2 были вновь изменены в сторону их большего ужесточения. На текущий момент достаточно сложно утверждать о последствиях такой редакции уголовного закона в статистическом ракурсе (ввиду того, что соответствующие официальные цифры пока не представлены), однако можно констатировать, что произведенная коррекция Уголовного кодекса спровоцировала множество вопросов среди правоприменителей и научного сообщества, породила неопределенность правового регулирования. Некоторые из обозначенных проблем:

1. Согласно части 1 статьи 110 Уголовного кодекса, доведение лица до самоубийства или до покушения на самоубийство путем угроз, жестокого обращения или систематического унижения человеческого достоинства потерпевшего **относится к тяжким преступлениям, максимальная санкция за совершение которого составляет шесть лет лишения свободы**; преступление считается оконченным в случае совершения потерпевшим самоубийства либо покушением на последнее. В соответствии с частью 1 статьи 110 Уголовного кодекса склонение к совершению самоубийства путем уговоров, предложений, подкупа, обмана или иным способом при отсутствии признаков доведения до самоубийства **является преступлением небольшой тяжести и предусматривает максимальное наказание в виде лишения свободы сроком до двух лет**; состав преступления формальный – преступление является оконченным с момента совершения склонения; однако, у данной статьи есть особый квалифицирующий признак, указанный в части 4, предусматривающей результат в виде самоубийства или покушения на самоубийство; максимальная санкция за такое деяние **составляет 10 лет лишения свободы, что без сомнений абсурдно, поскольку, исходя из логики и здравого смысла, доведение до самоубийства является более тяжким преступлением нежели склонение к самоубийству** (этот

вывод, среди прочего, основывается на характеристике способов совершения данных преступлений: статья 110 – угрозы, жестокое обращение, систематическое унижение человеческого достоинства; статья 110.1 – уговоры, предложения, подкуп, обман).

2. Неоднозначна статья 110.2, предусматривающая ответственность за организационную деятельность, направленную на побуждение другого лица к совершению самоубийства путем распространения информации о способах совершения самоубийства или призывов к совершению самоубийства; следовательно, в данной статье речь идет не об организации склонения к самоубийству, а **об организации деятельности, направленной на склонение другого лица/лиц к суициду**. Таким образом, как это ни парадоксально, **криминализовано абстрактное склонение – без заранее определенной жертвы**.
3. Кроме того, весьма спорен такой избранный законодателем способ склонения лица к самоубийству как **распространение информации о способах самоубийства**. Как в таком случае **разграничить организаторские действия по содействию совершению самоубийства советами, указаниями, предоставлением информации (часть 2 статьи 110.1) и организационную деятельность, направленную на побуждение к совершению самоубийства путем распространения информации о способах совершения самоубийства (часть 1 статьи 110.2)?**
4. Ответственность за деяние, предусмотренное статьей 110.2, приравнивает данное преступление к убийству – часть 1 предполагает лишение свободы на срок от пяти до десяти лет (с возможностью назначения дополнительного наказания); при наличии квалифицирующих признаков (часть 2) лишение свободы может достигать до пятнадцати лет, что без сомнений нелогично, неразумно и несправедливо – **по сути приготовление к склонению другого лица к самоубийству на сегодня законодателем практически приравнивается к окончательному убийству данного лица**.

До внесения изменений в статью 110 и дополнения Уголовного кодекса статьями 110.1 и 110.2 у правоприменителей возникали вопросы касательно толкования

оценочного понятия “жестокое обращение”, определения систематичности унижения человеческого достоинства, установления причинной связи между этими и другими деяниями, обозначенными в диспозиции, и наступившими последствиями в виде самоубийства или покушения на самоубийство; до сих пор актуальна дискуссия касательно возможности признания убийством “руками потерпевшего” доведения до самоубийства беспомощных лиц, таких как малолетние дети и невменяемые лица. Произведенная редакция Уголовного кодекса в этой части не сняла с повестки дня эти вопросы, кроме того, она лишь породила рассогласованность положений, связанных с превенцией преступлений такого рода. Представляется, что такое действие законодателя было скоропостижным (учитывая срок вступления в силу изменений в Уголовный кодекс) и являет собой лишь “видимость” попытки решения проблемы суицидов среди подростков, которая должна была утихомирить народный глас.

Таким образом, проанализированные в статье примеры внесения изменений в Уголовный кодекс Российской Федерации являются предтечей неопределенности установленных/скорректированных ими уголовно-правовых запретов – будучи оторванными от действительности, искусственно сгенерированными законодателем для решения сиюминутных политических амбиций, такие нормы вносят нестабильность в правовое регулирование и подрывают саму сущность права как регулятора общественных отношений. Уголовный закон становится орудием власти, используемым им достаточно вольно, что таит в себе серьезную опасность для общества. Хотя внешне редакции уголовного закона выглядят легитимными, но естество их все же иное – незаконное по сути.

Список источников (List of references):

Книги (Books):

- Аристотель (2015) *Политика*. Санкт-Петербург: Азбука, Азбука-Аттикус.
Бабаев М., Пудовочкин Ю. (2014) *Проблемы российской уголовной политики*. Москва: Проспект.
Келина С., Кудрявцев В. (1988) *Принципы уголовного права*. Москва: Наука.
Таганцев Н. (2001) *Русское уголовное право*. Тула: Автограф.

Законы (Laws):

- Уголовный кодекс Российской Федерации от 13 июня 1996 № 63-ФЗ, Собрание законодательства Российской Федерации, № 25.

Статьи из периодических изданий (газет) (newspaper articles):

- Берг Е. (2017, 17 февраля) Городская легенда. Что стоит за игрой “Синий кит” и всплеском интереса к “суицидальным пабликам”. Медуза, доступно по ссылке: <https://meduza.io/feature/2017/02/17/gorodskaya-legend-a-cto-stoit-za-igroy-siniy-kit-i-vspleskom-interesa-k-suitsidalnym-pablikam>, дата обращения 28.09.2018.
- Милкус А. (2017, 11 февраля) Новые “Группы смерти” в интернете: “Синие киты” провоцируют детей на самоубийства, Комсомольская правда, доступно по ссылке: <https://www.kp.ru/daily/26642.7/3660934/>, дата обращения 28.09.2018.
- Адвокатское сообщество публично выступило в поддержку Pussy Riot (ОТКРЫТОЕ ПИСЬМО) (2012, 2 августа), Новая газета, доступно по ссылке: <https://www.novayagazeta.ru/news/2012/08/02/58359-advokatskoe-soobschestvo-publichno-vystupilo-v-podderzhku-pussy-riot-otkrytoe-pismo>, дата обращения 28.09.2018.

Интернет-ресурсы (Online Sources):

- Официальный сайт Судебного департамента при Верховном суде Российской Федерации. Сводные статистические данные о состоянии судимости в России за 2014 год; Отчет о числе осужденных по всем составам преступлений Уголовного кодекса Российской Федерации – доступно по ссылке: <http://www.cdep.ru/index.php?id=79&item=2883>, дата обращения 28.09.2018.
- Официальный сайт Судебного департамента при Верховном суде Российской Федерации. Сводные статистические данные о состоянии судимости в России за 2015 год; Отчет о числе осужденных по всем составам преступлений Уголовного кодекса Российской Федерации – доступно по ссылке: <http://www.cdep.ru/index.php?id=79&item=3418>, дата обращения 28.09.2018.
- Официальный сайт Судебного департамента при Верховном суде Российской Федерации. Сводные статистические данные о состоянии судимости в России за 2016 год; Отчет о числе осужденных по всем составам преступлений Уголовного кодекса Российской Федерации – доступно по ссылке: <http://www.cdep.ru/index.php?id=79&item=3834>, дата обращения 28.09.2018.
- Официальный сайт Судебного департамента при Верховном суде Российской Федерации. Сводные статистические данные о состоянии судимости в России за 2017 год; Отчет о числе осужденных по всем составам преступлений Уголовного кодекса Российской Федерации – доступно по ссылке: <http://www.cdep.ru/index.php?id=79&item=4477>, дата обращения 28.09.2018.

CHAPTER II

Relation of Independent Institutions towards Illegality

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**MODERN STANDARDS OF THE RIGHT TO TRIAL WITHIN
REASONABLE TIME AND ITS IMPLEMENTATION IN THE
CASE-LAW OF THE COURTS IN BOSNIA AND
HERZEGOVINA**

Bosnia and Herzegovina is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights, through its judgments and decisions, interprets this Convention and establishes Convention standards of human rights protection and its judgments and final and binding for the parties. In case the Court finds the State has violated the appellant's rights under the Convention - this State has an obligation to implement the judgment. The judgments, depending on circumstances of each individual case, shall be implemented by way of payment of a fair compensation, by individual and or general measures. The Paper deals with European system of legal protection of the right to trial within reasonable time and implementation of its standards in judiciary and case-law of Bosnia and Herzegovina. After introductory remarks dealing with basic legal sources, the competencies of the European Court of Human Rights and criteria for finding violation of the right to trial within reasonable time in the case-law of this court, the authors analyze limitations of the right to trial within reasonable time in Bosnia and Herzegovina, case-law referring to the right to trial within reasonable time in criminal cases, violations of the right to trial within reasonable time in civil cases, as well as legal opinions of the Constitutional Court of Bosnia and Herzegovina.

Keywords: *Constitution of Bosnia and Herzegovina, European Convention for the Protection of Human Rights and Fundamental Freedoms, Constitutional Court of Bosnia and Herzegovina, the right to trial within reasonable time*

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1. Introductory remarks

According to the European Convention for the Protection of Human Rights and Fundamental Freedoms¹ (Article 6), in the determination of his civil rights and obligations or justification for any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This right obliges the state to correctly resolve legally uncertain situations within reasonable time. Judicial and administrative power, as well as constitutional justice have to ensure respect for any human's right to trial within reasonable time. Lack of material, technical, organizational and human potentials or chronic burden of court with huge number of received civil, criminal or other cases – does not release the state of its responsibility towards damaged individuals before the European Court of Human Rights². The European Court imposes an obligation on the state to expand the guarantee for the right to a fair trial under Article 6, including the trial within reasonable time, to all other proceedings before the state organs.

The system of rights under Article 6 of the European Convention rests on the idea of efficient legal protection of individuals before the court and other state authorities. This is only possible if this protection is timely. One of the most important aspects of efficient legal protection of an individual is its realization within a reasonable time, without excessive and unjustified delay, both by domestic courts and other state organs. That is why Article 6 of both Conventions is important because each person is guaranteed the right to be tried within a reasonable time. The European Court emphasizes that the trial of excessive duration undermines the efficiency and credibility of the judiciary (Goranić, 2000: 51).

¹ Hereinafter: the European Convention.

² Hereinafter: the European Court.

2. Criteria for establishing the violation of the right to trial within reasonable time

Reasonable time of trial is an open standard. This is maximal time whose excessive duration leads to violation of human right. This is not an optimal or ideal time which, depending on the circumstances, can be much shorter than reasonable. The European Court in its case-law does not set absolute boundaries for duration, but assesses reasonableness of duration of the proceedings in each individual case, taking into account several facts: complexity of the case, behavior of the applicant, actions of competent organs, value of protected good (i.e. its meaning for the applicant) and the need for urgent action, as well as number of procedural stages which the case went through. The speed is especially expected in criminal proceedings, and in civil actions regarding guardianship over children, labor disputes, disputes referring to physical injuries and, in general, cases when the speed is of general essence as, for example, in cases when a person infected with HIV virus by blood transfusion conducts proceedings for damage compensation³.

Considering the duration of the proceedings, the European Court examines the total, integral duration of the proceedings, as well as whether at any stage of the proceedings there were long periods of inactivity which were not caused by the applicant's behavior. Although the duration of the proceedings is not defined in the case-law of the Court, given the huge number of cases decided upon by the Court, some limits can be spotted. Thus, according to a recent analysis, the Court, even when it comes to complex cases, regularly found a violation if the proceedings lasted more than five years for criminal or eight years for civil cases. In cases requiring urgency (the so-called priority cases), the Court was able to determine the violation even if the trial lasted for only two years (Calvez, 2007: 6).

When observing particular stages of the proceedings, cases that have undergone several stages of trial would have an indicative boundaries of two to three years per decision level (trial, appeal proceedings, extraordinary remedy). Although in many cases the States invoked objective limitations on the actions of their courts (insufficient funds, overburdening of courts, a large number of cases), the European Court regularly did not consider it sufficiently justified, expressing the opinion that States Members are responsible for the organization of their judicial systems, so that their users are

³ *X v. France*, ECHR, App. No. 18020/91 (1992), pgs. 47–49.

guaranteed the respect of their fundamental rights⁴. The Court reached an opposite conclusion in case *Buchholz v. Germany*⁵ and found that the State was not responsible for duration caused by sudden increase of the number of disputes it could not reasonably predict, and which had been consequence of the economic recession, if it had proved that it had taken immediate steps to resolve such backlogs (Uzelac, 2011: 97).

In the case-law of the Court, the violation of the right to a trial within a reasonable time is not only the most common violation of the rights guaranteed under Article 6 of the European Convention, but also in relation to the rights protected under the Convention in general, because it refers to more than half of the judgments passed. The total duration of the proceedings includes the time needed for the enforcement of a court decision, and sometimes the time elapsed before the court proceedings have been initiated. Although Article 6 explicitly refers to „determination of rights and obligations ... within a reasonable time“, if some other means (such as conducting of the proceedings before administrative or professional organs) need to be exhausted before filing the lawsuit, then this period should also be included in the overall assessment whether the disputed rights were decided within a reasonable time.

As far as the time limit is concerned, the moment when the uncertainty over the rights to be decided in the proceedings has ceased, which does not necessarily coincide with the occurrence of legality because the proceedings before higher instances (the highest and constitutional courts) should be included in calculation of time - if this procedure can affect the outcome of the proceedings. From the *Hornsby*⁶ case, the European Court considers that the time necessary to enforce decisions taken by the courts should be taken into account when calculating the length of proceedings. Namely, starting from the fact that Article 6 guarantees to everyone „the right to a court“, the European Court ruled that „the right to a fair trial... would be illusory if the legal systems of member states allowed binding decisions to be ineffective“, for which reason „it should be considered that enforcement of court decisions is an integral part of trial for the purpose of Article 6“. The Court subsequently extended this doctrine to cases where there was no dispute (trial), but where (non)enforcement was based on court decisions on indisputable claims (eg. undisputed payment order) or other non-judicial acts which, by

⁴ *Zimmermann and Steiner v. Switzerland*, Series A, No. 66, of 13 July 1983, and *Guincho v. Portugal*, Series A, Number 81, of 10 July 1984.

⁵ Series A, Number 42 of 6 May 1981.

⁶ *Hornsby v. Greece*, Reports of Judgments and Decisions 1997-II, of 19 March 1997.

its legal force, are equal to an enforceable court decision (eg. Enforceable notarial acts) (Uzelac, 2011: 97).

3. Modern standards of the right to trial within reasonable time

According to the Basic Principles of Judicial Independence⁷, „the judges have the right and obligation, in accordance with the principle of independence, to ensure a fair trial and respect for the rights of all parties to the proceedings“ (paragraph 6). Furthermore, the European Charter on the Statute for Judges⁸ indirectly refers to the obligation to respect a reasonable deadline by submitting a request to show the readiness of a judge to „respect an individual and caution for the preservation of high level of competence... which the guarantee of rights of individuals depends on...“ (paragraph 1.5). The Charter directly refers to the State's obligation to „provide the judges with necessary means to properly fulfill their tasks, in particular those relating to the resolution of cases within a reasonable time“ (paragraph 1.6). When explaining the first of the above principles, the Charter makers point out that the request of „readiness“ of the judge relates to „the period of time necessary for reaching a correct judgment in the case, as well as to his attention and thoughtfulness ... because the decision of the judge is one that protects the rights of an individual. Respect for an individual is of utmost importance from the position of power given to the judges, for the sake of common feeling of inferiority when confronted with the court system“.

These requirements also also included in the Recommendation of the Committee of Ministers to the member states of the Council of Europe on the independence, efficiency and role of judges⁹. Bangalore principles of behavior of judges¹⁰ are particularly dealing with the deontological aspect of judges' actions. Among other things, in section „Competence and diligence“ it is stated that „judicial duties are more important for a judge than any other activities“ (6.1), and that „the judge shall perform all court duties, including limited decisions making, in an efficient and just way within a reasonable time“ (6.5) and shall „... exercise diligently judicial duties“ (6.7). The reasoning also emphasizes that it is necessary to provide them with the necessary means, equipment and assistance.

⁷ Adopted at the seventh UN Congress in Milano in 1985, confirmed by Resolutions of the UN General Assembly on 29 November 1985 and 13 December 1985.

⁸ The Charter was adopted under the umbrella of the Council of Europe, at a multilateral meeting of Europe Members' representatives in Strasbourg in July 1998.

⁹ Recommendation number R(94)12 adopted at the Council of Ministers meeting on 13 October 1994.

¹⁰ Adopted at the Conference of Presidents of Courts in the Hague in 2002.

According to the Opinion of the Consultative Council of European Judges on the principles of professional conducts of judges (and in particular ethics, incompatible behavior and objectivity), the judges should have a high level of professional awareness and be subject to diligence, with the aim of respecting the requirements for making judgments within a reasonable time. Although the Consultative Council of European Judges on the Principles of Professional Conduct of Judges does not in essence express a counter-general view in relation to establishing of civil liability for, for example, excessive length of proceedings, it considers it inappropriate for the judge to be exposed to any personal civil liability, except in the case of a deliberate offense, and that exclusively the state should have a civil responsibility. When it comes to the responsibility of the judges, the principles of judicial action can not be protected only by ethical principles of conduct, whereby legal and procedural norms certainly have their roles. Standards of professional conduct should be observed separately from legal and disciplinary rules, as these are self-regulatory standards that indicate „the awareness that law enforcement is not a mechanical exercise, that it involves a real discretion authority and puts judges in a relationship of responsibility towards themselves and towards citizens“¹¹.

Recommendation of the Committee of Ministers of the Council of Europe No. R (86) 12¹² on preventive measures and the reduction of the number of backlogs in courts, referring to the increase in the number of cases before the courts and recognizing the need to reduce the „non-judicial“ activities of the judges to the smallest extent, invites Member States' Governments to consider other measures to provide „government“ support, in addition to securing the resources for the efficient functioning of the judiciary in dealing with these challenges. Among other things, it is proposed that judges, as one of the key duties, are imposed a measure of responsibility that their conduct is continually directed towards resolving of disputes in question by „friendly settlement“ in all relevant cases „at the initial stage of the proceedings or at any other appropriate stage of the proceedings“. Furthermore, in the form of creating an ethical principle, a rule should be established according to which attorneys should seek the possibility of friendly settlement of disputes with the opposite party before the initiation of proceedings and at any appropriate stage of such proceedings.

¹¹ Consultative Council of European Judges, Opinion number 3 on the principles and rules of professional conducts of judges, in particular ethics, incompatible behavior and objectivity, paragraph 45.

¹² Adopted on 16 September 1986.

In accordance with jurisprudence of the organs of the European Court of Justice and the Constitutional Court of BiH, the period taken into account in case of the complaint regarding the length of proceedings begins on the day their jurisdiction being established. In evaluating the reasonableness of the time exceeding this deadline, the stage of the proceedings reached on that date must be taken into account. When assessing whether a trial has been conducted within a reasonable time, the commencement of a relevant period in criminal matters is related to a moment in which the person concerned has become aware of the fact that he or she is suspected of having committed a criminal offense, since from that such person has the interest of obtaining a court decision on existence of such doubt. Such determination of relevant period is obvious in cases where the arrest preceded a formal indictment¹³. Furthermore, the „charge“ within the meaning of Article 6 of the European Convention is an autonomous term which is applied regardless of the definition the „indictment“ has in domestic law.

In *Eckle* case, the European Court has held that relevant moment can precede the trial, which may be „a day of deprivation of liberty, the day when the suspect is officially informed of the fact that he or she shall be processed or the day of opening of a preliminary investigation“¹⁴. In this case, the European Court stated that in criminal proceedings the reasonable time referred to in Article 6 paragraph 1 begins to run as soon as the person is indicted, which may occur on a certain date even before the case has brought before the court. The European Court has pointed out that the „charges“ can be defined as an official notice given to an individual by the competent authority on the allegations that this person has committed a criminal offense or when a person was officially informed of a criminal proceeding against him, or that such a definition corresponds to the criteria determining „whether the position of the suspect is seriously attacked“¹⁵. The *Dewer* case Recommendation points out to the fact that this definition is intended to mark not only the beginning of a „reasonable time“, but also constitutes the point from which Article 6 of the European Convention begins to apply.

The relevant moment is also determined by marking the first examination by the investigating authorities. In another case, the investigation initially referred to a legal

¹³ The European Court, *Wemhoff v. Germany*, judgment number 2122/64 of 27 June 1968, paragraph 19; *Dobbertin v. France*, judgment number 13089/87 of 25 February 1993, paragraphs 9 and 138, and the Constitutional Court of BiH, Decision on Admissibility and Merits, number AP 2130/09 of 28 May 2010, published in „Official Gazette of BiH“ number 95/10, available at web-page of the Constitutional Court www.ustavnisud.ba.

¹⁴ Judgment of 15 July 1982, Series A, number 51, paragraph 73.

¹⁵ *Eckle v. Germany*, p. 73.

person (the company), and was subsequently extended to an applicant who was suspected of participating in the same criminal offense. Although the applicant had been determined detention and search of his house during the initial investigation, the European Court found that he was still not accused at that time in the sense of the provisions of the European Convention¹⁶. Or in the case of *Bertin-Mourov v. France*¹⁷ the commencement of the proceedings was marked when the applicant, who was otherwise suspected of illegally export of paintings, was questioned by the customs officer.

A special problem arises when the European Court has to assess the length and duration of the proceedings initiated before the responsible State was bound by the European Convention. In principle, the State can not be held responsible for the proceedings or for certain parts of proceedings that were undertaken before the Convention entered into force. In such cases, the starting point is the day when the Convention entered into force (Trechsel, Sarah 2005: 140). However, the length of proceedings before that date is not entirely irrelevant, as the European Court takes it into account in certain cases. In other words, if most of the time has already been „spent“, the competent organs shall have to make certain efforts to bring the proceedings to an end. (Trechsel, Sarah 2005: 140).

A moment when uncertainty regarding legal position of a person in question is ended is taken as the end of the relevant period. In this respect, the European Court applies equal criteria in both criminal and civil matters. In doing so, the indictment decision in criminal proceedings, i.e. the acquittal or dismissal of the indictment must be final. Finally, the final decision on the charges may also be the withdrawal from the further conduct of the criminal proceedings.

The European Court requires that the period, which is the subject matter of consideration, lasts until an acquittal or conviction judgment is issued, even when the appeal is pending. It is also possible to limit the appeal proceedings, in order to prevent its excessive duration. Such a standpoint also includes a hearing for the imposition of criminal sanction¹⁸, while the other proceedings for determining of criminal sanction are not included. The decision must become final; if it is revoked by the Appellate Court

¹⁶ *Reinhardt and Slimane - Kaid v. France*, 21/1997/805/1008 and 22/1997/806/1009, p. 93.

¹⁷ Number 36343/97 of 2 August 2000.

¹⁸ *Eckle v. Germany*, p. 77.

and returned for reconsideration – at that point the period of reasonable duration runs as well¹⁹.

The period of duration shall not end until the judgment is pronounced to the accused; the delay between the oral pronouncement of the verdict and the delivery of the reasoned judgment may lead to a violation. However, it is possible to file an appeal before the organs in Strasbourg even before the end of the proceedings. It would be absurd if the accused is expected to wait for the outcome of the proceedings, if these proceedings are pending for a long period of time, to file an appeal²⁰.

4. Constitutional and legal framework

The protection of human rights in Bosnia and Herzegovina refers to the rights guaranteed under the Constitution of BiH. The basic question of the efficient protection of human rights in Bosnia and Herzegovina is reflected in the legal nature of the Constitution of BiH, but also in relation between the Constitution of BiH and ratified international documents for the protection of human rights, before all the European Convention. The answer to this question is the response to the efficient institutional protection of human rights in the material sense, but also in the psychological moment that is reflected in the trust of citizens in the state institutions, thus in institutions whose primary task is to protect human rights. Additionally, the question of compliance of Bosnia and Herzegovina's legal system with international and regional human rights documents is, primarily (but not exclusively), the issue of the relationship of Bosnia and Herzegovina towards commitments undertaken when admitted to the Council of Europe (Živanović, 2014: 18).

In the practice of the Constitutional Court of BiH, the direct application of the European Convention by regular courts is mandatory. Thus, in Case No. AP-269/10, the Constitutional Court found a violation of the right to a fair trial as the regular courts failed to apply directly the provisions of the European Convention: „The Constitutional Court recalls that, in the sense of Article II/2 of the Constitution of BiH, rights and freedoms envisaged in the European Convention and its Protocols shall directly apply in Bosnia and Herzegovina and have priority over all other laws. In the present case, in the opinion of the Constitutional Court, the regular courts have failed to apply constitutional provisions indicating the priority of the application of the European Convention and its

¹⁹ *IA v. France*, 1/1998/904/1116, p. 115.

²⁰ *Donsimoni v. France*, no. 36754/97, pp. 30-31.

Protocols in relation to any other law. Therefore, regular courts, when deciding on the claims, have a constitutional obligation to apply international standards for the protection of human rights and freedoms, which was omitted in the case in question“.

Starting from the Constitution of BiH, human rights are also prescribed under the Constitutions of both Entities (Federation of Bosnia and Herzegovina and Republika Srpska), but also in the Brčko District of BiH Statute, and the Constitutions of ten Cantons in the Federation of Bosnia and Herzegovina. A key part of the constitutional order in Bosnia and Herzegovina, but also the seed of the future development of this system, are human rights and their protection.

The Constitution of BiH, as well as the Constitutions of the Entities, contain special provisions which list all international documents for the protection of human rights which have to be applied in Bosnia and Herzegovina. The position of international mechanisms listed in Annex I to the Constitution of BiH is not clear on the basis of actual constitutional expression. An additional question is the question of the scope of these 15 instruments, especially considering that some of them have been changed over time and that these changes have an automatic impact on the constitutional aspects of these instruments in BiH. Other international human rights treaties are binding for BiH when ratified, but are not a part of the Constitution, so we can speak about duality of these documents's character. This is the case, for example, with Additional Protocol No. 1 to the European Convention on the Prevention of Torture, Inhuman or Degrading Treatment or Punishment, which was ratified on 12 July 2002, and entered into force on 1 September 2002.

One of the principles underlying the Criminal Procedure Laws, which apply in the proceedings before the courts in BiH, is that the suspect or the accused has the right to be brought before a court within the shortest possible time and to be tried without delay. These laws also prescribe the obligation of the court to conduct the proceedings without delay and to prevent any abuse of rights the persons participating in the proceedings are entitled to. This principle has been elaborated in a series of provisions of the Criminal Procedure Code. On the other hand, an expedited procedure is not always in the interest of the accused, especially if he has not been detained. Finally, there is also the interest of society to avoid excessive delay of court proceedings, whereby it should be taken into consideration that the criminal procedure system is set up so that it is not just aimed at facilitating the judgment making process. It, of course, has other goals, which must also be taken into account so that any delay can hurt the achievement of those goals.

Appropriate legal provisions relating to the duration of criminal proceedings are closely related to the provisions relating to the duration of custody. Of course, the provisions relating to the duration of detention are much stricter and refer to fundamental freedoms and human rights. Keeping of persons in detention until trial is a bigger burden, which is the main reason for the additional guarantees set out in Article 9 paragraph 3 of the International Covenant on Civil and Political Rights and Article 5 paragraph 3 of the European Convention. Thus, in the case of *Wemhoff*, the European Court has held that the length of custody was not excessive, which means that there was no violation of the rule laid down in Article 6 of the European Convention. However, this does not have to be applicable in each case. Namely, the proceedings may last much longer than the duration of custody when, for example, the accused is released from custody or when delays occur during the appeal proceedings. Also, there may occur a delay in the case of a written judgment, when it is possible for the Court to establish a violation of Article 6 paragraph 1, but not Article 5, paragraph 3 of the European Convention (Trechsel, Sarah, 2005: 137).

The applicable civil laws allow courts to deal with all lawsuits or claims in an efficient and timely manner, since, for example, the first-instance proceedings in essence consists of two hearings, one preparatory and one main hearing, that deadlines for submitting a lawsuit to the defendant for his response are determined, as well as for giving response to a lawsuit and scheduling a preparatory hearing, that the parties are required to provide all the documents and items they wish to use as evidence at the preparatory hearing already. Also, prescribed is possibility that the courts should, at the preparatory hearing at the latest, and if it deems it appropriate in view of the nature of the dispute and other circumstances - propose that the dispute be resolved in the mediation process. For non-compliance with the procedural discipline, the law on civil proceedings provides for high fines, for the parties, legal representatives, assignees, intervening parties, witnesses, interpreters and experts, as well as for third parties (Gorjanc-Prelević, 2009: 135).

The civil procedure laws prescribe the obligation of urgent court actions in litigation proceedings referring to labor relations and disturbances of possession. The Family Law of the Federation of Bosnia and Herzegovina and the Brčko District also foresee that the court, especially when determining deadlines and hearings, shall always pay particular attention to the need of urgent resolving of disputes related to parents-children relations or marital relations - in order to protect the child's interests. The Family Law of the Republika Srpska stipulates that the Republika Srpska shall ensure a special protection to the family, mother and child, in accordance with internationally recognized human

rights and fundamental freedoms, which, in any case, implies the obligation of urgent actions in disputes of this kind in accordance with the case-law of the European Court.

5. Limitation of the right to trial within reasonable time

The entire judicial system in BiH is faced with the challenges of building, preserving and protecting the basic principles of the functioning of the system of justice, in the context of specific political, economic and social circumstances. However, no European state has been immune to „illness“ of the backlog of court cases and the need to take measures to improve the functioning of the judicial system – with the aim of more efficient conducts. In BiH, the High Judicial and Prosecutorial Council of BiH (Paripović, 2014: 1-13) took over the role of the initiator of these activities.

According to the Code of Judicial Ethics, adopted by the High Judicial and Prosecutorial Council of BiH in 2004, the judge performs his function and treats all cases without favoring, partiality, and prejudiced. Impartially refers not only to the decision, but also to the decision-making process. Furthermore, the judge shall act in and out of the court in a way that maintains and improves confidence of public and parties in the impartiality of that judge and justice as a whole (2.1), in a way to affirms public confidence in the integrity of the judiciary (4.2).

The Law on the High Judicial and Prosecutorial Council of BiH in Article 56 contains a list of disciplinary offenses, some of which may also relate to the length of the proceedings, as follows: 3) obvious breach of the duty of correct actions towards the parties to the proceedings, their legal representatives, witnesses and other persons, neglect or negligence in performing official duties; 9) making decisions that obviously violate the law or persistently and unjustifiably violate the rules of the proceedings; and 10) unjustified delays in making decisions or in other actions related to the performance of a judge's office or any other repeated failure to comply with a judge's duty. The mechanism of protection of the principle of judiciary, through disciplinary prosecution and sanctioning of actions that seriously undermine or endanger protected values of the judiciary – is established in the institution of the Disciplinary Prosecutor's Office at the High Judicial and Prosecutorial Council of BiH. The largest number of cases initiated for violation of the length of processing of cases is terminated by settlement, with written or public warning or, in more severe cases, by determining of measure of salary reduction at a certain percentage. However, the importance of the Ethics Committee of the High Judicial and Prosecutorial Council of BiH, and in particular ethical commissions formed in the associations of judges, should be taken into account.

The work and case-law of the former Human Rights Commission and the European Court accepted that no application could relate to violation of its provisions from the time before the Convention entered into force in the defendant State. The purpose of the six-month rule for submitting an application to the European Court is to ensure legal certainty on one hand, and on the other hand, that the applicant has enough time to prepare his application (Degan, 2003: 46).

The right to a fair trial concerns “civil rights and obligations” and the rights of individuals in criminal proceedings. It does not refer to protection of all the rights that an individual would enjoy under the applicable national law. On the other hand, it extends considerably beyond the scope of civic cases in the narrower sense. The term “determination of the rights and obligations of a civil nature”, within the meaning of the Convention, is interpreted autonomously in the case-law of the Court, which has evolved and gradually extended the scope of Article 6, according to the doctrine that the Convention is a living organism that needs to adapt to social change. To understand the meaning of this expression, it is important to note that the term “determination”, interpreted in the Court’s decisions, requires that there is a “dispute” referring to the content of rights and obligations, at least in the wider sense of this word (Uzelac, 2011: 5).

The European Court has held that it is the content of the decision that is important, and not the nature of proceedings which lead to decision, so that it can in principle review the trial in all types of proceedings, from criminal and disciplinary, through judicial and administrative, even proceedings before other organs with public authority. It is important that these proceedings decide on the rights and obligations of private law, which includes both property and status issues, labor or economic matters. Gradually, the distinction between the rights of private and public nature has ceased to be decisive, as the Court, in its jurisprudence, has submerged more and more of the latter cases under Article 6 guarantees.

The purpose of the protection provided by Article 6 paragraph 1 of the Convention is to ensure fair treatment, and not to examine the correctness of the outcome of the proceedings - a decision in the specific case. Therefore, the Court will regularly dismiss as manifestly ill-founded the requests in which the applicants primarily wish to question the correctness of factual or legal findings from the proceedings they challenge. The purpose and function of the Court is not to serve as a „fourth instance“. National law primarily needs to be interpreted and applied by the courts of the Member States, and therefore, as a rule, the Court shall not enter into its review. Nevertheless, the Court

takes into account the application of the rules of national law in the overall assessment of whether the proceedings were fair, and if it comes to the conclusion that the application of the rights of the competent national authorities was apparently arbitrary, it would regularly find a violation of the rights guaranteed under the Convention (Uzelac, 2011: 6).

6. Case-law of the Constitutional Court

The constitutional basis for the conduct of the proceedings and deciding on the appeals before the Constitutional Court of BiH is contained in Article VI/3b of the Constitution of BH, which reads as follows: „The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina“. In accordance with Article 16 paragraph 1 of the Rules of the Constitutional Court²¹, the Constitutional Court may examine an appeal only if all effective remedies available under the law against a judgment or a decision challenged by the appeal have been exhausted and if the appeal is lodged within a time limit of 60 days as from the date on which the appellant received the decision on the last effective remedy he/she used. The main issue here is to determine the domain of procedural jurisdiction of the Constitutional Court on the appeal and, hence, the content of this legal institute of constitutional law. It is undisputed that the Constitutional Court, although not a judicial authority, acts as a court when deciding on the appeal, even though the constitutional appeal is neither a regular nor an extraordinary remedy in the sense in which these funds are determined in the legal system of Bosnia and Herzegovina. This, however, seeks a functional separation of the Constitutional Court from regular (especially Appellate Divisions of the Court of BiH, Supreme Courts of Entities and the Appellate Court of Brčko District) and other courts.

The Constitutional Court has adapted its decision-making practice to the practices of the earlier European Human Rights Commission and the European Court, as well as the practice of constitutional courts of most European countries which, in principle, does not question the regularity and legality of the contested individual act, but decides only on the violations of certain, often restrictively understood, constitutional issues. The case-law of the Constitutional Court is motivated, above all, by the need to make its activities to fall within the boundaries of constitutional jurisdiction, i.e. the protection of constitutional, not all subjective rights of citizens.

²¹ Revised text (“Official Gazette of Bosnia and Herzegovina” number 94/14).

The Constitutional Court, in accordance with established practice, is limited to „the issues contained in this Constitution“. In this regard, the appellate jurisdiction of the Constitutional Court, according to Article VI/3b of the Constitution of BiH, does not in principle imply that the Constitutional Court may review decisions of regular courts regarding the established factual background or the interpretation and application of substantive law, until such decisions violate the appellant's constitutional rights. This will be the case, *inter alia*, when competent bodies apply positive law provisions or establish factual background in an arbitrary manner. Consequently, the Constitutional Court, as a rule, neither considers whether the courts have correctly and fully established the facts, nor the assessment of evidence and legal assessment of the courts.

Before all, the Constitutional Court points out that according to the consistent case-law of the European Court and the Constitutional Court, the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case, taking into account the established jurisprudence of the European Court and, in particular, the complexity of the case, conducts of the parties to the proceedings and the competent court or other public authorities, as well as the significance a particular legal matter has for the appellant²². The Constitutional Court recalls the position of the European Court in *Stjepanović et. al v. Bosnia and Herzegovina*²³, according to which the standard of expediency in historical cases (war crimes) greatly differs from the standard applicable to recent events, where time is often of crucial importance for the preservation of important evidence. Also, the European Court emphasized the circumstances that existed in Bosnia and Herzegovina, and a large number of war crimes cases before domestic courts - in assessing the respect of the minimum standards of a right to a fair trial. The Constitutional Court reiterates the case law of the European Court and its own jurisprudence according to which the duty of the State to organize its legal system to enable the courts and public authorities to comply with the requirements and conditions of the European Convention²⁴.

Thus, in Decision No. 15/03²⁵, the Constitutional Court concluded that the total length of seven-years and 10-months proceedings, which is still pending before the first instance - is not justified. The appellant can not be held responsible for the delay of the

²² See the European Court, *Mikulić v. Croatia*, application number 53176/99 of 7 February 2002, Report number 2002-I, paragraph 38.

²³ Of 16 December 2014, paragraphs 28 and 29.

²⁴ See the European Court, *Zanghi v. Italy*, judgment of 19 February 1991, Series A, number 194, paragraph 21 and the Constitutional Court, Decision number AP 1070/05 of 9 February 2006, paragraph 34.

²⁵ Od 28. novembra 2003. godine, stav 44, objavljena u „Službenom glasniku Bosne i Hercegovine“ broj 8/04.

proceedings, the case is not complex, and the conducts of the court indicate the lack of necessary devotion to the case, so the length of the proceedings can not be considered as „reasonable“. It is emphasized that, in principle, the Constitutional Court has no jurisdiction to examine the course of the proceedings before the administrative authorities, but only before the courts, given that only the courts are strictly bound by the rules of the European Convention. However, when deciding whether the proceedings are completed within a reasonable time - the duration of the proceedings before the administrative bodies must also be taken into account. Otherwise, the Constitutional Court could not make a fair decision as to whether the proceedings were completed within a reasonable time.

In the Decision on Admissibility and Merits, No. AP 45/02 of 28 November 2003, the Constitutional Court has held that the procedure for the disturbance of property that had been pending for more than six years and four months and which was not complex, and the procedure for determining of the right of co-ownership over immovable property which had been pending for five years, nine months and 17 days, which was relatively complex, that the appellant did not significantly contribute to the length of these proceedings and that the courts had conducted the proceedings for unreasonably long time - crossed the limits of a reasonable time. The same point of view has been made by the Constitutional Court in the Decision on Admissibility and Merits, number AP 701/04 of 18 January 2005²⁶, in the situation where the appellant was unable to obtain a valid legal decision in the enforcement proceedings for six years from the date these proceedings were initiated. There is a violation of the right to a fair trial in relation to the adoption of a decision within a reasonable time even when the proceedings in the case relating to the non-pecuniary damage compensation before the Basic Court have been pending for six years and five months, and the judge, who provided no reasons for such a long duration of the proceedings²⁷, can be considered as fully responsible for such a long proceedings, etc.

When deciding on the appellant's claim for compensation of non-pecuniary damage, the Constitutional Court refers to previously established principle of determining the amount of damage compensation in such cases²⁸. According to the established principle,

²⁶ Paragraph 47, published in „Official Gazette of BiH“ number 73/05.

²⁷ Decision of the Constitutional Court of BiH, number AP 3511/08 of 13 October 2010.

²⁸ See Constitutional Court, Decision number AP 938/04, published in „Official Gazette of BiH“ number 20/06, pgs. 48-51.

the appellant should be paid approximately 150KM for every year a decision was not made.

On the other hand, the two months delay in submitting of a second-instance ruling in itself does not constitute a violation of the right to a fair trial when there are no other elements indicating that such delay does not meet the requirements of Article 6 of the European Convention or that the competent authorities do not take measures to correct such a situation²⁹. Or, assessing the length of the proceedings and the stated objective circumstances that have affected the decision of the Supreme Court has still not been reached, there were no circumstances on the basis of which it could have been concluded that the delay in question was of such a nature to violate the requirements of Article 6 paragraph 1 of the European Convention³⁰, etc.

7. Final remarks

The right to a trial within a reasonable time constitutes the fundamental human right defined under Article 6 paragraph 1 of the European Convention and a series of other international instruments and, as such, constitutes a natural right of a man - not to be subjected to unnecessary and arbitrary actions by any authority deciding on his rights and obligations. The right to a trial within a reasonable time is one of the elements of the right to a fair trial.

The Constitution of BiH and the Constitutions of the Entities guarantee the rights protected under the European Convention, as well as constitutional rights. Even though this right relates to an individual, one can not ignore the factor of influence of individuals on the public. It seems logical to conclude that in a situation where the length of the proceedings has exceeded a reasonable period of time in relation to a greater number of persons and in a greater number of cases, their negative voice in forming of public awareness and the level of trust in judiciary plays a significant role.

At the international level, the mechanism of protection of the right to a trial within a reasonable time is dealt with in the institution of the European Court. This court receives numerous applications per day for violation of the rights protected under the Convention, most of which refer to violation of the fairness of the trial. In Bosnia and

²⁹ Decision on Admissibility and Merits, number AP 600/04 of 17 February 2005, paragraph 25, published in „Official Gazette of BiH“ number 42/05.

³⁰ Decision on Merits, number AP 955/04 of 17 November 2005, paragraph 33, published in „Official Gazette of BiH“ number 20/06.

Herzegovina, the Constitutional Court of BiH and the Office of the Ombudsman for BiH, each within their competencies, form a framework of the mechanism for the protection of fundamental human rights, including the right to a trial within a reasonable time. Even before these institutions, the largest number of cases relate to the length of proceedings initiated by citizens and other entities.

Domestic competent authorities have the ability to avoid liability under Article 6 of the European Convention, by providing compensation to persons affected by the excessive length of the proceedings. To achieve this, two explicit requirements are necessary. First, there must be a finding of the fact that the duration of the proceedings was unreasonable. Secondly, there must be an adequate reduction of the conviction and it should be clear that the purpose of such reduction is compensation to a specific person for the excessive duration and length of the proceedings. Although there is no special law on the precedents which confirm so, other forms of compensation, such as, for example, financial compensation, are not excluded. If both requirements have been met, the applicant is no longer able to claim to be a victim, or damaged person.

Literature

- Calvez, F. (2007). Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights. Strasbourg: Council of Europe.
- Degan V.Đ. (2003). Europski sud za ljudska prava, Predavanja na postdiplomskom tečaju na Pravnom fakultetu Sveučilišta u Mostaru. Mostar: Pravni fakultet.
- Goranić, I. (2000). Suđenje u “razumnom roku” - jedan od uvjeta za pravično suđenje (članak 6. stav 1. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda), Vladavina prava, 6, str. 47-62.
- Gorjanc-Prelević, T. (2009). Pravo na suđenje u razumnom roku, Zbirka izabranih presuda Evropskog suda za ljudska prava u slučajevima protiv Bosne i Hercegovine, Hrvatske, Makedonije, Slovenije i Srbije. Sarajevo.
- Paripović, S. (2014). Rješavanje predmeta u razumnom roku u kontekstu primjene postojećih zakona o parničnom postupku u BiH, autor Kanada - BiH, Projekat pravosudne reforme. Sarajevo: Blicdruk.
- Trechsel, S., Sarah J.S. (2005). Human Rights in Criminal Proceedings. New York: “Oxford University press“.
- Uzelac A. (2010). Pravo na pravično suđenje u građanskim predmetima: Nova praksa Europskoga suda za ljudska prava i njen utjecaj na pravo i praksu, Zbornik PFZ, 60(1), str. 101-148.
- Uzelac, A. (2011). Pravo na pošteno suđenje: opći i građanskopravni aspekti čl. 6. st. 1. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda, Usklađenost hrvatskih zakona i

prakse sa standardima Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda.
Zagreb: Centar za mirovne studije.

Živanović, M. [et al.] (2014). Ljudska prava u Bosni i Hercegovini 2014: pravo, praksa i međunarodni standardi ljudskih prava. Sarajevo: Centar za ljudska prava Univerziteta u Sarajevu.

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**CONSTITUTIONAL AND JUDICIAL PROTECTION OF
CITIZENS AGAINST ILLEGAL INDIVIDUAL ACTS AND
ACTIONS – ILLEGALITIES, WHICH ARE WITHOUT
PROTECTION IN PROCEEDINGS ON CONSTITUTIONAL
APPEALS LE**

The fundamental and original jurisdiction of constitutional courts is the abstract normative control, or establishing and control of the conformity of laws and other general acts with the Constitution. At the same time, the majority of constitutional courts nowadays also carry out other constitutional and judicial functions: deciding on conflict of jurisdiction between authorities, special electoral disputes, prohibition of operation of political and other organisations, deciding on citizens' constitutional appeals etc. A constitutional appeal was extensively introduced to the constitutional law of the Republic of Serbia only by the 2006 Constitution of the Republic of Serbia. Pursuant to Article 170 of the Constitution: "A constitutional appeal may be lodged against individual acts or actions performed by state bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been applied or not specified". The Constitutional Court of the Republic of Serbia has operated within the present constitutional framework since late 2007. In the previous decade, the greatest amount of the Constitutional Court's administrative, expert and intellectual capacities was engaged and used in resolving of constitutional appeals. For years the Constitutional Court would receive more than 10,000 constitutional appeals annually, whereas the total number of cases in all other fields within the Constitutional Court's jurisdiction was below 1000. To put it simply, a constitutional appeal is a legal instrument used to control the constitutionality (as well as, indirectly, the legality) of court rulings. With only rare exceptions, constitutional appeals are lodged directly or indirectly against rulings made by courts of general or specific jurisdiction (in some cases, citizens actually appeal the acts and actions of administration, local self-government and other authorities, but in such cases too, their legality and constitutionality had been previously established as legally binding and controlled in the proceedings before courts). A reasonable question is raised as to where to draw a demarcation line between illegality, in relation to which protection is provided by the

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Constitutional Court by way of constitutional appeals and potential cases of illegality for which there is no constitutional and judicial protection. This paper will focus on the analysis of the constitutional case law of the Constitutional Court, with a special emphasis on determining this demarcation line, as well as specifying the concrete, individual acts of authorities in which, regardless of their potential illegality, the Constitutional Court fails to provide any protection in the proceedings on deciding on a constitutional appeal.

Keywords: *Constitutional Court, constitutional appeal, rejection of constitutional appeal, fair trial*

Introduction

Constitution is the foundation and roof of the legal system, as all general and individual legal acts need to be harmonised with the provisions of the Constitution. At the same time, the political power restricted by the Constitution, or constitutionality, is not achieved by passing the text of the Constitution – the document, or by declaring supremacy of the Constitution, but through efficient, constitutionally prescribed mechanisms used for the protection of constitutional provisions. Although there are states where there is no constitutional and judicial control of the law, the currently prevailing opinion is that the control of constitutionality of the law by the Constitutional Court or courts of general jurisdiction is, if not the only, then certainly the most efficient method of enforcing the Constitution (Kokott, Kaspar, 2012:718-713). The fundamental and original jurisdiction of constitutional courts is the normative control, or establishing and control of the conformity of laws and other general acts with the Constitution. The constitutional and judicial control was developed in the USA without any straightforward basis in the U.S. Constitution of 1787. Starting from the case of *Marbury vs. Madison* from 1803¹, the Supreme Court of the United States has, with supreme authority, assessed the conformity of laws with the U.S. Constitution. John Marshall, the president of the Supreme Court at the time, explained that the interpretation and enforcement of laws, as well as the Constitution, was the task of the judicial authorities. (Martinez, 2012:503). Constitutional and judicial control of laws has long been associated with the state that adopted the first modern written constitution. Development of the European or Austrian-German model of constitutional judiciary followed the model of the Constitutional Court of Austria (established in the period between the two world wars),

¹ *Marbury v Madison* 5 US 137 (1803).

created by an internationally recognised professor of constitutional law, Mr Hans Kelzen, which still dominates the legal systems of the majority of world states. (Stone Sweet, 2012: 728). The Constitutional Court's competence to assess the laws passed by democratically elected national representation body, or even eliminate such laws from the legal system in the event of their unconstitutionality, is causing controversy in the expert, scientific and political discourse. How do judges, who carry out their functions without electoral legitimacy, become so powerful to judge the acts of democratic representatives of people, and become a negative legislator? (Beširević, 2013: 955) Constitutional and judicial activism often makes the Constitutional Court a powerful political actor. Although assessment of constitutionality of laws and other regulations is the original and fundamental constitutional and judicial function, as well as a significant characteristic of constitutional courts, it is still not the only competence of constitutional courts. Most constitutional courts established according to the Austrian model carry out some other constitutional and judicial functions as well, such as: deciding on conflict of jurisdiction between different authorities, electoral disputes, prohibition of operation of political organisations and religious communities, deciding on citizens' constitutional appeals etc. Out of all the listed competences of constitutional courts, particularly important is the constitutional appeal, as a legal instrument the citizens may use to contest the individual legal acts or actions performed by state authorities, in which human (and minority) rights and freedoms guaranteed by the Constitution have been violated. Constitutional courts have acquired a powerful competence through the institute of constitutional appeal, to control (regular) courts, which is, in theory, considered politicisation of judiciary, as opposed to judicialisation of politics through normative control (Orlović, 2013: 148) . This paper is also analysing some issues concerning the competences of the Constitutional Court of the Republic of Serbia (hereinafter: the Constitutional Court) to decide on constitutionality of individual legal acts of authorities regarding the constitutional appeals. Our Constitutional Court, just like the Constitutional Court of Slovakia and Croatia, belongs to those constitutional courts that decide on an extremely great number of constitutional appeals, where the Constitutional Court's opinions and case law have widely opened their door to citizens, who may use a constitutional appeal, referring to the violation of provisions of the Constitution, to contest the constitutionality of decisions, primarily those passed by courts, but also by other state authorities. This paper is an analysis of the Constitutional Court's case law, aimed at establishing the boundary between the individual legal acts whose illegality is meritoriously assessed by the Constitutional Court and those acts, whose merits and illegality are not meritoriously decided on by the Constitutional Court, but instead, are rejected by it in a ruling. The constitutional and legal framework is rather general and

flexible, allowing much room for various interpretations, so the opinions and case law of the Constitutional Court are relevant to determine the boundary between the constitutional appeals that were considered and those that were not subject to a meritorious consideration. This paper is divided into several chapters. After the introductory part, the first chapter will present the normative framework of the constitutional appeal in the Republic of Serbia (hereinafter: Serbia), with a special emphasis on legal grounds for rejection of constitutional appeals. This part will also consider the structure and scope of constitutional appeals in the Constitutional Court's case law and its deciding on them. The second part will consider the cases of rejecting constitutional appeals by the Constitutional Court, due to irregularity in lodging the petition or failing to observe the timeline, as common cases of non-consideration of petitions due to procedural reasons. The third part of the paper will analyse the most commonly applied legal framework for rejection of constitutional appeals, or non-existence of other prerequisites for conducting the proceedings and deciding, stipulated by the law. This basis is used when rejection of a constitutional appeal is related to the legal character of the contested legal act, non-existence of active legitimation of the appellant, little significance of the dispute, formal referral to constitutional rights etc. The fourth part will present some conclusions.

1. Normative framework of constitutional appeal in Serbia and review of the statistics of the Constitutional Court's case law in deciding on constitutional appeals

1.1. Normative framework of constitutional appeal

Constitutional appeal was introduced to the constitutional law of Serbia only in the 2006 Constitution of the Republic of Serbia. The Constitution, however, contains only a single provision concerning the constitutional appeal, which reads as follows: “A constitutional appeal may be lodged against individual acts or actions performed by state bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been applied or not specified“². Furthermore, the Constitution does not specify deciding on constitutional appeals as one of the Constitutional Court's competences, which is an obvious nomo-technical oversight. However, this has never led, either in practice or in theory, to any dilemma regarding the competent authority deciding on constitutional appeals. The quoted constitutional

² Constitution of the Republic of Serbia, “Official Gazette of RS“, no. 98/2006, Article 170

provision defines a broad range of acts and actions against which the constitutional appeal may be used, providing a specific requirement that legal remedies for the protection of human or minority rights have been exhausted. Such a flexible constitutional framework has provided the legislator, on the one hand, with great freedom in regulating the rules of the Constitutional Court's acting of upon constitutional appeals, while allowing the Constitutional Court to shape, through its case law, the boundaries and scope of the constitutional appeal, as a new institute of our constitutional law.

The Law on the Constitutional Court³ specified the constitutional provision on the constitutional appeal, conditions for the use of the constitutional appeal and the procedure for deciding of the Constitutional Court. Pursuant to the Law, the Constitutional Court decides on the merits of the constitutional appeal with the “ruling“⁴ while in the case of absence of procedural preconditions, it rejects the constitutional appeal with the “decision“⁵. The specific provisions on the constitutional appeal are found in Articles 82-89 of the Law. These provisions stipulate, inter alia, that a constitutional appeal may be lodged by anyone whose constitutional right has been violated (including legal persons)⁶, the possibility to lodge a constitutional appeal on the basis of vested authority⁷, deadline to lodge the constitutional appeal (within 30 days of the date of being served an individual act or the date of the action by the public authority)⁸, conditions and deadlines for allowing restitution for failing to observe the time limit for submitting a constitutional appeal⁹, content and mandatory attachments of a constitutional appeal¹⁰, the possibility of suspending implementation of the disputed

³ Law on the Constitutional Court, (“Official Gazette of RS“, no. 109/2007, 99/2011, 18/2013 – Decision of the Constitutional Court -, 40/2015, 103/2015.

⁴ Law on the Constitutional Court, Article 45, Paragraph 1, Item 9.

⁵ Ibid, Article 46, Paragraph 1, Item 9.

⁶ Ibid, Article 83, Paragraph 1.

⁷ Ibid, Article 83, Paragraph 2.

⁸ Ibid, Article 84, Paragraph 1.

⁹ Ibid, Article 84, Paragraph 2 and 3.

¹⁰ “Constitutional appeal must contain the name and surname, citizens' identification number, place of permanent or temporary residence, or name and seat of an appellant, name and surname of their representative, number and date of the act against which the appeal is being lodged and the name of the authority that enacted it, specification of human or minority right and freedom guaranteed by the Constitution that is allegedly violated with specification of the Constitutional provision guaranteeing such right or freedom, dedicated motion on which the Constitutional Court is to decide, specifying the amount and basis for compensation for pecuniary and non-pecuniary damages, where compensation is required, and the signature of the person lodging the constitutional appeal or the person who was issued a special authorization to lodge a constitutional appeal.

individual act¹¹, the possibility of expanding the legal effect of the decision of the Constitutional Court in regard to the constitutional appeal to persons who did not lodge a constitutional appeal¹², reasons to discontinue the procedure¹³, the possibility to annul the contested individual legal act by the decision of the Constitutional Court with which the constitutional appeal is upheld and to award the compensation for pecuniary and non-pecuniary damage.¹⁴

For this paper, the provisions of the Law on the Constitutional Court that have special significance are those which determine in which cases, due to the lack of procedural preconditions, the Constitutional Court will, without meritorious consideration of a constitutional appeal, reject it with a decision¹⁵. These cases are not specifically regulated by Law, but to reject a constitutional appeal, the provision of the Article 36 of the Law is applied, which refers to all petitions addressed to the Constitutional Court, including the constitutional appeal. Pursuant to this Article of the Law, the Constitutional Court will reject the petition which initiates or institutes the procedure in the following cases:

- 1) When it determines that it is not competent to issue a decision;
- 2) When a petition is not lodged within the prescribed time limit;
- 3) When a petition is anonymous;
- 4) When the appellant had not rectified shortcomings which preclude processing within a designated time limit;
- 5) When it determines that the petition is manifestly unfounded;

A copy of the disputed individual act, evidence that legal remedies have been exhausted, evidence on the amount of pecuniary damage, and other evidence of significance for determination shall be attached to the constitutional appeal. A claim for compensation of damages may only be set simultaneously with lodging of a constitutional appeal.” Article 85 of the Law on the Constitutional Court.

¹¹ Law on the Constitutional Court, Article 86, Paragraph 2.

¹² Ibid, Article 87.

¹³ Ibid, Article 88.

¹⁴ Ibid, Article 89.

¹⁵ Pursuant to Article 42c of the Law on the Constitutional Court, a constitutional appeal is rejected by a Small Panel of the Constitutional Court, composed of three judges, by passing a decision unanimously. In the absence of unanimity of members of the Small Panel, the decision or the conclusion shall be passed in the Session of the Constitutional Court, by majority vote of all judges of the Constitutional Court.

- 6) When it determines that the petition represents an abuse of law;
- 7) When other preconditions for conducting a procedure and determination do not exist, as established by law.

The generalised wordings from this provision of the Law were formulated and they received their specific content and outlines in the the Constitutional Court’s case law in the last ten years. The Constitutional Court’s case law was especially important in order to formulate legal concepts, determine their practical content and scope, and answer many questions, such as: when is a constitutional appeal manifestly unfounded?, what constitutes an abuse of right when lodging a constitutional appeal, when can one speak of the absence of “other preconditions” for issuing a decision on a constitutional appeal? The answer to all these questions must be sought in the abundant Constitutional Court’s case law. This case law of the Constitutional Court gave clear answers to some of the above formulated questions, while in respect to other case law of the Constitutional Court, it does not provide clear distinction.

1.2. Brief review of the Constitutional Court’s case law in figures, number and structures of cases

In this paper’s introduction, we have stated that a constitutional appeal has become very popular in Serbia, which is best illustrated by the data that the number of constitutional appeals has steadily increased since 2010 after the European Court for Human Rights recognised for the first time a constitutional appeal as an effective legal remedy, whose prior use is the condition to address the court in Strasbourg¹⁶. In 2010 in relation to 2009, the number of received and formed cases was increased from 3597 to 7604 cases and in 2011 to 8041, in 2012 to 11,380 and since then, the number of new cases was above 10,000 even with the introduction of some new legal remedies for the protection of constitutional rights before the courts of general and specific jurisdiction¹⁷. The share of constitutional appeals in all cases of the Constitutional Court also increased and it is

¹⁶ See Judgement of the Second Section of the European Court on Human Rights dated 1 December 2009, *Vinčić and Others v. Serbia*, in Item 51 of the Judgement, the Court stated the following principled view: The Court takes the view that the constitutional appeal, should in principle, be regarded as an efficient legal remedy within the meaning of the Article 35 Paragraph 1 of the Convention in respect to all petitions filed as of 7th August 2008, as the date when the first meritorious decisions of the Constitutional Court on the merits of the mentioned appeals published in „The Official Gazette“ of the Respondent State“.

¹⁷ REVIEW OF WORK OF THE CONSTITUTIONAL COURT IN 2016 WITH THE OVERVIEW OF THE WORK OF THE CONSTITUTIONAL COURT IN THE PERIOD DECEMBER 2007- DECEMBER 2016, Constitutional Court, Belgrade 2017, p.21.

more than 95% today¹⁸. In 2017, the Constitutional Court received and formed 12,487 cases, out of which 12,118 were constitutional appeals¹⁹. These statistical indicators alone point to the fact that the Constitutional Court spends most of its expert and administrative capacities on settling constitutional appeals, and with little exaggeration, it could be said that the Constitutional Court is becoming increasingly a court for constitutional appeals. Congestion of the Constitutional Court with constitutional appeals greatly burden the judges of the Constitutional Court which inevitably affects the quality of passed rulings. (Simović, Petrov, 2014: 444) The available data may suggest that the Constitutional Court without meritorious consideration rejects about 79% of constitutional appeals (primarily via Small Panels), while 21% of these are decided on merits²⁰. Out of those decided on merits, the Constitutional Court passes or partially passes 80% of constitutional appeals decided on merits (a violation of a certain constitutional right is granted while it is rejected or dismissed in respect to other human rights) at the Session of Constitutional Court or at two Grand Panels²¹. The striking majority of constitutional appeals dispute the judgements with final force and effects and decisions of courts, even when it comes to administrative matters in which conducting the administrative proceedings is the requirement to address the Constitutional Court. This leads to another conclusion in respect to the constitutional appeal, which is that the constitutional appeal is increasingly regarded, by appellants, as an extraordinary legal remedy against final court decisions, as necessary middle step before addressing the European Court for Human Rights in Strasbourg. Since the Constitutional Court annuls several hundred final judgments of the courts of general and specific jurisdiction on constitutional appeals, interpreting not only constitutional provisions but also the norms of the law, the Constitutional Court's case law has produced tensions between the Supreme Court of Cassation and the Constitutional Court. (Nenadić, 2013: 98-99) The effect of the connection of a constitutional appeal with the international protection of human rights through the court in Strasbourg, on one hand, is that the violation of those human rights most commonly pointed out and successfully defended before the European Court for Human Rights in Strasbourg (above all, Article 6 of the European Convention - a fair trial within reasonable time) is regularly highlighted before the Constitutional Court, while on the other hand, the

¹⁸ Ibid, p. 4.

¹⁹ REVIEW OF WORK OF THE CONSTITUTIONAL COURT IN 2017, Constitutional Court, Belgrade 2018

http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/%D0%9F%D1%80%D0%B5%D0%B3%D0%BB%D0%B5%D0%B4_2017.pdf. Visited on 20th September 2018, p. 2.

²⁰ Ibid, p. 27.

²¹ Ibid, p. 27.

Constitutional Court largely monitors the jurisprudence of the European Court and adjusts its views and standards to them. This leads to a less diverse picture when it comes to human rights whose violation is highlighted and established in the proceedings before the Constitutional Court. Of all the adopted constitutional appeals, the violations of the right to a fair trial and trial within a reasonable time, as well as the right to equal protection (before the courts) amount to about $\frac{3}{4}$ of the total number of adopted constitutional appeals²². If we add to this the number of determined violations of the right to property which is most frequently the result of ineffective judicial protection of this right, as well as the violation of the right in respect to detention and the right to the legal remedy, then one can conclude that 99% of the adopted appeals were related to the violation of the Court by the courts²³. What is also evident from the report of the Constitutional Court, is the increasing inefficiency of the Constitutional Court. Every year, the Constitutional Court receives significantly larger number of constitutional appeals than it resolves in the same year, which contributes to the constant increase in the number of unresolved cases. The largest number of constitutional appeals settled in merits are resolved after 2-3 years from lodging a constitutional appeal, but in the case of rejecting a constitutional appeal, reaching a decision often takes a year or more.²⁴

2. Rejection of constitutional appeals due to various cases of irregularity of petitions or failure to meet the deadline

Irregularity of petitions and failure to meet preclusive deadlines represent a usual method for rejection of petitions by parties, without meritorious consideration in various legal proceedings. In this regard, a proceeding before the Constitutional Court shows a great similarity to other legal proceedings. The Constitutional Court rejects anonymous constitutional appeals, without summoning the appellants to eliminate deficiencies, since there is no one to summon to eliminate deficiencies.²⁵ On the other hand, if a constitutional appeal does not contain elements and appendices, pursuant to Article 85 of the Law (appellant's personal data, special power of attorney, copy of contested legal act, specification of the constitutional provision that has been violated, signature, act), a judge-rapporteur, on behalf of the Constitutional Court, shall determine a deadline and require from the appellant to supplement the constitutional appeal. Only after the expiry

²² Ibid, p. 28-29.

²³ Ibid.

²⁴ REVIEW OF WORK OF THE CONSTITUTIONAL COURT IN 2016 WITH THE OVERVIEW OF THE WORK OF THE CONSTITUTIONAL COURT IN THE PERIOD DECEMBER 2007- DECEMBER 2016, Constitutional Court, Belgrade 2017, p. 47.

²⁵ Law on the Constitutional Court, Article 36, paragraph 1, item 3.

of the said deadline, which is usually 15 days from the day of delivery of a letter to a party, the Constitutional Court shall reject an irregular constitutional appeal, by means of its decision. Due to a possibility of supplementing an irregular constitutional appeal, as well as the fact that parties are represented by lawyers before the Constitutional Court, the number of rejected constitutional appeals due to irregularity of petitions, is far below 10%. More complex and legally uncertain is the situation regarding rejection of constitutional appeals due to failure to meet deadlines, which is directly related to the previous application of (effective) legal remedies. The Law on Constitutional Court does not answer the question when does the 30-day deadline for lodging a constitutional appeal begin. Only people who are well familiar with positions and case law of the Constitutional Court may have a clear notion of when the conditions are met for lodging a constitutional appeal in legal proceedings. In various legal proceedings (administrative, misdemeanour, civil, criminal, non-contentious...), the possibility for filing a constitutional appeal opens in different phases of the proceeding (Manojlović, Andrić, 2013:164-165). In that manner, a final judgement of the Court of Appeal in criminal matters is contested by constitutional appeal, within thirty days from delivery of such judgement, regardless of the stated special legal remedy, while in civil proceedings, it happens after the ruling on a lodged review which has been approved. In a relatively large number of cases, not even attorneys in fact of parties-lawyers are aware of these differences, therefore their constitutional appeals remain meritoriously unconsidered, regardless of potential and evident violation of constitutional rights.

**3. Absence of other prerequisites for conducting a proceeding
and decision-making, stipulated by law and obvious
ungroundedness of constitutional appeal.**

“Under the provision of Article 170 of the Constitution of the Republic of Serbia, by means of which a constitutional appeal was established as a special and exclusive legal remedy for protection of rights and freedoms guaranteed by the Constitution, it is implied that one of the prerequisites for lodging a constitutional appeal is that it should be lodged by a person on whose rights and duties a decision was being rendered, by means of an individual act which is contested by a constitutional appeal, that is a person against whom the contested action has been undertaken .”²⁶

²⁶ Constitutional Court Decision No. Už 688/2017 .

3.2. Unlawfulness of a constitutional appeal due to a legal nature of contested legal act - *ratione materiae* -

Another large group of cases when the Constitutional Court, with reference to item 7, paragraph 1, Article 36 of the Law on the Constitutional Court, rejects a constitutional appeal without its meritorious consideration, if they have been lodged against legal acts of public authorities, for which the Constitutional Court concluded that these had not been the acts, referred to in Article 170 of the Constitution (that is, Article 82 of the Law on the Constitutional Court), therefore they had not been individual acts or actions of public authorities or organisations which had been entrusted with public competences, but which violate or deny human or minority rights. In the reasoning of its decisions, the Constitutional Court often uses the following wording:

“Pursuant to the provision of Article 170 of the Constitution of the Republic of Serbia, by means of which a constitutional appeal was established as a special and exclusive legal remedy for protection of rights and freedoms guaranteed by the Constitution, a constitutional appeal may be lodged only against an individual act or action by means of which it has been decided on the rights and duties of the appellant of the constitutional appeal, since it is only by such act or action that some of the rights and duties of the appellant, guaranteed by the Constitution, might be violated or denied. Based on the aforementioned and having in mind a legal nature and content of the contested act, the Constitutional Court has established that in the specific case, this was not an individual act referred to in Article 170 of the Constitution, therefore it rejected the constitutional appeal”²⁷

Various categories of individual legal acts, which the Constitutional Court considers as acts other than those referred to in Article 170 of the Constitution, since it has not been definitely decided by them on some right or obligation of an individual, include different acts of public prosecutor’s office by means of which criminal charges are rejected, the proceeding is discontinued, complaints against the work of public prosecutor is rejected or refused etc. ²⁸, court decisions on the motion for a new trial²⁹,

²⁷ Constitutional Court Decision No UŽ 1725/2017

²⁸ See Constitutional Court Decisions No UŽ-8929/2016 and UŽ-8341/2016.

²⁹ Constitutional Court Decision No UŽ-7806/2016.

various court proceeding rulings in the process of court enforcement³⁰ or *bankruptcy proceedings*³¹ etc.

3.3. Rejection of a constitutional appeal due to a small relevance

In some cases, due the absence of other prerequisites for conducting a proceeding and decision-making, the Constitutional Court states as a reason for rejection of a constitutional appeal a small relevance of a case. In the reasoning of decisions, rejecting constitutional appeals against judgements of misdemeanour courts, we may often find the following wording:

“Pursuant to the provision of Article 170 of the Constitution of the Republic of Serbia, by means of which a constitutional appeal was established as a special and exclusive legal remedy for protection of rights and freedoms guaranteed by the Constitution, from which it may be inferred that individual acts or actions, which are contested by a constitutional appeal, have to be of such relevance that could objectively cause violation of rights guaranteed by the supreme legal act of the state.

Having in mind the content of a constitutional appeal and a contested judgement, as well as a sentence imposed in a subject misdemeanour proceeding and respecting a personal relevance of the subject-matter of the decision-making process for an appellant of the constitutional appeal, the Constitutional Court has concluded that the constitutional appeal does not initiate some wider or general issue of importance to the exercise of constitutionally guaranteed rights, nor the appellant of the constitutional appeal has been incurred a major material damage by the contested judgement, regardless of the potential impact which the said legal matter has on her subjectively.”³²

Secondly, in the reasoning of a decision on a constitutional appeal, due to unawarded civil proceedings costs, the Constitutional Court states the following opinion:

“Based on the aforementioned, having in mind the circumstances of the respective case and respecting the potential subjective relevance of the case for an appellant of the constitutional appeal, the Constitutional Court has concluded that the failure to award costs for composing the objection to acceleration by a lawyer, as well as determined duration of the voluntary obligation fulfilment deadline for payment of the amount of

³⁰ Constitutional Court Decision No UŽ - 2789/2017

³¹ Constitutional Court Decision No UŽ – 1725/2017

³² Constitutional Court Decision No broj UŽ – 726/2017

6,000 RSD, in a respective case, may not be deemed as issues of constitutional and legal relevance, nor may the potential omissions of the competent court have a power of violation of rights guaranteed by the Constitution.”³³

It may be concluded that objectively small relevance of cases, which at the same time “does not initiate some wider or general issue of importance to the exercise of rights guaranteed by the Constitution“, represents almost a limitless possibility for the Constitutional Court not to decide meritoriously on constitutional appeals for which it assesses that they objectively have a small relevance. In the Constitutional Court case law we find cases where for identical legal and factual state of affairs, the Constitutional Court wins one constitutional appeal against the decision of the Administrative Court, while it rejects the other appeal by the same appellant, because in that case the Administrative Court has unconstitutionally rejected the complaint of the complainant regarding the administrative act, imposing a substantially lower tax liability to a complainant.³⁴ In particular, in cases of constitutional appeals against imposed fines in a misdemeanour proceeding, as well as court decisions on costs of civil proceedings within the case law of the Constitutional Court, there is no sufficiently defined line between those which are considered meritoriously and those rejected by a decision due to objectively small relevance of a proceeding.

3.4. Absence of constitutional legal grounds for consideration of the constitutional appeal

The Constitutional Court rejects, by means of decision, most constitutional appeals “due to the absence of other presuppositions for conducting proceedings and decision - making” in cases when it, as a court of higher instance, assesses that it has been required by means of constitutional appeal to assess enforcement of law, a conclusion concerning the determined facts, or quality of the disputed court rulings. In such cases, the statement of reasons of the Constitutional Court decision comprises the following formulations:

“Pursuant to the Constitution of the Republic of Serbia Article 170 provision, by means of which a constitutional appeal was established as a special and exceptional legal remedy for protection of rights and freedoms guaranteed by the Constitution, in the proceeding on the constitutional appeal, the Constitutional Court has jurisdiction only to

³³ Constitutional Court Decision UŽ - 1738/2017

³⁴ Odluka Ustavnog suda broj UŽ – 8111/2015 i rešenje Ustavnog suda broj UŽ – 3626/2016.

examine whether there was a violation or denial of rights and freedoms guaranteed by the Constitution. Therefore, statements in the constitutional appeal must also be based on the constitutional and legal grounds, which from the perspective of the identified constitutional right or freedom the content of which is determined by the Constitution, support the statements about its violation or denial. At the same time, it means that the Constitutional Court, as a court of higher instance, does not have jurisdiction to once again examine legality of the disputed acts or actions, when it acts upon the constitutional appeal; and it is for those reasons that formal reference to violation of constitutional rights and freedoms in and of itself does not qualify the constitutional appeal as admissible.³⁵

In another place, the Constitutional Court reasoned the decision as follows:

“Pursuant to Article 170 provision, by means of which a constitutional appeal is established as a special and exceptional legal remedy for protection of rights and freedoms guaranteed by the Constitution, in the proceeding on the constitutional appeal, the Constitutional Court has jurisdiction only to examine whether there is a violation or denial of rights and freedoms guaranteed by the Constitution. Therefore, statements in the constitutional appeal must also be based on the constitutional and legal grounds which from the perspective of the identified constitutional right or freedom, the content of which is determined by the Constitution, support the statements concerning its violation or denial.

3 The Constitutional Court determined, by reviewing the disputed judgements, that they contained detailed and clear explanations which were based on the nonarbitrary, and constitutionally and legally acceptable interpretations of the applicable law by whose application the claimant's, in this case, appellant of the constitutional appeal's statement of claim was finally rejected in the part where they had required from the court to bind over the defendants to pay monthly amounts in the value of...”³⁶

In another case the Constitutional Court pointed out:

“Starting from the content of the right to fair trial, and reasons for lodging the constitutional appeal, the claims pertaining to violation of the right are based on; the Constitutional Court indicates that the constitutional appeal may not be considered legal

³⁵ The Constitutional Court Decision number UŽ 1967/2017.

³⁶ The Constitutional Court Decision number UŽ 220/2017.

remedy by means of which the legality of the regular courts' rulings would be examined. When deciding on the constitutional appeal, the Constitutional Court may not assess regularity of the regular courts' decisions as regards the methods used by the courts when they applied substantive and procedural law, unless it arises from the reasons stated in the constitutional appeal that the courts' conclusions in the disputed court decisions were obviously made arbitrarily, that is, the entire proceeding was not fair pursuant to Article 32 paragraph 1 of the Constitution.”³⁷

In order to meet constitutional standards for fair trial, a judgement must contain sufficiently detailed and clear statement of reasons that is based on the constitutionally and legally acceptable, as well as nonarbitrary, interpretation of the applicable law; evidence must not be evaluated prejudicially contrary the interest of the appellant of the constitutional appeal, whereas conclusions of the court should not be made arbitrarily. In order to decide whether the constitutional appeal contains reasons which factually dispute the above-mentioned court rulings' quality, the judge-rapporteur must investigate in detail both the constitutional appeal and the court ruling itself. Certainly, such an intellectual process does not represent a mere evaluation of fulfilment of formal procedural presumptions for conducting a procedure and making decisions, but an investigation of the substantive presuppositions for decision making. (Manojlović Andrić, 2013: 167-168). It is exactly due to those reasons that it is not rare to see that decisions on rejection of constitutional appeals contain an examination of statements of the appellant of the constitutional appeal and evaluation of the provided "response" in the statement of reasons of the disputed court acts. Informal name for such decisions is "small meritum" (Manojlović Andrić, 2013: 168).

4. Conclusion

The Constitutional Court receives more than ten thousand new constitutional appeals annually, and it is becoming an increasingly big and difficult challenge for this state authority to resolve them promptly. In most of the constitutional appeals, their appellants indicate (i) violation of the constitutional right as provided in Article 32 paragraph 1 of the Constitution (the right to a fair trial within a reasonable time) which has been violated by rulings of the special and general jurisdiction courts. This pressure to the Constitutional Court was partially one of the reasons that the Court has not decided meritoriously in 80% of the constitutional appeals, but has rejected them by means of decision. In addition to the irregular petitions, and there are only a few of

³⁷ The Constitutional Court Decision number UŽ 8234/2016.

them, a tendency has been noticeable in the case law where the Constitutional Court, referring largely to "other processing reasons", has rejected and has not considered various categories of constitutional appeals, thus avoiding to decide on possible unlawfulness. Even though it is certain that such approach gives rise to the survival of a large number of unlawful individual legal acts in the legal system, such approach and case law of the Constitutional Court is more than justified from the point of view of constitutionality and the Constitutional Law. The Constitutional Court may not and cannot become the supreme controller of the legality of the supreme courts' acts, even though this tendency is present in many states. (Stone Sweet, 2012: 734) The Constitutional Court's intervention is justified only and exceptionally in case when the courts themselves have breached the citizens' constitutional rights or have failed to protect the constitutional rights; more so, such breach of the right guaranteed by the Constitution must have objectively relevant consequences, to cause pain, suffering, substantial material or non-material damage to citizens, or open a new constitutionally and legally significant issue. Certainly, it is relatively easy to determine a borderline generally, formally, however, each case is specific in case law and depends largely on a free judicial assessment of the Constitutional Court's judge. One of the criteria for the existence of a fair trial is that a law is interpreted and applied correctly, not arbitrary, by a court. In order to determine arbitrariness, the Constitutional Court needs to interpret the laws and determine the meaning of the law norms, which on one hand often creates disputes with the supreme court in Serbia - which assumes a right to interpret law in the last instance - (Nenadić, 2013: 96-97) while on the other hand it opens a broad space for the Constitutional Court to use discretionary authority to cancel judgements of the courts due to their arbitrary interpretation of the substantive law (Manojlović Andrić, 2013: 177). Analysis of the Constitutional Court's case law reveals that the Constitutional Court is much more willing to determine violation of right to fair trial caused by arbitrary interpretation and application of the law, and consequently cancel judgements of the supreme courts in Serbia in administrative and civil matters than in criminal matter; The Constitutional Court much more hesitates to indicate arbitrary application of the law, insufficiently reasoned judgement, and arbitrary and biased assessment of evidence in criminal matter than in administrative, and even more so in civil area of the law. It is not easy to find sustainable justification for this case law, it is difficult to comprehend that courts violate elements of the right to fair trial incomparably more in civil than in criminal matters. On the other hand, there is a large number of constitutionally guaranteed human and minority rights regarding which the Constitutional Court has almost never determined a violation of right (and exceptionally rarely, constitutional appeals are lodged against violation of those rights) consequently

it has never interpreted character, importance, scope or essence of those rights.³⁸ It is exactly these non-uniformities of the Constitutional Court's case law that make it difficult to draw a clear line between ordinary violations of rights and violation of constitutional rights, between interpretation of the Constitution and interpretation of the law, and this should certainly be preferable in order to make a constitutional appeal what it is supposed to be - an exclusive legal remedy for protection of violation of constitutional rights by means of individual legal acts.

References

- Beširević, V. (2014) , Governing without Judges - The politics of the Constitutional Court in Serbia. *International Journal of Constitutional Law*, 12(4), str. 954-979
- Kokott, J. – Kaspar M. (2012) Ensuring Constitutional Efficacy. U: Rosenfield, M., Sajo, A. (ur.) *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, str. 706-725, DOI: 10.1093/oxfordhb/9780199578610.013.0040
- Manojlović Andrić, K. (2013) Postupak i obim ispitivanja ustavne žalbe. U: Nenadić, B. (ur.), *ULOGA I ZNAČAJ USTAVNOG SUDA U OČUVANJU VLADAVINE PRAVA*. Beograd: Ustavni sud, str. 161-180.
- Martinez S.J. (2012) Horizontal Structuring. U: Rosenfield, M., Sajo, A. (ur.) *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, str. 488-514, DOI: 10.1093/oxfordhb/9780199578610.013.0040
- Nenadić, B. (2013) O nekim aspektima odnosa ustavnih i redovnih sudova. U: Nenadić, B. (ur.), *ULOGA I ZNAČAJ USTAVNOG SUDA U OČUVANJU VLADAVINE PRAVA*. Beograd: Ustavni sud, str. 71-111.
- Orlović, S. (2013) Promena položaja ustavnog sudstva. *Zbornik radova Pravnog fakulteta u Novom Sadu*, 47(4) str. 145-161
- Simović, D. – Petrov, V. (2014) *Ustavno pravo*. Beograd: Kriminalističko-policijska akademija.
- Stone Sweet, A. (2012) Constitutional Courts. U: Rosenfield, M., Sajo, A. (ur.) *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, str. 726-739, DOI: 10.1093/oxfordhb/9780199578610.013.0040
- PREGLED RADA USTAVNOG SUDA U 2016.GODINI SA OSVRTOM NA RAD USTAVNOG SUDA U PERIODU DECEMBAR 2007 – DECEMBAR 2016.GODINE, Ustavni sud, Beograd 2017, http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/%D0%9F%D1%80%D0%B5%D0%B3%D0%BB%D0%B5%D0%B4_2016.pdf, Posećeno, 20.septembra 2018.
- PREGLED RADA USTAVNOG SUDA U 2017, Ustavni sud, Beograd 2018. http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/%D0%9F%D1%80%D0%B5%D0%B3%D0%BB%D0%B5%D0%B4_2017.pdf, Posećeno, 20.septembra 2018.

³⁸Minority rights guaranteed by Articles 75 - 81 of the Constitution come under those rights.

Ljubinko Mitrović *

PROTECTION OF HUMAN RIGHTS AND FREEDOM OF PERSONS DEPRIVED OF THEIR LIBERTY¹ FROM THE PERSPECTIVE OF OMBUDSMAN FOR HUMAN RIGHTS OF BOSNIA AND HERZEGOVINA

The Institution of the Ombudsman for Human Rights of Bosnia and Herzegovina (hereinafter: the Institution²) represents a specific and independent institution for the protection of human rights established with the task of promoting good governance and the rule of law, i.e. the protection of human rights and fundamental freedoms. It is within its competence to protect and promote human rights and fundamental freedoms, then to prevent or eliminate discrimination of all kinds, to deal with complaints concerning freedom of access to information at all levels of government in Bosnia and Herzegovina, and the handling of complaints related to the ministerial, governmental and other appointments. A special segment of its activity is the protection of human rights and freedoms of persons deprived of liberty, which is the organizational responsibility of the Detention/Prisoner Unit.

Amendments to the Law on the Ombudsman for Human Rights of Bosnia and Herzegovina (which are being held for more than two years) should also establish a new competence regarding the functioning of the preventive mechanism for the prevention of torture and other cruel, inhumane or humiliating punishments or proceedings.

It is about the protection of human rights and the freedoms of persons deprived of their liberty, as well as the need to establish a preventive mechanism in Bosnia and Herzegovina.

Keywords: *Human Rights and Fundamental Freedoms, Human Rights Ombudsman of Bosnia and Herzegovina, Rights of Persons Deprived of Liberty, Preventive Mechanism.*

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¹ Constitution of Bosnia and Herzegovina, Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina, signed on 14.12.1995.

² The provisions of Article 8 of the Law on the Ombudsman for Human Rights of Bosnia and Herzegovina read as follows: (1) The institution of the Ombudsman consists of three persons. ... (7) The ombudsmen are appointed from three constituent peoples (Bosniak, Croat and Serb), which does not exclude the possibility of appointing and from among others.

1. In general, the Ombudsman for Human Rights of Bosnia and Herzegovina

The Ombudsman for Human Rights Institution of Bosnia and Herzegovina is an independent institution established with the task of promoting good governance and the rule of law, i.e. to protect the civil rights and fundamental freedoms corpus. It started work in 1996 and was established in accordance with Annexes IV and VI to the General Framework Agreement for Peace in Bosnia and Herzegovina (in the public known as the Dayton Agreement, which was adopted on 21 November 1995 and ratified on 14 December 1995).

According to Annex IV of the Dayton Agreement, which is at the same time the Constitution of Bosnia and Herzegovina³, Bosnia and Herzegovina and both of its entities, the Republika Srpska and the Federation of Bosnia and Herzegovina, guarantee the realization of the human rights established by the Constitution of Bosnia and Herzegovina and the European Convention on Human Rights and Fundamental Freedoms⁴. According to Annex VI of the Agreement, the Ombudsman Institution of Bosnia and Herzegovina and the Human Rights Chamber made the Human Rights Commission of Bosnia and Herzegovina. Also, Annex VI emphasizes that democracy and human rights factors of building companies that lead in international integration. The European Convention on Human Rights and Fundamental Freedoms, according to the Constitution of Bosnia and Herzegovina, is applied directly and has a priority in its application in relation to the establishment of laws in Bosnia and Herzegovina. Finally, pursuant to Article 1 of the Law on Ombudsman for Human Rights of Bosnia and Herzegovina, the Ombudsman Institution is an independent institution established with the aim of promoting good governance and the rule of law and the freedom of natural and legal persons, as guaranteed by the Constitution of Bosnia and Herzegovina and international agreements, which are contained in the Annex to that Constitution. The Institution monitors the activities of the institutions of Bosnia and Herzegovina, its

³ Constitution of Bosnia and Herzegovina, Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina, signed on 14.12.1995.

⁴ The European Convention for the Protection of Human Rights and Fundamental Freedoms is the basic and oldest instrument of human rights protection that is implemented in the Council of Europe system. The convention was signed in Rome on November 4, 1950, and came into effect after it was ratified by eight European countries (3 September 1953). Bosnia and Herzegovina ratified the Convention on 12 July 2002 and committed itself to ensuring the highest level of protection of internationally recognized human rights and fundamental freedoms. Article II of the Constitution of Bosnia and Herzegovina established that the rights and freedoms envisaged by the European Convention for the Protection of Human Rights and Fundamental Freedoms and Related Protocols will be directly applicable in the legal system of Bosnia and Herzegovina and will have priority over other domestic existing legislation.

entities and the Brčko District of Bosnia and Herzegovina. Finally, the Institution acts within the framework of constitutions, laws, other regulations and general acts, as well as ratified international treaties and generally accepted rules and standards of international law.⁵

At present, the Ombudsman for the Protection of Human Rights of Bosnia and Herzegovina works on the basis of the Constitution of Bosnia and Herzegovina and the Law on the Ombudsman for Human Rights of Bosnia and Herzegovina⁶, which are guaranteed independence and framework of infrastructure for promotion and protection of human rights and fundamental freedoms.

The Law on Ombudsman for Human Rights of Bosnia and Herzegovina was adopted in 2000 and has been amended to date three times - 2002, 2004 and 2006. This law defines the mandate, competencies, powers, as well as the rules of procedure of the Ombudsman of Bosnia and Herzegovina. With the protection and promotion of human rights and freedoms, the Ombudsperson Institution of Bosnia and Herzegovina has special powers prescribed by the following laws:

- The Law on Prohibition of Discrimination in Bosnia and Herzegovina⁷, which stipulates that the Ombudsman Institution of Bosnia and Herzegovina is a central body for the implementation of this law and can act on all natural and legal persons;
- the laws on freedom of access to information (for the level of Bosnia and Herzegovina, as well as the entity levels of government)⁸, by which the Ombudsman of Bosnia and Herzegovina is competent to take appropriate measures aiming to respect the rules on access to information, and

⁵ Official Gazette of Bosnia and Herzegovina, no. 32/2000, 19/2002, 35/2004 and 32/2006.

⁶ Official Gazette of Bosnia and Herzegovina, no. 32/2000, 19/2002, 35/2004 and 32/2006.

⁷ Official Gazette of Bosnia and Herzegovina, no. 59/2009 and 66/2016.

⁸ Law on Freedom of Access to Information in Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, no. 28/2000, 45/2006, 102/2009, 62/2011 and 100/2013; Law on Freedom of Access to Information in the Republika Srpska, Official Gazette of the Republika Srpska, no. 20/2001; Law on Freedom of Access to Information in the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina, no. 32/2001 and 48/2011.

- laws on government, ministerial and other appointments (for the level of Bosnia and Herzegovina, but also entity level of government)⁹, under which the Ombudsman Institution of Bosnia and Herzegovina is responsible for monitoring the implementation of the principles of the mentioned appointments, i.e. issuance of measures for annulment of decisions.

With a view to protecting the rights of citizens, the Ombudsmen of Bosnia and Herzegovina have an obligation to deal with individual and group complaints of citizens, conduct investigative procedures on human rights violations, issue recommendations to responsible human rights violation bodies, take measures to implement the issued recommendations and remove violations of rights and freedom, to inform natural and legal persons about their rights and obligations, to acquaint physical and legal persons about the possibilities of judicial and other forms of protection, to parties proposing the initiation of mediation proceedings and others.

The institution is organized according to the territorial and functional principle. Thus, three branch offices were organized: in Sarajevo, Brčko and Mostar, as well as the field office in Livno, while the headquarters of the Institution were located in Banja Luka. According to the principle of organization of office days, the lawyers of the Institution are at least twice a month in direct contact with the citizens in Tuzla, Bijeljina, Doboј, Grahovo, Drvar, Kupres, Glamoč and Bihać.

According to the functional principle, the Institution is organized into seven departments, in the fields of human rights (the Department of Children's Rights, the Department for Rights of Persons with Disabilities, the Department for Rights of National, Religious and Other Minorities, the Department of Civil and Political Rights, Social and Cultural Rights, the Discrimination Section and the Detention/Prison Department).

In accordance with the law, the Institution shall at the beginning of each calendar year, submit to the Presidency of Bosnia and Herzegovina, the Parliamentary Assembly of Bosnia and Herzegovina, the National Assembly of the Republika Srpska and the Parliament of the Federation of Bosnia and Herzegovina an annual report on the results

⁹ Law on Ministerial Appointments, Appointments to the Council of Ministers and other Appointments of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, no. 7/2003 and 37/2003; Law on Ministerial, Governmental and Other Appointments of the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina, no. 12/2003, 34/2003 and 65/2013 and the Law on Ministerial, Governmental and Other Appointments of the Republika Srpska, Official Gazette of the Republika Srpska, No. 41/2003.

of the activities of the Institution. The annual report also states the total number and nature of complaints received¹⁰, the number of complaints that the Ombudsmen did not take into consideration, as well as the reasons for this, the number of complaints that were the subject of an investigative procedure, as well as the number of acting lawyers. The annual report also presents data on the number of Ombudsman's recommendations issued to the responsible authorities, as well as statistical data pertaining to the number of recommendations issued to the accountable bodies, so-called unrealized recommendations. The annual reports are publicly presented and are intended for the widest range of the public because they are one of the relevant indicators of human rights and freedoms in Bosnia and Herzegovina.

The institution has been accredited for a number of years under "A" status at the International Coordinating Committee of the National Institutions for the Promotion and Protection of Human Rights (ICC), the Global Alliance of National Human Rights Institutions (GANHRIs), which implies its independence and functioning in accordance with the Paris Principles, and gives Ombudsmen the possibility of voting within this Committee¹¹.

2. Tasks and Responsibilities of the Detention/Prison Department

Detention/Prison Monitor Department¹² acts within the Institution and its role is to receive complaints from persons deprived of liberty and *ex officio* initiates investigations in cases where it considers that there is a violation of the rights of these persons, or when there are problems in exercising the rights deriving from the European Prison Rules, the United Nations Minimal Rules of Procedure with the convicted

¹⁰ Illustrations work, during the year 2017, the Institution received a total of 3,160 appeals. Compared to 2016, 183 complaints were registered. During the reporting period, a total of 13,968 citizens (direct contacts, telephone calls, electronic mail and written complaints) addressed to the Ombudsman Institution. Together with the cases transferred from previous years, a total of 4,963 complaints have been filed. In 2017, 2,908 cases were completed. The largest number of complaints related to violations of civil and political rights and amounted to 1,861 cases. Appeals related to: violation of economic, social and cultural rights (755), all forms of discrimination (178), violations of the rights of children (172), rights of detainees and inmates (135), violations of rights of persons with disabilities (51) and violations of the rights of national and religious minorities (8).

¹¹ The last accreditation was carried out on 24 November 2017 when the Human Rights Ombudsman Institution of Bosnia and Herzegovina was reacted to status "A" by the Global Alliance of National Human Rights Institutions (GANHRI), meaning that it operates in accordance with the Paris Principles. It should not be forgotten that from the very beginning of its functioning, the institution is accredited as "A".

¹² The new Rulebook on Internal Organization and Systematization of Jobs in the Institution of Human Rights Ombudsman of Bosnia and Herzegovina of 2018 provides for the new title of this Department, namely: the Monitoring Unit for the Realization of the Rights of Persons Deprived of Freedom.

persons, the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the European Convention on Human Rights and Freedoms (Mitrović, Lj. Jovašević, D., 2013, pp. 295-306). Also, this Department has the task to continuously (and struggle) with the realization of the protection of basic and all other rights and freedoms of detainees/detainees, and within their competencies and powers, inter alia, undertakes in particular:

- Measures and activities investigating justified complaints of convicted and detained persons (as well as other persons deprived of their liberty), related to the treatment of responsible state bodies in the sense of possible violations of human rights,
- points out existing regulations regulating the status and status of the convicted and detained persons, as well as the adequate manner of dealing with the employees in the competent services in the penal institutions,
- advocates for the consistent application of legal regulations (laws and bylaws of authority of all levels in Bosnia and Herzegovina), and also analyzes and points out the key causes of non-functioning of government structures dealing with issues related to the realization of detainees/prisoners.

Under the current conditions, and certainly taking into account the fact that there is still no preventive mechanism in Bosnia and Herzegovina, this Department also assumes the function of preventive mechanism, and accordingly the staff of this Department regularly visits all the institutions where the deprived persons are located (criminal-correctional institutions, police stations, psychiatric clinics and hospitals, institutions where juveniles are in conflict with the law, etc.).

The status of the Department is also indicated by the statistical data, i.e. the number of registered complaints in the Institution over the last three years, as follows: in 2015 there were a total of 108 complaints, in 2016 166 appeals, and in 2017 135 complaints (which, compared to the previous year, represents a decrease of 19.6%), as a rule, individual complaints. Otherwise, handling individual complaints of detainees/prisoners is one of the most important forms of human rights protection. What is to be noted is positive is the trend that some cases or complaints of the mentioned persons are resolved positively and before the recommendation of the Ombudsman has been resolved, so that the correctional agencies themselves have corrected their actions after the oral or first written address of the Institution.

When analyzing the number and structure of appeals of detained/convicted persons is similar to the previous years, which means that the appeals of this category of citizens were mostly related to dissatisfaction with the quality of health care provided, the issues of using extracurricular benefits, accommodation conditions and treatment, incorrect behavior of civil servants or other inmates or the inability to obtain a work engagement. A certain number of appeals of detained / convicted persons also concerned the content of legal court decisions which this person adopts as guilty, which in no way can be the subject of conduct or review of the Ombudsman, whereby convicted persons are informed by written or oral means, of course with legal instruction to whom how to deal with appeals of the above content.

An important segment of the activities of the Department for the Protection of the Rights of the Detained/Imprisoned Persons also includes the daily visits of the employees of this Department to persons deprived of their liberty, in which the way of dealing with them is examined in particular, with the aim of strengthening the protection of these persons from torture. During the reporting period, as a part of regular activities, the detained / inmate detainees and appellants, primarily convicted persons, visited the following institutions for the execution of criminal sanctions: KPZ Zenica (two times), KPZ Foča, KPZ Trebinje, KPZ Bijeljina, KPC Mostar, KPZ Bihać, KPZ Tuzla, KPZ Sarajevo, KPZ Orašje, KPZ Banja Luka and KPZ Doboј. In these visits, the representatives of the Institution, as a rule, went unannounced, solely at the request of the convicted persons, to examine the merits of the appeals filed, in accordance with the previous practice of the Institution.

A significant but certainly insurmountable problem in this area relates to the system of enforcement of criminal sanctions in Bosnia and Herzegovina which is extremely complex, with the indication that jurisdiction over the enforcement of criminal sanctions is divided between the levels of Bosnia and Herzegovina, then the Entities and finally Brčko district of Bosnia and Herzegovina¹³. It is precisely this kind of system where there are four inconsistent laws on the execution of criminal sanctions¹⁴, ultimately

¹³ The system of execution of criminal sanctions in Bosnia and Herzegovina is complex, because the positive legislation governing this area, in accordance with the constitutional structure of Bosnia and Herzegovina, is divided into three levels of government. Namely, the jurisdiction regarding the execution of criminal sanctions is divided between the Ministry of Justice of Bosnia and Herzegovina, the Ministry of Justice of the Federation of Bosnia and Herzegovina, the Ministry of Justice of the Republika Srpska and the Judicial Commission of Brcko District of Bosnia and Herzegovina.

¹⁴ Law on Execution of Criminal Sanctions in the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina, no. 44/98, 42/99, 12/2009 and 42/2011; Law on Execution of Criminal and Misdemeanour Sanctions in the Republika Srpska (Official Gazette of Republika Srpska, No.

results in the existence of different legal norms that regulate the same area (or issue) in different ways, which again results in uneven application of the same. This situation inevitably leads to unequal treatment of persons deprived of their liberty, and depending on which part of Bosnia and Herzegovina they are deprived of their liberty, that is, as a rule, they are sentenced to imprisonment or other punishment, that is, in which institution and in which entity they serve imprisonment long-term imprisonment or some other form of deprivation of liberty. It should also be added to the observation by the representatives of the Institution that the unequal treatment of inmates/detainees is also contributed by the fact that the convicted or detained persons serving the sentence or some other measure of deprivation of liberty are subject to the different rules contained in the ordinances and other by-laws applicable, the court pronounced the sentence of imprisonment, eg whether the courts of the entity or the Court of Bosnia and Herzegovina. Precisely for this reason, and if it determines the existence of different legal norms that in different ways regulate the same right in certain legislations, the Ombudsmen initiate initiatives to amend and harmonize the legal regulations.

A concrete example that can clearly support the foregoing is the question of transferring convicted persons from one penal institution to another in Bosnia and Herzegovina. The Ombudsmen have found that in Bosnia and Herzegovina the transfer of convicted persons (and even between institutions of one entity) is a complex problem, especially since the legislation in this area is not harmonized or is not equally based on this possibility, especially in part referring to the transfer of convicted persons from an entity's criminal justice institution to the same institution of the other entity. Specifically, the Law on Execution of Criminal Sanctions in the Federation of Bosnia and Herzegovina does not in general prescribe the possibility of transferring convicted persons to serve imprisonment or long-term imprisonment¹⁵ in penal institutions in the Federation of Bosnia and Herzegovina to support these penalties in the penal institutions in the Republika Srpska. For the sake of all the above, the Ombudsmen have sent to the

63/2018); Law of Bosnia and Herzegovina on the Execution of Criminal Sanctions, Detention and Other Measures, Official Gazette of Bosnia and Herzegovina, No. 22/2016 - Official Tentative Text; Law on Execution of Criminal Sanctions, Detention and Other Measures in Brcko District of Bosnia and Herzegovina, Official Gazette of Brcko District of Bosnia and Herzegovina, No. 31/2011.

¹⁵ The term of imprisonment and long-term imprisonment is differently determined in Entity Criminal Laws. Thus, the Criminal Code of the Republika Srpska (Official Gazette of the Republika Srpska, No. 64/2017) provides that imprisonment may be imposed for a term between three months and twenty years, while the term of long-term imprisonment is pronounced for 25 to 45 years. On the other hand, the Criminal Code of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, No. 36/2003, 37/2003, 21/2004, 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014 and 46/2016) prescribes a prison sentence ranging from thirty to twenty years and a long-term imprisonment for a term between twenty and one to 45 years.

Parliament of the Federation of Bosnia and Herzegovina, the Federation Ministry of Justice and the Ministry of Justice of Bosnia and Herzegovina with a view to ensuring clarity and consistency of the application of the law in this case in the case of Ž-BL-07-107 / 16 of March 2016 Serb, Initiative for Amendments to the Law on Execution of Criminal Sanctions in the Federation of Bosnia and Herzegovina¹⁶ and the Law on Execution of Criminal Sanctions of the Republika Srpska¹⁷. Unfortunately, to date, the Federation of Bosnia and Herzegovina has not adopted the proposed amendments to the Law on the Execution of Criminal Sanctions, which would resolve this issue as well as other rights of the convicted persons in a more adequate and just manner. On the other hand, unlike this entity, in the Republika Srpska a few months ago the new Law on Execution of Criminal and Misdemeanor Sanctions in the Republika Srpska was adopted¹⁸, which introduces certain innovations in the execution of criminal and misdemeanor sanctions and certainly regulates the issue of the transfer of convicted persons and those from one institution to another institution.

The issue of health care of detained/convicted persons is also significant from the aspect of the protection of human rights of these persons. Even today, in Bosnia and Herzegovina, the rights of detained / convicted persons to adequate health care are largely violated because the system of health care in the institutions for the execution of criminal sanctions has not been established in full capacity and in the manner prescribed by the European Prison Rules in the part III which regulates the issue of health. Specifically, this relates to the fact that all penal institutions do not have at least one permanent practitioner of general practice¹⁹ as stipulated in point 41.1 of the European Prison Rules²⁰, they already use the option set out in Section 41.3 of these Rules²¹, or honorary general practitioners. In such situations, this pharmacist is most often employed in an institution on the basis of a labor contract and his duty is to be available at all times and to come to the institution regularly. In addition to this, the health care

¹⁶ Official Gazette of the Federation of Bosnia and Herzegovina, no. 44/98, 42/99, 12/2009 and 42/2011.

¹⁷ Official Gazette of the Republika Srpska, no. 12/2010, 117/2011 and 98/2013.

¹⁸ Official Gazette of the Republika Srpska, No. 63/2018.

¹⁹ The permanently employed doctors in the Republika Srpska have the following institutions: KPZ Banja Luka, KPZ Foča and KPZ Istočno Sarajevo, while KPZ Dobož, KPZ Trebinje and KPZ Bijeljina do not have them. On the other hand, in the Federation of Bosnia and Herzegovina, a permanent medical staff member has KPZ Zenica and KPZ Tuzla, but this is not the case with KPZ Bihać, KPZ Mostar, KPZ Sarajevo, KPZ Orašje and KPZ Busovača.

²⁰ The European Prison Rules in Part III that regulates the issue of health, point 41.1 provide that "at least one qualified practitioner in each prison will be in each prison".

²¹ The European Prison Rules in Part III dealing with the issue of health, point 41.3 provide: "In the case of no permanent medical staff, the dentist will be paid a part-time fee".

institution should have enough staff and other medical staff, especially trained to provide adequate healthcare, as well as the necessary resources to work. In this regard, the Ombudsmen for the last few years in their annual reports on the results of the activities of the Ombudsman Institution for Human Rights of Bosnia and Herzegovina repeat their recommendation to the Ministries of Justice of Bosnia and Herzegovina, Federation of Bosnia and Herzegovina and the Republika Srpska to establish a clear healthcare system in accordance with European Prison Rules policy in criminal sanctioning facilities and provide all the necessary material and technical facilities for its implementation, and to organize educational programs to familiarize persons with deprivation of liberty with the dangers of the disease and the ways of transmitting contagious diseases with a view to preventive action. Positive effects of these recommendations are in view of the fact that representatives of the Institution during the visit of KPC Sarajevo on 25 June 2018 were informed that this institution is in the process of phasing out the procedure for permanent employment of general practitioners, and neuropsychiatry which shows that the authorities in Bosnia and Herzegovina still recognize the importance of the referenced recommendations. Also, the health care facilities in this institution have been significantly improved. The Ombudsmen will certainly continue to insist and monitor the establishment of health care in all correctional institutions.

Also, one of the problems faced by Bosnia and Herzegovina over the last few years is the overcrowding of some penal institutions in the Federation of Bosnia and Herzegovina (above all KPC Sarajevo), but this problem was largely resolved in the previous months after significant activities of the Institution. Specifically, in its Special Report on the Status of Human Rights in Institutions for the Execution of Criminal Sanctions in Bosnia and Herzegovina in 2009²², as well as in the case Ž-SA-07-1381/11 Reference Number: P-209/11, warned of the extremely bad conditions in which detainees/ prisoners in the Sarajevo Penitentiary Institution reside. In addition, in its Second Special Report on the Status of Human Rights in Institutions for the Execution of Criminal Sanctions in August 2012, the Ombudsmen pointed out that in the overall system of execution of criminal sanctions in Bosnia and Herzegovina²³ the worst situation within KPC Sarajevo, and that the responsible ministry did not follow the real

²² Special Report on the Status of Human Rights in Institutions for the Execution of Criminal Sanctions in Bosnia and Herzegovina, Ombudsman Institution for Human Rights of Bosnia and Herzegovina, published in September 2009.

²³ Special Report on the Status of Human Rights in Institutions for the Execution of Criminal Sanctions in Bosnia and Herzegovina, Ombudsman Institution for Human Rights of Bosnia and Herzegovina, published in August 2012.

needs, given the density of population in the area gravitating to this institution²⁴. In relation to the mentioned period or 2016, when 180 persons of the deprived rooms (capacity 88) were accommodated in KPZ Sarajevo, during the visit to this institution in June 2018, the number of persons deprived of liberty was 94 on the day of the visit. It can be concluded that the problem of overcrowding has been considerably reduced and the Ombudsmen hope that in the coming period this problem will be completely overcome.

In any case, today it is safe to say that in recent years the conditions of accommodation in most criminal correction facilities in Bosnia and Herzegovina have been significantly improved, as significant material resources have been allocated for these purposes. Namely, today the conditions of accommodation do not only include the size of the room where the detained / convicted persons live and the quality of their diet, but also other aspects such as air volume, illumination, ventilation, the use of sports and cultural contents, religious freedom, with members of the family and the outside world etc. A positive example that deserves attention is KPZ Dobož who provided last year with a children's corner (with toys and children's furniture) used by children when they visit their convicted fathers.

According to the data provided by the Institution in the previous two years, considerable financial resources have been specially allocated and the conditions in the following institutions: KPZ Dobož, KPZ Banja Luka, KPZ Orašje and KPZ Zenica IX Pavilion have been greatly improved. Also, large funds were allocated for building a state prison which unfortunately has not yet been put into operation although according to the Ombudsman's findings it meets all international standards and to a large extent the

²⁴ In the Report on the Ombudsman's visit to the Sarajevo-based Sarajevo-type Penitentiary Bureau of February 2016, the Government of the Federation of Bosnia and Herzegovina, the Federation Minister of Justice and the Director of the Sarajevo Penitentiary Institute, the following recommendations were sent: - to take all necessary measures, without delay, the improvement of the quality of life of the detainee means, above all, the provision of sufficient living space for detainees, provision of lighting, heating, ventilation, access to drinking water, maintenance of these premises in a satisfactory condition and fulfilment of prison sanitation requirements; - take measures to relocate the defendant's part of the facility to Igman or Ustikolina; - that the competent courts point out the need to refrain from issuing custody orders in custody in KPZ Sarajevo to the creation of the abovementioned conditions, and that detainees refer to other institutions; - to resolve or mitigate the problem of insufficient number of employees working with persons deprived of their liberty without further delay; - Immediately allow detained persons to stay on fresh air for two hours; - to work with the Federal Ministry of Health to solve the problem of scabies from which several detainees were affected; - to resolve, in cooperation with the Ministry of the Interior, the Police Administration, the issue of police assistance when conducting high-risk detainees based on medical assistance.

transfer of a certain number of prisoners from other institutions would relieve the existing institutions.

Additionally, after a series of Ombudsman recommendations, significant progress has been made regarding the communication of convicted persons with the Institution, given that this communication is defined in European Prison Rules Part II as well as communication with the outside world and it reads *"the convicted persons have the right to communicate without restrictions, letters, telephone or otherwise, with their family, other persons or representatives of outside organizations and to receive their visits."*

Certainly, a positive example of co-operation between criminal justice institutions and the Institution is a well-respected recommendation that Ombudsmen have regularly addressed to the Ministry of Justice of the Republika Srpska and to the Criminal Repairs Institutions in Republika Srpska in accordance with European Prison Rules to ensure the confidentiality of written consignments to persons deprived of their liberty they point to the Institution.

Also, the positive practice adopted by most of the penal institutions (Doboj, Mostar, Zenica, Busovača) and at the same time the recommendation of the Ombudsman is that the educators, when they are assessed, allow the direct telephone contact of the convicted person with the representatives of the Institution. In this way, convicted persons will receive the necessary legal advice in the short term, and if there are any elements and procedures for dealing with them, the Ombudsmen can take adequate measures without delay.

As a positive example we can still state that in the Republika Srpska in 2018 the Amnesty Law (with the Law on Execution of Criminal and Misdemeanor Sanctions in the Republika Srpska and the Criminal Code of the Republika Srpska) was adopted, and that the Ombudsmen gave a full contribution to the development of these legal solutions, which will certainly have a positive impact on the criminal justice system of this entity.

3. Preventive mechanism

In addition to the list of positive examples we have to point out that there are still problems in this area, primarily related to the inability to provide a greater number of convicted persons with a job engagement. Under the conditions in which unemployment is one of the major problems faced by all citizens of Bosnia and Herzegovina, this

problem is particularly pronounced in this category of persons. The ombudsmen constantly point out that additional efforts are needed because the work activity of the convicted persons is of great importance and affects the realization of a complete program of treatment in closed-type institutions. Only a small number of convicted persons are engaged in work, as a rule, on jobs related to maintaining the circuit cleanliness of an institution or possibly involving work on their own economies. For this reason, the Ombudsmen in each address addressed to the institutions again point out to the competent authorities that it is necessary to take more concrete measures to address this problem. As a positive example we can mention KPZ Banja Luka, within which the Bema Footwear Factory operates and employs convicted persons, and the tourist and recreational complex "Brioni" owned by KPZ Foca and on which were imprisoned persons sentenced to imprisonment, or long-term imprisonment, in this institution.

Another problem that is still very recent in all the penal institutions in Bosnia and Herzegovina relates to the use of extraterrestrial benefits of convicted persons. Namely, the Ombudsmen noted that, in a significant number of appeals of convicted persons, the competent police stations during the performance of the security clearance, i.e. the assessment of the convicted person's freedom of residence at the place of residence or residence during the duration of this benefit, did not establish the right situation on the ground and are not sufficiently objective, but by the automatic delivery to the Criminal Investigation Offices negative opinions. For this very reason, the Ombudsmen underline that the police bodies are obliged to observe the overall situation on the ground during the performance of these verifications and to identify all relevant facts in order to formulate an opinion reflecting the objective circumstances and thus constitute a good basis for the administration of the penal-correctional institution when deciding on the use of extraterrestrial benefits.

What the Ombudsman has to point out (and pointed out all these years) and indirectly affects the realization of the rights of the convicted persons is the fact that in a large number of penal institutions, especially in the Federation of Bosnia and Herzegovina (KPZ Zenica, KPZ Sarajevo) lack of staff relative to the number of convicted persons. Particularly worrying is the state of treatment and security, and this calls into question the realization of the process of re-socialization. Namely, the importance of the number of employees in these positions has been in the past few years fulfilled the conditions for retirement, and their jobs (which are, in turn, systematized) are not fulfilled. For this reason, the Ombudsmen will continue to ask the competent ministries to solve this problem and provide the necessary funds for recruiting a new staff.

Finally, the Ombudsmen certainly believe that it would be extremely important in the forthcoming period to carry out additional training of employees in criminal justice institutions on topics related to the realization of human rights and freedoms.

Torture, or abuse or torture with many types and forms of its manifestation is one of the oldest and most serious forms of injury or threat to human dignity and violation of fundamental human rights (Mitrović, Lj., - Pavlović, G., 2017: pp. 1-18).

Torture or abuse means any act intentionally causing pain or serious physical or mental suffering to a person in order to obtain from him or a third person the notice or confession, his punishment for an offense committed or committed by a third party or for whose execution he is suspected intimidating or exerting pressure on him or intimidating and exerting pressure on a third person or for any other reason based on any form of discrimination if such pain or suffering is caused by an official or any other person acting in an official capacity or to his encouragement or to his express or implicit consent²⁵. The term torture does not refer to pain or suffering resulting solely from legal sanctions, inseparable from such sanctions or the sanctions that are incurred.

What makes torture particularly dangerous is the property of its perpetrator. These are, in effect, persons who are representatives of state organs, and in particular the bodies of criminal repression, among which are particularly police officers, and then employed prosecutors, courts and judicial police, prison administration and others.

For that reason, or to suppress torture more effectively, international torture bodies have been established at international level to address the citizens of the Member States of the respective conventions, such as the UN Committee against Torture, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishments or Procedures and Substitution to Prevent Torture.

Also, most modern states have established internal or national mechanisms of general human rights protection, especially those related to the prevention of torture. One of them is certainly the preventive mechanism established by the obligation under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter: OPCAT). Practice in many countries has shown that the best model for establishing a preventive mechanism is the award to

²⁵ Article 1 of the Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment.

the Human Rights Ombudsman Institutions, with the inclusion of non-governmental sector and civil society organizations, competencies and powers, i.e. rights and obligations envisaged by OPCAT.

With regard to the establishment of a preventive mechanism in Bosnia and Herzegovina, it should be stressed that in October 2008 Bosnia and Herzegovina ratified the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and thus committed itself to meeting all standards mentioned in this Protocol, and one of them is certainly the establishment of a preventive mechanism. However, regardless of the enormous importance of establishing a preventive mechanism for combating torture, the same until today in Bosnia and Herzegovina has not been established. Specifically, the 2016 Bill of Human Rights Ombudsman for Bosnia and Herzegovina envisaged the establishment of a preventive mechanism within the Ombudsman Institution for Human Rights of Bosnia and Herzegovina, as resolved in the countries of the region²⁶. However, this law was not adopted, and therefore no preventive mechanism was established. The same happened in 2017 when no amendments were made to the Law on Human Rights Ombudsman of Bosnia and Herzegovina²⁷ which provided for the establishment of a preventative

²⁶ The provision of Article 2 paragraph 1 item d) of the Law on Human Rights Ombudsman of Bosnia and Herzegovina has been published by: National Preventive Mechanism means a body made up of experts with a mandate to visit places / institutions where persons are deprived of liberty and are competent to prevent torture and other severe, inhuman or degrading punishment or punishment. Article 8 of the same Law, entitled The Preventive Mechanism, reads: (1) In accordance with Article 17 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Institution is responsible for the operation of the National Preventive Mechanism. (2) The institution may at any time and without prior notice visit the places where the persons deprived of their liberty are located, places where persons with limited freedom of movement are located, and places where individual groups are located or staying. The institution has the right to access all places - premises where persons deprived of liberty are located. (3) The Annual Report of the Institution shall contain a special chapter on the functioning of the National Preventive Mechanism with recommendations. (4) The Institution by a special Rule regulates the organization and mode of operation, the criteria for the selection of representatives of civil society organizations, the academic community and other experts involved in the functioning of the national preventive mechanism.

²⁷ Article 2 of the Draft Law on Amendments to the Law on the Ombudsman for Human Rights of Bosnia and Herzegovina stated: After Article 4 a new Article 4^a is added, which reads: Article 4^a: 1. The ombudsman, in accordance with Article 17 of the Optional Protocol to the Convention against Torture and of other cruel, inhuman or degrading treatment or punishment (Official Gazette of Bosnia and Herzegovina - International Agreements, No. 08/2008), perform preventive measures to prevent torture and other cruel, inhuman or degrading treatment or punishment. 2. Ombudsmen may, at any time and without prior notice, visit places where persons deprived of their liberty are located, places where persons with limited freedom of movement are located, and places where individual groups are located or staying. The ombudsmen have the right to access all places - premises where persons deprived of their liberty are respected, respecting the rules of house law and the prohibited access by the penal institution to which they come. (3) The Annual Report on the Work of the Ombudsman Institution shall contain a special chapter on the functioning of the preventive mechanism with recommendations. (4) The Institution by a special Rule regulates the organization and manner of work,

mechanism within the Institution, although proposed amendments to the Act were adopted by the Council of Ministers of Bosnia and Herzegovina and adopted in the first reading by the Constitutional Affairs Committee of the House of Representatives, the Constitutional Affairs Committee of the House of Peoples and the Joint Committee on Human Rights of the Parliamentary Assembly of Bosnia and Herzegovina. It is therefore necessary for the competent authorities in Bosnia and Herzegovina, before all the Parliamentary Assembly of Bosnia and Herzegovina, to make additional efforts to establish this mechanism in the forthcoming period in order to properly address this matter and to fulfill the obligations arising from OPCAT.

The most important goal of the preventive mechanism of action in Bosnia and Herzegovina is that through continuous visits of those employed in institutions where detainees are deprived of their liberty, it is preventive, so that the representatives of the state organs, i.e. the official persons who work in them, turn away from torture and others severe, inhuman or degrading punishment or treatment. Hence, employees in the Preventive Mechanism Department would have the obligation to continuously visit and control all places where they are and may be detained persons (prisons, prisons, police stations, psychiatric hospitals, psychiatric departments in general hospitals, clinical centers, social welfare institutions, asylum and refugee centers for foreigners, institutions for the accommodation of juveniles in conflict with the law).

Conclusion

An important segment of the work of Human Rights Ombudsman Institution of Bosnia and Herzegovina is the monitoring of the realization of the rights of persons deprived of their liberty through the functioning of the Special Department for the Rights of Detainees/Prisoners (in the future Department for monitoring the exercise of the rights of persons deprived of their liberty). By analyzing the number and structure of complaints of detained/convicted persons received by the Ombudsman Institution (not a small number of these complaints, and on average it exceeds 100) it can be concluded that the majority of complaints relate to the dissatisfaction of the persons deprived of their liberty with the quality of the provided health care, as regards the use of extraterritorial benefits, complaints concerning the conditions of accommodation and treatment of persons deprived of their liberty in penal institutions, complaints related to

criteria for the selection of representatives of civil society organizations, the academic community and other experts involved in the functioning of the preventive mechanism.

inappropriate behavior of civil servants (primarily those dealing with treatment) or other prisoners (common problems often resulting in physical disassociation), and the inability of the convicted person to engage in work engagement. It is to be expected in the forthcoming period to establish a special organizational unit within the Institution of the Ombudsman which would refer to the operation of the preventive mechanism.

Literatura

Knjige i članci:

- Mitrović, Lj. – Jovašević, D., (2013), Neosnovano lišenje slobode u krivičnom zakonodavstvu Republike Srbije – odgovornost i kažnjivost, *Zbornik radova sa Međunarodne konferencije o društvenom i tehnološkom razvoju - STED 2013 sa temom: Razvoj naučne misli kao determinanta društvenog i tehnološkog razvoja*, ISSN 2303-498X, Banja Luka, 2013. godine, str. 295-306.
- Mitrović, Lj. - Grbić-Pavlović, N., (2015), Oblici lišenja slobode u najnovijem prekršajnom zakonodavstvu Republike Srpske, *Zbornik radova sa LV Redovnog godišnjeg međunarodnog savetovanja Srpskog udruženja za krivičnopravnu teoriju i praksu iz Beograda pod nazivom: SUĐENJE U RAZUMNOM ROKU I DRUGI KRIVIČNOPRAVNI INSTRUMENTI ADEKVATNOSTI DRŽAVNE REAKCIJE NA KRIMINALITET*, ISBN 978-86-6411-003-7; COBISS.SR-ID 209102860; UDK 343.2/.7(082) 343.85(082); Zlatibor, 17-19. septembar 2015. godine, str. 663-679.
- Mitrović, Lj. – Pavlović, G., (2017), Neophodnost usaglašavanja pravnih standarda u Bosni i Hercegovini sa međunarodnim standardima na polju prevencije torture, *Zbornik radova sa Međunarodne naučne konferencije pod nazivom: Usaglašavanje pravne regulative sa pravnim tekovinama (Acquis communautaire) Evropske unije – stanje u Bosni i Hercegovini i iskustva drugih*, ISBN 978-99976-704-0-3; COBISS.RS-ID 6345240; UDC 340.13(4-672EU:497.6)(082), Istraživački centar Banja Luka, 25. februar 2017. godine, str. 1-18.

Ustavi, zakoni, podzakonski akti i izvještaji:

- Ustav Bosne i Hercegovine, Aneks IV Opšteg okvirnog sporazuma za mir u Bosni i Hercegovini potpisan dana 14.12.1995. godine.
- Ustav Federacije Bosne i Hercegovine, Službene novine Federacije Bosne i Hercegovine, br. 1/94, 13/97, 16/2002, 22/2002, 52/2002, 18/2003, 63/2003, 9/2004, 20/2004, 33/2004, 72/2005, 71/2005 i 88/2008.
- Ustav Republike Srpske, Službeni glasnik Republike Srpske, br. 21/92 – prečišćeni tekst, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/2002, 26/2002, ispravak, 30/2002, ispravak, 31/2002, 69/2002, 31/2003, 98/2003, 115/2005, 117/2005 i 48/2011.
- Statut Brčko distrikta Bosne i Hercegovine, Službeni glasnik Brčko distrikta Bosne i Hercegovine, br. 17/2008 i 39/2009.

- Zakon o ombudsmenu za ljudska prava Bosne i Hercegovine, Službeni glasnik Bosne i Hercegovine, br. 32/2000, 19/2002, 35/2004 i 32/2006.
- Zakon o izvršenju krivičnih sankcija u Federaciji Bosne i Hercegovine, Službene novine Federacije Bosne i Hercegovine, br. 44/98, 42/99, 12/2009 i 42/2011.
- Zakon o izvršenju krivičnih i prekršajnih sankcija u Republici Srpskoj, Službeni glasnik Republike Srpske, broj 63/2018.
- Zakon Bosne i Hercegovine o izvršenju krivičnih sankcija, pritvora i drugih mjera, Službeni glasnik Bosne i Hercegovine, broj 22/2016 – službeni prečišćeni tekst.
- Zakon o izvršenju krivičnih sankcija, pritvora i drugih mjera u Brčko distriktu Bosne i Hercegovine, Službeni glasnik Brčko distrikta Bosne i Hercegovine, broj 31/2011.
- Zakon o zabrani diskriminacije, Službeni glasnik Bosne i Hercegovine, br. 59/2009 i 66/2016.
- Zakon o slobodi pristupa informacijama u Bosni i Hercegovini, Službeni glasnik Bosne i Hercegovine, br. 28/2000, 45/2006, 102/2009, 62/2011 i 100/2013.
- Zakon o slobodi pristupa informacijama u Republici Srpskoj, Službeni glasnik Republike Srpske, broj 20/2001.
- Zakon o slobodi pristupa informacijama u Federaciji Bosne i Hercegovine, Službene novine Federacije Bosne i Hercegovine, br. 32/2001 i 48/2011.
- Zakon o ministarskim imenovanjima, imenovanjima Savjeta ministara i drugim imenovanjima Bosne i Hercegovine, Službeni glasnik Bosne i Hercegovine, br. 7/2003 i 37/2003.
- Zakon o ministarskim, vladinim i drugim imenovanjima Federacije Bosne i Hercegovine, Službene novine Federacije Bosne i Hercegovine, br. 12/2003, 34/2003 i 65/2013.
- Zakon o ministarskim, vladinim i drugim imenovanjima Republike Srpske, Službeni glasnik Republike Srpske, broj 41/2003.
- Krivični zakonik Republike Srpske, Službeni glasnik Republike Srpske, broj 64/2017.
- Krivični zakon Federacije Bosne i Hercegovine, Službene novine Federacije Bosne i Hercegovine, br. 36/2003, 37/2003, 21/2004, 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014 i 46/2016.
- Pravila postupka Institucije ombudsmena za ljudska prava Bosne i Hercegovine, Službeni glasnik BiH, broj 104/2011.
- UN Rezolucija br. 68/171 – Nacionalne institucije za promociju i zaštitu ljudskih prava, decembar 2013.
- Specijalni izvještaj o stanju ljudskih prava u ustanovama za izvršenje krivičnih sankcija u Bosni i Hercegovini, Institucija ombudsmena za ljudska prava Bosne i Hercegovine, objavljen u septembru 2009. godine.
- Godišnji izvještaj o rezultatima aktivnosti Institucije ombudsmena za ljudska prava Bosne i Hercegovine za 2016. godinu (2016). Sarajevo: TPM Društvo za zapošljavanje slijepih i slabovidnih lica.
- Godišnji izvještaj o rezultatima aktivnosti Institucije ombudsmena za ljudska prava Bosne i Hercegovine za 2017. godinu (2017). Sarajevo: TPM Društvo za zapošljavanje slijepih i slabovidnih lica.

Specijalni izvještaj Ombudsmena za ljudska prava BiH pod nazivom: *Preporuke za unapređenje zaštite prava djece na privatnost kada su prava narušena od strane medija u Bosni i Hercegovini*, (2012) Sarajevo; dostupno na: www.ombudsman.gov.ba.

Izvještaj o posjeti ombudsmena Kazнено-popravnom zavodu poluotvorenog tipa Sarajevo; Sarajevo, februar 2016. godine.

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О КОНКРЕТИЗАЦИИ УНИВЕРСАЛЬНОГО ПРИНЦИПА СПРАВЕДЛИВОСТИ В УГОЛОВНОМ ПРАВЕ

Вопросы справедливости уголовного права не теряют своей актуальности и не могут считаться окончательно решенными, несмотря на тысячелетнюю историю самой идеи социальной справедливости. Справедливость – многоаспектное и широкое понятие. Она требует справедливого распределения социальных благ и справедливого воздаяния за нарушение социального порядка. Уголовному праву принадлежит весьма ограниченная роль в ее обеспечении. Уголовное право не конструирует справедливость, создание справедливого социального порядка не является его функцией. Уголовное право не обсуждает вопрос о том, насколько справедливы отношения, существующие в обществе; оно только поддерживает силой репрессии тот порядок, который сложился в обществе и который априори для уголовного права является справедливым. В связи с этим принцип справедливости, будучи фундаментальным принципом правовой системы, нуждается в уголовно-правовой конкретизации с тем, чтобы его требования приобрели инструментальный характер. Установлено, что справедливость уголовного права предполагает: справедливость криминализации общественно опасных деяний, справедливость законодательно сформулированной санкции за их совершение, справедливость уголовно-правовой оценки преступления, не допускающую привлечение к ответственности дважды за одно и то же деяние; справедливость индивидуализации мер уголовной ответственности.

Ключевые слова: принцип справедливости; справедливое уголовное право; справедливость привлечения к уголовной ответственности; справедливость наказания

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1. Понятие справедливости весьма сложно для понимания и объяснения. Следует различать социальную справедливость как некий идеал, к которому общество вечно стремится и никогда не достигнет, с одной стороны, и справедливость как некий существующий в каждый конкретный исторический момент порядок вещей, определяемый соотношением общественных сил и находящий выражение в существующих социальных и правовых нормах. Важно отметить, что уголовное право и уголовное правосудие, по большому счету, не обсуждают вопросов о том, насколько действительно (объективно, в идеале) справедлив тот порядок вещей, который оно стремится восстановить. Уголовное право, что бы сегодня не говорили о его классовой природе, не столько моделирует идеальную справедливость, сколько закрепляет и восстанавливает социальный порядок, отвечающий интересам создающих это право социальных сил. Уголовное право стремится к восстановлению того (объективно несправедливого) порядка вещей, который был утвержден на момент совершения преступления и который по большому счету, детерминировал сам факт совершения противоправного деяния. Таким образом, оно стремится к закреплению существующего *status quo*. В социально-криминологическом отношении это означает “движение по кругу”: мы восстанавливаем нарушенный преступлением порядок, который обладает свойством порождать преступление.

Подобная концепция уголовного права и правосудия сегодня активно подвергается критике. Начало ее положено в известной работе основателя доктрины восстановительного правосудия Х. Зера. В поисках альтернативной (усовершенствованной) модели организации правосудия, он обращается к модели библейского правосудия и библейского понимания справедливости. “Библейская справедливость призвана делать жизнь лучше, она не предназначена для поддержания *status quo*. Напротив, в ее цели входит расшатывание *status quo*, совершенствование, развитие” (Зер, Х., 2002: 164). Иными словами, библейское правосудие призвано восстанавливать не нарушенную преступлением справедливость, а стремиться к достижению идеала социальной справедливости, минимизирующего или исключаящего саму возможность совершения преступлений. Такой взгляд на проблему восстановления справедливости коренным образом меняет устоявшиеся представления об основных принципах организации правосудия. Вместо модели пассивного, “с закрытыми глазами”, закрепляющего существующее *status quo* правосудия, ориентированного на установление виновности и определение меры наказания-страдания для преступника перед нами открывается модель активного, одновременного

беспристрастного и пристрастного правосудия, ориентированного на достижение справедливости, основанной на потребностях вовлеченных в уголовно-правовой конфликт людей, посредством применения преимущественно восстановительных процедур.

Восстановительные процедуры или реститутивная парадигма воздействия на преступность, не ограничивается только восстановлением нарушенных прав потерпевшего. Реституция есть восстановление, а точнее, стремление к достижению социальной справедливости, посредством реализации специальных процедур, направленных к удовлетворению потребностей преступника и его жертвы. Детальный анализ этих потребностей приведен в той же работе Х. Зера. Их анализ приводит к пониманию того, что минимизация социальных последствий преступлений в процессе разрешения уголовно-правового конфликта может идти в трех основных направлениях: 1) восстановление нарушенного преступлением правопорядка; 2) восстановление экономического и социально-психологического статуса потерпевшего; 3) социально-психологическая реабилитация и социальная реинтеграция преступника.

2. Между тем, эта парадигма, при всей своей теоретической значимости, не стала сегодня (а, по-видимому, и не может стать) доминантой уголовно-правового развития. “Широкое восстановление” мыслится в действительности лишь как возможность закрепления в законе отдельных реститутивных норм и предписаний. Уголовное право сохраняет по преимуществу репрессивную модель воздействия на преступления и преступников. Оно объективно ограничено в выборе средств социального переустройства и может использовать лишь наиболее острые, корректирующие средства для минимизации социальных девиаций, в частности уголовное наказание. Но от этого значимость проблем обеспечения справедливости в уголовном праве не только не снижается, но напротив, многократно возрастает, ибо поддерживать справедливость в обществе может только справедливое уголовное право.

3. Справедливость представлена в нормах международного права преимущественно как универсальный принцип уголовного процесса. Согласно ст. 10 Всеобщей декларации прав человека 1948 г. каждый человек имеет право на то, чтобы его дело было рассмотрено с соблюдением всех требований справедливости независимым и беспристрастным судом. Сходные положения содержатся в ст. 14 Международного пакта о гражданских и политических правах (1966 г.) и в ст. 6 Конвенции о защите прав человека и основных свобод (1950 г.).

В Конституции Российской Федерации начала справедливости также закреплены применительно к уголовному судопроизводству (ст. 46 - 64).

Сквозь призму справедливости в научной литературе рассматриваются многие иные взаимосвязанные межотраслевые принципы правосудия: разумность, право на судебную защиту, конституционность и законность, состязательность и равноправие сторон, самостоятельность и независимость, гласность и транспарентность, презумпция невиновности.

Всеобщность и универсальность принципа справедливости вовсе не исключает необходимости его конкретизации, детализации применительно к отдельным отраслям материального права, в частности, применительно к уголовному праву, поскольку, как известно из философии, общего не существует, общее всегда проявляется в конкретном, в единичном. Тем, более, когда это касается не терпящих аналогии уголовно-правовых норм и их применения на практике.

В российской уголовно-правовой доктрине предлагается множество определений справедливости как принципа уголовного права, порой специалистами в нем выделяется до пяти уровней, существенно различающихся своим содержанием: общественный (социальный, этический), государственный, законотворческий, правоприменительный, личный, адресованный непосредственно к осужденному (Филимонов, 2009; Бунин, 2006). Однако не все из этих определений и уровней имеют прикладное значение.

4. Продуктивные идеи конкретизации справедливости в юриспруденции вообще и в уголовном праве в частности содержатся в известных трудах, начиная с древних времен.

Так, Аристотель выделял два вида справедливости: справедливость в смысле соразмерности и равномерности, а также справедливость юридическую, приравнивая ее к законности (Аристотель, 2012: 81). О законности как неотъемлемом атрибуте справедливости писали и другие авторы (Иеринг, 1881: 265; Боннер, 1992: 30). Понимание законности далее конкретизировал Х. Перельман, предлагая разделить оценку справедливости уголовно-правовых норм и оценку справедливости практики их реализации (Perelman, 1957). Необходимым условием справедливости, начиная с договорной традиции Нового времени (Т. Гоббс, Дж. Локк, Ж.-Ж. Руссо, И. Кант) едва ли не всеми исследователями провозглашается равенство (Рассел, 2001: 228; Ролз, 1995). Важным аспектом в

понимании и конкретизации справедливости является аргументированное понимание того, что источник справедливости находится в рациональности, разумности (категорический императив И. Канта).

Однако при всей своей значимости эти подходы и позиции не добавляют конкретности в уголовно-правовое содержание справедливости, понимание которого необходимо и при конструировании норм права, и при исполнении (соблюдении), и при применении. При том, что по-прежнему существуют разные мнения относительно того, является ли вообще справедливость правовой категорией (Боннер, 1992: 26).

Правоприменителю же недостаточно констатаций, что справедливость относится к высшим ценностям, выступает в качестве правового идеала или ориентира. Судья не может руководствоваться общественным мнением в оценке справедливости и учитывать его при определении меры ответственности. Требуется конкретная нормативная опора этой юридической оценочной деятельности.

В попытке ее обоснования В.Д. Филимонов в свое время предлагал строить общую схему справедливости в уголовном праве по трем параметрам - как меру и оценку: а) целей уголовной ответственности и наказания; б) средств их достижения - наказания и иных мер уголовно-правового характера; в) результатов применения наказания и иных мер уголовно-правового характера (Филимонов, 2002: 107).

Однако такое предложение представляется ограниченным, поскольку справедливость в уголовно-правовых отношениях проявляется гораздо шире, не ограничиваясь сферой ответственности и наказуемости деяния.

5. Соотношение между преступлением и наказанием выступает частным проявлением известного соотношения между деянием и воздаянием (Толкаченко, Харабет, 2013). Соответствие между этими характеристиками оценивается в этике как справедливость, несоответствие - как несправедливость. Именно это исходная позиция и должна стать основой для понимания справедливости в уголовном праве.

Рассматриваемый принцип охватывает правотворчество, правоприменение, правоисполнение. Справедливость реализуется законодателем при установлении

и дифференциации уголовной ответственности (определении круга преступных деяний, видов и размеров наказаний за конкретные преступления), а также правоприменителем, судом - в процессе квалификации преступлений, индивидуализации ответственности и наказания.

Уголовно-правовое содержание принципа справедливости в российском праве, таким образом, пронизывает все нормы УК РФ: наказание и иные меры уголовно-правового воздействия, применяемые к совершившему преступление лицу, должны соответствовать тяжести и конкретным обстоятельствам преступления, особенностям личности виновного. При этом из положений Конституции РФ и корреспондирующих положений статьи 6 Конвенции о защите прав человека и основных свобод с необходимостью следует, что правосудие по своей сути может признаваться таковым лишь при условии, что оно отвечает требованиям справедливости и обеспечивает эффективное восстановление в правах.

Поливариантные возможности реализации этого принципа заключаются в содержании всех норм уголовного закона, а сам принцип включает в себя следующие требования: справедливость криминализации деяний, справедливость пенализации преступлений, справедливость привлечения к уголовной ответственности, справедливость назначения и реализации наказания и иных мер уголовно-правового характера.

6. Требование справедливой криминализации деяний предполагает социальную и этическую обусловленность уголовно-правового запрета. Эти требования предполагают учет критериев и принципов криминализации деяний, разработка которых составляет важную часть предмета отечественной уголовно-правовой доктрины. Среди факторов криминализации сегодня не без оснований называют: степень общественной опасности деяния и причиняемый им вред, распространенность и динамику деяний этого вида, неурегулированность ответственности за него в уголовном законе, невозможность противодействия таким деяниям средствами, не связанными с использованием уголовного закона, реальные возможности системы уголовной юстиции в борьбе с ним, уровень общественного правосознания и правовой культуры, исторические традиции и др. Немаловажное значение в процессе криминализации деяния имеет учет общественных представлений о допустимом и невозможном. Уголовный закон, отвечающий требованиям социальной, криминологической, этической обоснованности можно определить как справедливый.

В противном случае недостатки уголовно-правового законодательства, издержки криминализации могут привести к двум противоположным, но одинаково нежелательным последствиям: пробельности в уголовно-правовой охране общественных отношений либо избыточности криминализации деяний. В первом случае нарушение справедливости выражается в отсутствии ответственности за деяния, объективно причиняющие вред и, как правило, осознаваемые обществом как недопустимые; во втором – нарушение справедливости проявляется в перенасыщенности законодательства уголовно-правовыми запретами, необходимость в которых уже отпала или даже не существовала, в разрастании негативных последствий существования так называемых “мертвых норм” (Бабаев, М., Пудовочкин Ю.: 2010).

7. Следующее требование принципа справедливости состоит в справедливой пенализации преступлений, то есть в адекватном определении пределов наказуемости криминализованного деяния в санкции уголовно-правовой нормы. В науке разработаны и критерии оценки санкции уголовно-правовой нормы как справедливой: а) она должна соответствовать тяжести описанного в диспозиции деяния; б) она должна согласовываться с санкциями, предусмотренными за другие преступления; в) она должна давать суду возможность индивидуализировать наказание с учетом всех возможных вариантов совершения преступления (Келина С. Кудрявцев В. 1988: 135).

Вместе с тем, приходится констатировать, что обеспечение справедливости санкции – важная, но далеко не всегда грамотно решаемая, а порой и просто игнорируемая законодателем задача. В последние годы, когда поток изменений в УК РФ приобрел недопустимо большой и несогласованный характер, обеспечения справедливости санкций стало по сути недостижимым идеалом, хотя и не утратило от этого качества составной части принципа уголовного права.

8. Непременное условие восстановления нарушенной преступлением справедливости заключается в обязательном реагировании на преступление со стороны государства. При этом справедливость восстанавливается не только, а возможно и не столько, наказанием виновных, сколько, прежде всего, раскрытием преступлений, своевременным изобличением виновных и привлечением их к уголовной ответственности. Сам факт привлечения к уголовной ответственности каждого, кто совершил преступление, изживает ощущение безнаказанности и вседозволенности, и тем самым укрепляет в общественном сознании начала справедливости. На реализацию принципа справедливости направлены нормы

Общей части УК РФ об исключении ответственности (ст. 37 - 42), об освобождении от ответственности и от наказания (ст. 75 - 86), об особенностях ответственности и наказания несовершеннолетних (ст. 87 - 96), об иных мерах уголовно-правового характера (ст. 97 - 104.3), а также специальные нормы об освобождении от ответственности, содержащиеся в примечаниях к ряду статей Особенной части УК РФ. Хотя, разумеется, наибольшее применение принцип справедливости находит при индивидуализации уголовного наказания.

9. Важным условием обеспечения справедливости является правильная юридическая оценка содеянного. Вмененное подсудимому преступление должно быть квалифицировано в точном соответствии со статьей (частью статьи) УК РФ, предусматривающей ответственность за совершение этого деяния.

В этой связи ч. 2 ст. 6 УК РФ закрепляет правило о том, что никто не может нести уголовную ответственность дважды за одно и то же преступление, основанное на положении ч. 1 ст. 50 Конституции РФ и согласующееся с нормами международного права (“non bis in idem”). На недопустимость повторного привлечения к ответственности направлены также положения ст. 12 и ст. 17 УК РФ. Кроме того, положения этого принципа раскрываются и в уголовно-процессуальном законодательстве (п. 4, 5 ч. 1 ст. 27; ст. 308 УПК РФ).

Так, приговор, судебное решение любой инстанции, в том числе в части преступности и наказуемости деяния, должны отвечать требованиям законности, обоснованности, мотивированности, справедливости (ст. 7, 297 УПК РФ). Неправильное применение уголовного закона, положений как Общей, так и Особенной частей УК РФ, является одним из оснований отмены приговора суда (ст. 382 УПК РФ).

Указанные положения являются конкретизацией общеправового принципа справедливости и направлены на обеспечение правовой безопасности и стабильности, в том числе и в уголовном законодательстве РФ.

Вместе с тем, Конвенцией о защите прав человека и основных свобод, ее п. 2 ст. 4 Протокола № 7 (в ред. Протокола № 11), установлено, что право не привлекаться повторно к суду или повторному наказанию не препятствует повторному рассмотрению дела в соответствии с законом соответствующего государства, если имеются сведения о новых или вновь открывшихся обстоятельствах или если в ходе предыдущего разбирательства было допущено существенное нарушение (т.е.

имеющее фундаментальный, принципиальный характер – “a fundamental defect”), повлиявшее на исход дела. Отсутствие возможности пересмотра окончательного судебного решения в связи с имевшим место в ходе предшествующего разбирательства фундаментальным нарушением, которое повлияло на исход дела, означало бы, что - вопреки принципу справедливости и основанным на нем конституционным гарантиям охраны личности и судебной защиты прав и свобод человека - такое ошибочное решение не может быть исправлено (Постановление, 2002).

Разновидностью неправильного применения уголовного закона является двойное вменение, которое, как и объективное вменение (при отсутствии вины), на практике может касаться всех элементов и признаков состава преступления.

Принцип *non bis in idem*, как он установлен Конституцией РФ и регулируется уголовным законодательством, исключает повторное осуждение и наказание лица за одно и то же преступление, квалификацию одного и того же преступного события по нескольким статьям уголовного закона, если содержащиеся в них нормы соотносятся между собой как общая и специальная или как целое и часть, а также двойной учет одного и того же обстоятельства одновременно при квалификации преступления и при определении вида и меры ответственности.

В условиях состязательности процесса и полномочий в нем суда предварительная квалификация все больше приобретает фикционный характер (характер допущения стороны обвинения, при котором оценка преступления оказывается ошибочно завышенной). Неправильная юридическая оценка содеянного ввиду неверного избрания норм УК РФ по распространенности может быть подразделена следующим образом: квалификация оценочных признаков преступления; оценка единых сложных и совокупных преступлений; квалификация общественно опасных последствий; оценка малозначительных деяний и преступлений, граничащих с проступками.

Примерами двойного вменения (т.е. оценки, квалификации) являются следующие типичные его варианты:

Одновременное вменение основного и дополнительного состава преступления при необходимости разрешения конкуренции между ними, как это предусмотрено ст. 17 УК РФ;

Вменение одного и того же признака дважды – в качестве основного (конструктивного) признака одного состава преступления и квалифицирующего признака другого состава преступления;

Оценка части составного преступления повторно в качестве самостоятельного состава преступления;

Вменение одних и тех же обстоятельств как в качестве признака состава, так и признака, влияющего на индивидуализацию наказания (например, вменение при квалификации деяния ст. 150 УК РФ о вовлечении несовершеннолетнего в преступление дополнительно в качестве отягчающего наказание обстоятельства признака совершения деяния в отношении малолетнего;

Вменение наряду с итоговым вредом промежуточных последствий или этапов деяния (например, квалификация содеянного не только как убийства, но и причиненного в процессе лишения жизни тяжкого вреда здоровью; вменение не только покушения на преступление, но и приготовления к этому же преступлению, оценка деяния не только как соисполнительство, но и как организация преступления и т.п.).

10. Следующее требование принципа справедливости заключается в справедливости назначения и реализации наказания и иных мер уголовно-правового характера. “Справедливость наказания, - пишет М.М. Бажанов, - заключается, прежде всего, в том, что оно должно правильно отражать правосознание и мораль нашего общества. Назначенное судом наказание должно отвечать нравственным требованиям ... людей, убеждать их в правильности судебной политики. В отношении опасных преступников, а также рецидивистов справедливость требует назначения суровых мер наказания. В то же время к лицам, совершившим преступления, не представляющие большой общественной опасности, с учетом личности виновного, в соответствии с принципом справедливости следует применять наказания более мягкие или вообще заменять их мерами общественного воздействия” (Бажанов, М, 1980: 21 – 22). В приведенной цитате верно утверждается, что справедливое наказание – это, прежде всего, наказание индивидуализированное.

11. Принципы справедливости и индивидуализации - близкие, но не вполне совпадающие категории. Индивидуализация всегда относится к личности

виновного, справедливость же - понятие более широкое: здесь учитываются и личные, и общественные интересы.

Так, санкции статей Особенной части УК РФ носят относительно-определенный или альтернативный характер. Широкие пределы индивидуализации установлены в статьях Общей части УК РФ, которые позволяют при наличии определенных обстоятельств существенно смягчить наказание либо освободить виновного от наказания.

Во исполнение принципов уголовного закона, в том числе справедливости, в ст. 60 УК РФ сформулированы общие начала назначения наказания, которое должно соответствовать характеру и степени общественной опасности преступления (понятию, по своему объему шире, чем общественная опасность деяния), обстоятельствам его совершения, личности виновного.

Характер общественной опасности преступления определяется в соответствии с законом с учетом объекта посягательства, формы вины и категории преступления, а степень общественной опасности преступления - в зависимости от конкретных обстоятельств содеянного, в частности от размера вреда и тяжести наступивших последствий, степени осуществления преступного намерения, способа совершения преступления, роли подсудимого в преступлении, совершенном в соучастии, наличия в содеянном обстоятельстве, влекущих более строгое наказание в соответствии с санкциями статей Особенной части УК РФ.

Обеспечение справедливости наказания не должно противоречить другим его целям, необоснованно ущемлять права невиновных. Поэтому в ч. 3 ст. 60 УК РФ указано, что при назначении наказания наряду с обстоятельствами, характеризующими преступление и личность виновного, должно учитываться влияние наказания на исправление осужденного и на условия жизни его семьи.

Таким образом, следует признать, что от суда не требуется такого глубокого погружения в категорию справедливости и ее исследования при индивидуализации наказания. Из всей социальной и психологической полноты объема этого понятия законодатель нормативно определил лишь ограниченное уголовно-правовое содержание справедливости и еще более узкое, конкретное его понимание как критерия назначения уголовного наказания.

12. Вместе с тем, справедливость предполагает взаимосвязь с другими принципами, и в первую очередь с законностью, равенством граждан перед законом и гуманизмом, презумпцией невиновности (Толкаченко, 2012).

Каждый из указанных принципов имеет специфическое содержание, но вместе с тем характеризует определенную сторону (аспект) справедливости в уголовном праве, без которого не может быть справедливости в целом. Так, нет справедливости, если при отправлении правосудия по делу нарушаются законность, принципы равенства граждан перед законом и гуманизма.

Европейский Суд по правам человека неоднократно констатировал необходимость постановления справедливого приговора надлежащим судом, в разумные сроки, при недопустимости негуманного, унижающего человеческое достоинство и несоразмерного содеянному чрезмерно длительного содержания обвиняемых под стражей до назначения им индивидуально определенного наказания; отмечал в качестве неотчуждаемого право каждого осужденного на обжалование судебного решения по вопросам факта и права. В том числе и в этой связи в процессуальном законодательстве России появилась статья о разумном сроке уголовного судопроизводства, а также введены апелляционные инстанции для всех без исключения судов, в том числе в 2018 г. – специальные апелляционные суды РФ.

Подводя итог, можно констатировать, что справедливость выступает, с одной стороны, весьма конкретным, а с другой стороны, обобщающим принципом регулирования уголовно-правовых отношений, а потому дальнейшее исследование межотраслевого принципа справедливости в сфере уголовной юстиции представляется одним из перспективных научно-практических направлений.

Литература

- Perelman, Ch. (1957) *Les Trois Aspects de la Justice. Revue Internationale de Philosophie.* № 41/3. p.p. 344 – 362.
- Аристотель (2012) *Никомахова этика.* Москва: Директ Медиа, 2012, 202 с.
- Бабаев, М. Пудовочкин, Ю. (2010) “Мертвые нормы” в Уголовном кодексе: проблемы и решения. *Уголовное право.* № 6. С. 4 – 10.
- Бажанов, М.И. (1980) *Назначение наказания по советскому уголовному праву.* Киев: Вища школа, 216 с.

- Боннер, А.Т. (1992) *Законность и справедливость в правоприменительной деятельности*. Москва: Российское право, 320 с.
- Бунин, О.Ю. (2006) *Реализация принципа справедливости при установлении санкций уголовно-правовых норм*. Москва: ТК-Велби, Проспект, 128 с.
- Зер, Х. (2002) *Восстановительное правосудие: новый взгляд на преступление и наказание*. Москва: МОО Центр “Судебно-правовая реформа”, 328 с
- Иеринг, Р. (1881) *Цель в праве*. Петербург: Изд. Н.В. Муравьева, 425 с.
- Келина, С.Г., Кудрявцев В.Н. (1988) *Принципы советского уголовного права*. Москва: Наука, 176 с.
- Толкаченко, А.А., Харабет К.В. (2009) *Мировые религии о преступлении и наказании*. Москва: Норма, 336 с.
- Постановление Конституционного Суда РФ от 17.07.2002 г. № 13-П по делу о проверке конституционности отдельных положений статей 342, 371, 373, 378, 379, 380 и 382 УПК РСФСР, статьи 41 УК РСФСР и статьи 36 Федерального закона “О прокуратуре Российской Федерации” в связи с запросом Подольского городского суда Московской области и жалобами ряда граждан”. Вестник Конституционного Суда РФ. 2002. № 6.
- Рассел, Б. (2001) *История западной философии*: В 3 кн. Новосибирск: Сиб. унив. Изд-во; Изд-во Новосиб. ун-та, 992 с.
- Ролз, Д. (1995) *Теория справедливости*. Новосибирск: Изд-во НГУ, 532 с.
- Толкаченко, А.А. (2012) Межотраслевое содержание презумпции невиновности. В: Взаимодействие уголовного и административно-деликтного права / Под ред. Ю.Е. Пудовочкин, Н.И. Пикурова. Москва: РГУП, С. 346 – 362.
- Филимонов, В.Д. (2002) *Принципы уголовного права*. Москва: Центр ЮрИнфоР, 139 с
- Филимонов, О.В. (2009) *Понятие и цели наказания*. В: Уголовное право России. Общая часть. Учебник / под ред. В.П. Ревина. Москва: Юстицинформ, С. 30 – 42.

**CONCRETIZATION OF THE UNIVERSAL
PRINCIPLE OF JUSTICE IN CRIMINAL LAW**

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The issues of the fairness of criminal law do not lose their relevance and can not be considered definitively settled, despite the thousand-year history of the very idea of social justice. Justice is a multifaceted and broad concept. It requires an equitable distribution of social benefits and a just retribution for violation of the social order. Criminal law has a very limited role in its provision. Criminal law does not construct justice, creating a just social order is not its function. Criminal law does not discuss the question of how fair the relations existing in society are; it only supports the power of repression that order that has developed in society and which is a priori for criminal law is fair. In this regard, the principle of justice, being a fundamental principle of the legal system, needs criminal law concretization so that its demands become instrumental in nature. It was established that the validity of the criminal law presupposes: the fairness of the criminalization of socially dangerous acts, the fairness of the legislatively formulated sanction for their commission, the fairness of the criminal-legal assessment of the crime, which does not allow bringing to responsibility twice for the same act; fairness of individualization of criminal liability measures.

Keywords: *principle of justice; fair criminal law; fairness of bringing to criminal responsibility; justice of punishment*

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**BETWEEN GENOCIDE AND CRIMES AGAINST HUMANITY:
THE ROLE OF INDEPENDENT INSTITUTIONS IN COMING
TO TERMS WITH HISTORICAL INJUSTICE AGAINST THE
NORWEGIAN ROMANI PEOPLE**

In this paper the authors will relate part of the legal definitions of Genocide and Crimes against Humanity to how Norwegian authorities, both through legal means as well as political inactivity until recently, abstained from effectively regulating the treatment of the Romani national minority in a fair and human manner consistent with the evolution of democratic institutions and the international regime for human rights after 1948.

Coming to terms with this historical and moral injustice, the authors will explore the role of independent institutions at the national as well as the international level to bear pressure on the Norwegian government to admit to well document historical wrongdoings. Underlying our approach is a warning that maltreatment and injustice of individuals and groups may happen again – today more specifically immigrants with Muslim background. Finally, we list a set of prerequisites for this not to happen again.

Keywords: Minorities, Romani, Genocide, Crimes against Humanity.

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1. Definitions

Genocide is in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide defined as:

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.”¹

Unlike genocide, crimes against humanity have not been codified in an international treaty. The definition offered in the founding treaty of the permanent International Criminal Court (ICC), the Roman Statute, reflects the latest consensus of the international community, and, for the time being, is considered the most authoritative definition of crimes against humanity.

“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation or forcible transfer of population;

¹ <https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx>

- e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f) Torture;
- g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i) Enforced disappearance of persons;
- j) The crime of apartheid;
- k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”²

Pertaining to the Romani in Norway, especially relevant are points b, d, and e in the above definition of the crime of genocide, and points d, e, and g in the above definition of crimes against humanity, as will be elaborated in the text.

2. The situation in Norway

The authors argue that Norwegian authorities abstained from effectively regulating the treatment of the Romani national minority in a fair and human manner. “Vagrants” were never much liked by the authorities, and from the middle of the 19th century policies toward minorities and indigenous people hardened. Until the 1980s the Romani minority was discriminated by legal means and through political inactivity. Hard-handed measures, bordering on crimes against humanity, were sanctioned by the state and applied by municipalities, police and state-sponsored institutions. This is not consistent with the evolution of democratic institutions and the international regime for human rights after 1948.

² <http://www.internationalcrimesdatabase.org/Crimes/CrimesAgainstHumanity>

2.1. Who are the Romani?

At present, the Romani are in Norway classified as one of the five national minorities³, following ratification of the Framework Convention for the Protection of National Minorities (FCNM). The convention was signed on February 1995 by 22 member states of the Council of Europe, among those Norway, and became active in 1998.

The number of Norwegian Romani today is not known. Estimates depend on how membership to the group is defined and informed guesses range from “a couple of thousand”⁴ to “somewhere between 4 000 and 10 000”⁵. Neither do we know how many individuals still speak the Romani language. With exception of the indigenous Sami people there is no registration of ascribed or self-ascribed ethnicity in Norway.

2.2. Delimitations

Although the Romani regard themselves as a distinct group the minority is easier defined by its borders than by ethnicity. The group is delimited on one side by sedentary Norwegians, on the other to by the Roma, who are classified as a separate national minority and generally seen as distinct from Romani, due to differing history, language and traditions. There is a certain amount of intermarriage between Rom and Romani; in general borders between the groups are porous, but they are well maintained.

Ethnic lineage is contested and neither clear-cut nor important; some Romani share genetic traits with the Rom, others are descendants of “drop-outs” from the Norwegian majority. There is evidence of individuals crossing borders either way, ethnic Norwegians ‘taking to the road’ and persons of Romani descent turning into sedentary citizens.

Nonetheless, historically there is a distinct and strong group-identity. The Romani idea of who they are is centered on being travelers⁶, i.e. living without permanent residence for at least part of the year; by a strong sense of belonging together, and by their traditional occupations as peddlers, metalworkers and horsemen. Autonomy is a highly

³ St.meld. nr. 15 (2000-2001)

⁴ St.meld. nr. 15 (2000-2001) chap. 1.5

⁵ Muižnek 2015 available at St.meld. nr. 15 (2000-2001) chap. 2.2

⁶ Many Romani prefer “reisende” (travelers) rather than “Romani” to describe themselves and their group.

priced value. A distinctive culture is manifested in an own language (Romani), music and traditions.

2.3. Persistent discrimination

It is hard to assess the sedentary population's stance in Norway toward these travelers during the centuries. Romani were regarded with suspicion due to their unconventional lifestyle and “other-ness”, but they also filled a niche in economy and met needs by their occupations. Without doubt the authorities and their politics showed a negative attitude to the group, from the first appearance around 1500 AD on what now is Norwegian soil of groups called “travelers” or “tatars” until the late 1970, when repressive policies changed at last.

The group's main adversary became the developing nation-state, starting from around 1850 and continuing well beyond the end of the 2nd world war. While nation building and mass-politics in this period offered increasing rights and possibilities for democratic participation to sedentary citizens, the Romani people were not included. They themselves kept authorities at a distance and valued their freedom. No state is happy to have a group within its borders that shuns control, taxes and censuses, and the Romani where evading all of that. Their loyalty was not to the nation but to kin.

As a consequence the Romani were subjugated to heavy-handed attempts at assimilation and efforts to turn them into mainstream sedentary citizens and taxpayers against their will. This may partially be due to an idea of giving these “inferior people” a chance to become good citizens (ref. “the white man's burden”) but there are clear racist attitudes underlying these measures. The Romani way of life was seen as a threat to stable society, law and order.

To enforce assimilation and destroy “vagrancy” the authorities passed overtly and covertly discriminating laws, denying the Romani to practice their occupations, their nomadic lifestyle and even to enter Norwegian soil. In particular the 1900 Vagrancy Act⁷ was used against travelers. The assumption was that travelers were living by begging, theft or other crimes. Police could pick up and detain any “vagrant” at will. Authorities wanted Romani to settle and give up their traditional way of life and culture.

The protestant State church of Norway also took a hostile attitude towards the group and condemned them on moral grounds, for not living as good Christians should. Usually

⁷ Løsgjengerloven (Lov 31. mai 1900 nr. 5 om Løsgjængerer, Betleri og Drukkskab) came into force 1907

Romani were baptized but, not belonging to a parish, were not confirmed, and Romani could therefore not marry in church but had to “live in sin”.

2.4. Strong assaults by the authorities and their henchmen

From 1907 until 1986 implementation of Romani “reeducation” was left to a semi-private religious institution, “Norsk misjon blant hjemløse”⁸ (NMH), that ran a labor colony⁹ for “vagrants”. The institution’s explicit aim was to destroy the Romani lifestyle, culture and community. This was done with the authorities’ economical, legal and moral support.

Individuals and whole families were brought to the colony to be “cured” of their wandering habits and reshaped into responsible citizens. Inmates were forced to hard labor and could not leave at their free will, were submitted to censorship of communications, random inspections and the like as a matter of routine.

The authorities and their henchmen focused their efforts especially on two areas. Romani children were taken from their parents by force and links to family were cut without mercy. An educated guess is that in the period from 1900-86 about 1500 children were treated that way, that is about one third of all Romani children in this period¹⁰. All of these children experienced trauma, many were exposed to neglect, maltreatment and abuse¹¹.

In the era between 1st and 2nd World wars sterilization of “social misfits” was common and approved of by both medical authorities and politicians. But forced sterilization of Romani even increased when peace and freedom came. In the period between 1950–1970 as much as 40% of the women at the labor colony “Svanviken” were sterilized during their stay¹².

At the same time Romani still living the “roving life” were denied services and livelihood. They were chased from their stopping-places by police, denied gainful employment and then interned for their “vagrancy”. From 1951 Romani were forbidden husbandry of horses; and registers of Romani were kept during most of the last century.

⁸ “The Norwegian Mission for the Homeless”, founded as the “Mission for Counteracting Vagrancy”

⁹ Svanviken arbeidskoloni

¹⁰ NOU 2015:7

¹¹ *ibid*

¹² *ibid*

The Norwegian authorities continued these policies in spite of the developing international regime for human rights. At least after Norway voted in favor of the UN Declaration of Human Rights in 1948 and ratified the European Human Rights Convention in 1953 policy clearly ought to have been revised. Ironically, while Norway promoted human rights on a national and international level, those rights were not applied to the situation of the stigmatized Romani people at home. Politics with the aim of ending “vagrancy” and eradicating of Romani culture and lifestyle continued until the 1980s and there was no sense nor acknowledgement of former wrongdoings.

2.5. The damage done

The policies of neglect and discrimination have resulted in distrust and fear of authorities and estrangement to society at large by the Romani, who feel they are neither seen nor treated as equal to others. The Romani perceive politics, school, social activities and work as arenas of the majority; places they do not belong and are not welcome to. Their deep-seated distrust of the state, authorities and institutions has good reasons:

An investigation of living conditions of Romani born between 1941 and 1955, conducted on behalf of the Norwegian government in 2011¹³, concluded that the politics of assimilation pursued by the authorities had done severe damage to individuals and the group as a whole. Among other devastating results, there is a startling low level of education and high mortality among this generation of Romani. Mortality among those born between 1951 and 1955 is shown to be more than four times the average for Norwegians of the same age. Only 20% had higher education, as compared to more than 70% among the population in general¹⁴.

These historic and still present wrongdoings have weakened trust between Romani and Norwegian authorities. As a consequence, dialog and cooperation are difficult, and their opportunities for participation in democratic processes and for assessing their rights are severely inhibited. Not only do Romani have a low level of formal education and therefor trouble finding work and establish themselves, they have little information on how to access welfare benefits or how to get necessary paperwork done. This leaves them on the fringes of contemporary Norwegian society.

¹³ Ellingsen og Lilleaas 2015a. referred in NOU 2015:7 chap. 6.1.

¹⁴ *ibid*

2.6. *What now?*

Although the Romani now are allotted status as a recognized minority with a right to its own culture and identity, there still is a blatant lack of knowledge and goodwill among police, teachers and social services towards members of the group. Often the aim of intervention by authorities seems to control or get rid of perceived troublemakers. Negative stereotyping is still persistent and widespread among the general population. Romani report discrimination, especially in the housing- and labor-markets. It is quite usual that “travelers” are refused at camping sites and municipal areas open to the public. Young Romani still are denied apprenticeships to work and bullied at school.

Concealment thus has become a significant strategy for many “travelers”. Romani in Norway are not visible in society, in contrast to the UK and Ireland where similar traditions are still alive and strong. Romani in Norway are marginalized and nobody seems to care.

2.7. *Amends made*

Apologies were made, first informally 1998 by a member of the government, then in 2000 in the Whitepaper¹⁵ that was a follow-up of Norway’s accession to the FCNM. The Church of Norway apologized for its attitudes, actions and omissions in 1998 and 2000. Still, these apologies were not widely communicated, neither among the affected nor among the public in general. Again, the Norwegian government apologized officially and in public on occasion of the public presentation of NOU 2015:7. So did the State church on the same occasion¹⁶.

Between 2005 and 2014, compensation and redress schemes provided payments to around 1200 Romani for bullying, forced sterilization and settlement. An unknown number of persons received payments for abuse and neglect suffered during placement in orphanages. These schemes have been criticized as unfair because they vary greatly among municipalities and not all persons belonging to the minority received information and guidance about how to apply for compensation.¹⁷

¹⁵ St.meld. nr. 15 (2000-2001) chap. 2.6

¹⁶ Den norske kirke, 1.6.2015

¹⁷ Advisory Committee on the Framework Convention for the Protection of National Minorities (2017): “Fourth Opinion on Norway.”

3. On the role of independent institutions

Until the 1980s Norwegian authorities were persistently inactive and complacent regarding the wrongs done to the Romani. In their view vagrants, travelers, nomads were not adapted to modern society; they had to be restrained and assimilated. This attitude is incompatible with the international regime for human rights of which Norway has been a keen proponent after 1948. But the authorities showed no interest in implementing humanitarian principles toward a minority at home.

For long the situation of the Romani was neither widely known nor cared for in society; authorities and their helpers in the “Norwegian Mission for the Homeless” carried on as they had for decades and generations. Change finally was initiated, but not by politicians; pressure by public opinion, researchers and independent institutions on the national and international level transformed the situation of the Romani minority from illegality to legality.

3.1. Norwegian voices

A critical documentary¹⁸ on the Romani’s fate, transmitted by the Norwegian public-service broadcaster (NRK) in 1973, led to a public outcry. Individuals and families went public with their stories, resulting in growing pressure on authorities to address and amend the situation.

Only then a revision of policy was considered, and an investigating committee established in 1976. After the Solheim-committee published its findings in a Whitepaper 1980¹⁹, measures used to target the Romani were gradually discontinued²⁰. The infamous Vagrancy Act was greatly reduced by 1995 and repealed entirely in 2005²¹.

The Norwegian Helsinki Committee²² contributed by highlighting the plight of the Romani people during several decades, nudging politicians toward revision of policies. Two research papers from the Research Council of Norway and the Norwegian Helsinki Committee laid the basis for the investigation that produced the Government Whitepaper “Assimilation and Resistance” (NOU 2015:7).

¹⁸ “Tradra – i går ble jeg tater” by Vibeke Løkeberg

¹⁹ NOU 1980:42

²⁰ Den norske Helsingforskomité (2009): Pdf p. 49.

²¹ https://lovdata.no/artikkel/statsrad_21_desember_2005/739

²² <http://www.nhc.no/en/about/>

In the 1990s organizations, committees and foundations were established by Romani to further their interests, four of which now receive subsidies by the Norwegian state²³.

3.2. *International actors*

The gradual establishment and ratification of covenants and conventions made it increasingly difficult to ignore breaches of human rights by state authorities. On the international level the UN, the Organization for Security and Co-operation in Europe (OSCE), the Council of Europe (CoE) and other transnational organizations have defined minority-rights. Norway is member in all these organizations and aspires to the role of global peacemaker. There is a considerable normative force towards implementation of good policies towards national minorities. And, although implementation is somewhat sluggish, authorities have been responsive. The seminal Whitepaper St.meld. nr. 15 (2000-2001) on national minorities was an explicit and direct consequence of Norway's ratification of the Framework Convention for the Protection of National Minorities.

4. Never to happen again

Without doubt the Romani have suffered heavily at the hands of the authorities and their henchmen. Also, society in general has lost a reservoir of valuable impulses, ways of thinking and handling experiences related to diversity. Today, this is reflected in an increase in hate speech and the number of hate crimes, a phenomenon not only specific to Norway but attracting international attention by such transnational actors as OECD, EU and the Council of Europe. (See for example Ivanovic and Soltvedt, 2018).

This leads us to the obvious question: are bygones bygones, or might this happen again?

Laws are in place against discrimination, hate-speech and other abuse of minority persons. Foremost is probably the “The Equality and Anti-Discrimination Act”²⁴; the Norwegian Penal Code's section 185 protects against hate speech²⁵ and section 186

²³ Taternes Landsforening; Landsorganisasjonen for romani-folket; Romanifolkets Kystkultur and Romanifolkets Riksforbund.

²⁴ Act relating to equality and a prohibition against discrimination (Equality and Anti-Discrimination Act) available at https://lovdata.no/dokument/NLE/lov/2017-06-16-51#KAPITTEL_1

²⁵ https://lovdata.no/dokument/NLE/lov/2005-05-20-28/*##C2%A7section185 accessed 25.07.2018

against discrimination²⁶. National minorities now fall under the remit of the Equality and Anti-Discrimination Ombudsperson²⁷, an office established in 1978.

Good laws are necessary. But laws do not suffice as long as consciousness is sadly lacking, both among the authorities’ and the population in general. There is still very little knowledge on minority matters in general, and recognition of the Romani as a distinctive group that has suffered severe oppression at the hands of the nation-state.

4.1. What about the Romani?

In its rapport *Norsk romani-/taterpolitikk: Fortid, nåtid, fremtid* (22/04-2009) the Norwegian Helsinki Committee concludes that Norway’s transgressions against the Romani do not constitute crimes against humanity in a legal sense, although several of the elements that are part of this category of crime were present in Norwegian policies.²⁸

The rapport strongly recommends establishing a “truth-commission” on transgressions committed by Norwegian authorities toward the Romani²⁹. Furthermore, it proposes the following prerequisites for improving the Romani’s situation: The state has to recognize the Romani as a minority. Norwegian legislators ought to adopt a law for compensating those affected by the former hard-handed measures. In addition, Romani culture and experience ought to be given ample space in curriculums for schools.³⁰

Similar propositions and recommendations can be found in the Whitepaper NOU 2015:7 and in the latest rapport by the Advisory Committee on the Framework Convention for the Protection of National Minorities (2017). Among measures proposed to be taken by Norway to ascertain the rights of the Romani is information to increase knowledge among the population, more scientific research on matters related to welfare conditions of the Romani, and more specifically protection against discrimination by police and other representatives of the authorities, and unimpeded access to camping sites.

²⁶ https://lovdata.no/dokument/NLE/lov/2005-05-20-28/*#%C2%A7section186 accessed 25.07.2018

²⁷ Likestillings- og diskrimineringsombudet

²⁸ *Den norske Helsingforskomité (2009)*

²⁹ *Ibid*

³⁰ *Ibid*

What do the Romani wish? In responses to consultation and research³¹ collected in connection with Whitepaper NOU 2015: 7 it appears that they mainly look for three things.

For the first, the Romani want adequate compensation for former wrongs done. Many Romani hold that arrangements for compensation are unjust and find it difficult to further claims.

For the second, Romani look for sincere acknowledgement of former wrongs done. Romani organizations claim that historic discrimination is insufficiently reviewed and documented. The fate of the Romani should not be forgotten.

Beyond that, many Romani individuals apparently wish to be left in peace to live the life they prefer, without much interference by authorities. Since travelling constitutes a main part of the Romani identity this would imply that authorities abstain from promoting a sedentary lifestyle but rather make traveling compatible with the claims of the contemporary state.

4.2. The Muslim question

Although many issues remain to be clarified, political pressure on Romani in Norway is over, and the numbers of travelers are too insignificant to pose a problem in contemporary society. Still, the treatment of Romani sheds light on today's challenges. Can we live in peace with strangers now? How do we, how do Norwegian authorities nowadays treat those we perceive as different and not fitting in?

Statements such as 'Here [in Norway] we eat pork, drink alcohol and show our faces',³² mean to Muslims they have to choose between being Norwegian and being good Muslims. Unwilling and unable to compromise what they perceive as an essential part of being a true believer, they find themselves excluded.

Likewise, the signal to Norwegians is that Muslims do not belong, unless they change their ways fundamentally. This determination to “educate them to our values and way of living” reminds us of what a nation state is capable of doing to minorities in the name of safety and stability. Attempts by authorities and the majority to force groups into a mold

³¹ NOU 2015: 7 “Høring - oppfølging av Tater-/romaniutvalgets rapport”

³² Facebook post by then Norwegian Minister of Immigration and Integration S. Listhaug, quoted in *Aftenposten* 16.10.2016; translation by R. Heberling

of conformity will backfire, and raise borders rather than build bridges. Fear of and suspicion towards state institutions and alienation to society at large will then prevail.

The role of symbolic “other” in Norwegian society, now filled by the Muslim immigrant, continues to carry the threat of apartness and the stigma of not belonging. In today’s politics, however, the challenge is not only on how to make a religious minority part of society without doing force to their integrity and identity. Equally important is how we treat members of minority groups that are not given the right to belong – in particular those from war torn countries not granted status as refugees and forcibly returned to their homeland.

Most serious, in our view, is the present tendency in Europe to exclude this group as members of society, in particular those fleeing war-ravaged Afghanistan. In 2015, Europe received close to 200 000 applications for asylum from Afghan refugees. This constitutes 15% of all such applications. In spite both of evaluations of the present security situation in Afghanistan and a recommendation from the UN High Commissioner for Refugees NOT to return Afghan asylum seekers, Norway continues to do so. In fact, during the period 2015-2017, Norway was the country that forcibly returned the largest number of Afghani asylum seekers to Afghanistan, numbering close to 700 persons for the period as such. To what destiny we do not know. The number, however, touches a nerve when we know it approaches the number of Jews that Norway sent to Auschwitz and other extermination camps during the Second World War, as well as the refusal of the Norwegian government to allow Jews and members of the Romani nation to enter Norway during the Second World War, fleeing prosecution in Nazi-Germany (Aas, Sigmund and Thomas Vestergården, 2014).

5. Conclusion

It seems that the tendency to treat the “other” in diminutive ways is an inherent characteristic that we all may carry with us, regardless of time and space. Today, we look at the way we have treated the Romani with disgust and incomprehension. Our concern now is that we may learn from the past, and actively seek to provide for a better future for all of us - within an institutional framework provided not first and foremost by the state but rather by independent norm entrepreneurs such as the Norwegian Helsinki Committee, Amnesty International, Norwegian Peoples’ Aid or the Norwegian Refugee Council at the national level, and the EU, UNHCR or the CoE at the international level.

Romani have difficulties finding a place in Norwegian society. They live in limbo, and hardly exist at all. One could argue that assimilation politics have achieved their aim. There are few left; and Romani today feel not themselves convinced that they belong to a cultural minority. Diversity has been standardized, autonomy has been broken, and much is lost. Muslim refugees must not be treated this way. They may be tolerated if necessary and be seen an asset rather than somebody to be feared. Maltreatment of any minority hurts all of society and strikes at the roots of democracy and human rights.

Reference list

Aas, Sigmund and Thomas Vestergården (2014): *Skammens historie. Den nroske stats mørke sider*. Oslo: Cappelen Damm.

Advisory Committee on the Framework Convention for the Protection of National Minorities (2017): “Fourth Opinion on Norway.” Pdf available at <https://www.nhri.no/fil/3766/>

Aftenposten (16.10.2016) available at [https://www.aftenposten.no/norge/politikk/i/0Aj02/Listhaug-Her-i-Norge-spiser-vi-svin - drikker-alkohol-og-viser-ansiktet-vart](https://www.aftenposten.no/norge/politikk/i/0Aj02/Listhaug-Her-i-Norge-spiser-vi-svin-drikker-alkohol-og-viser-ansiktet-vart) accessed on 20.07.2019

“Act relating to equality and a prohibition against discrimination (Equality and Anti-Discrimination Act)” available at https://lovdata.no/dokument/NLE/lov/2017-06-16-51#KAPITTEL_1

Den norske Helsingforskomité (2009). *Norsk romani-/taterpolitikk: Fortid, nåtid, fremtid*. Oslo: Den norske Helsingforskomité. Available at http://nhc.no/filestore/Publikasjoner/Rapporter/2009/romanirapport_final_version2.pdf accessed 25.07.2018

Den norske kirke (01.06.2015) <https://kirken.no/nb-NO/om-kirken/aktuelt/--vi-erkjenner-var-skyld/> accessed 27.07.2018

Ellingsen, D. og S.B. Lilleaas (2015): *Levekårsundersøkelse romanifolket/taterne. Registerbasert undersøkelse om dødelighet og utdanning*. Vedlegg til NOU 2015:7.

Equality and anti-discrimination Ombud <http://www.ldo.no/en/> accessed 26.07.2018

Halvorsen, R. (2004) “Dynamics of Control and Resistance: Reactions to the Modern Policy of Assimilation of the Travellers in Norway”. PDF available at https://www.researchgate.net/publication/290499639_Dynamics_of_Control_and_Resistance

Reactions to the Modern Policy of Assimilation of the Travellers in Norway accessed 29.07.2018

The International Crimes Database (ICD)

<http://www.internationalcrimesdatabase.org/Crimes/CrimesAgainstHumanity> accessed 21.07.2018

Ivanovic, Aleksandar and Soltvedt, LP (2018): “Investigating and Prosecuting War Crimes in the Western Balkans” in Varstvoslovje, Journal of Criminal Justice and Security 18 (2), 133-159.

Ivanovic, Aleksandar and Soltvedt, Lars Petter (Forthcoming): “Hate Crimes in Montenegro and Norway”.

Løsgjengerloven (Lov 31. mai 1900 nr. 5 om Løsgjænger, Betleri og Drukkskab), repeal of, available at https://lovdata.no/artikkel/statsrad_21_desember_2005/739 accessed 28.07.2018

NOU 1980:42 “Disiplinering og assimilering av tater på Svanviken” available at https://www.nb.no/items/URN:NBN:no-nb_digibok_2008060200021 accessed 25.07.2018

NOU 2015: 7 “Assimilation and Resistance” available at

<https://www.regjeringen.no/no/dokumenter/nou-2015-7/id2414316/> accessed 28.07.2018
<https://www.regjeringen.no/no/dokumenter/sammendrag-av-nou-20157-assimilering-og-motstand/id2469282/> accessed 18.07.2018

NOU 2015: 7 “Høring - oppfølging av Tater-/romaniutvalgets rapport”, available at

<https://www.regjeringen.no/no/dokumenter/horing---oppfolging-av-tater-romaniutvalgets-rapport/id2464464/?factbox=horings svar> accessed 26.07.2018

Office of the United Nations High Commissioner for Human Rights (OHCHR)

<https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx> accessed 23.07.2018

Office of the UN Special Adviser on the Prevention of Genocide (OSAPG) “Analysis Framework” (n.d.) Pdf available at

http://www.un.org/ar/preventgenocide/adviser/pdf/osapg_analysis_framework.pdf accessed 19.07.2018

Penal Law §185 available at https://lovdata.no/dokument/NLE/lov/2005-05-20-28/*#%C2%A7section185 accessed 25.07.2018

Penal Law §186 available at https://lovdata.no/dokument/NLE/lov/2005-05-20-28/*#%C2%A7section186 accessed 25.07.2018

YEARBOOK
HUMAN RIGHTS PROTECTION
“FROM UNLAWFULNESS TO LEGALITY“

St.meld. nr. 15 (2000-2001) “Nasjonale minoriteter i Noreg - Om statleg politikk overfor jødar, kvener, rom, romanifolket og skogfinnar” <https://www.regjeringen.no/no/dokumenter/stmeld-nr-15-2000-2001-/id585195/> accessed 25.07.2018

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COOPERATION AMONG INSTITUTIONS, BETWEEN LEGALITY AND ILLEGALITY

Romania is currently confronted with a series of disclosures regarding the conclusion of collaboration protocols between the Superior Council of Magistracy and various institutions, including the Romanian Intelligence Service.

The present study aims at analyzing the extent to which the conclusion of such protocols violates the procedural rights of the parties, from the way in which the commission of a crime is brought before the judicial bodies to how suspects are investigated and the damage is established, with consequences on criminal and civil liability.

Keywords: *Superior Council of Magistracy, Romanian Intelligence Service, fundamental rights, procedural rights.*

1. Introduction

The present analytical approach is justified by the fact that, in the last couple of years, on the background of the anti-corruption fight, whose importance no one can deny, the Romanian Intelligence Service has become increasingly present in the activity of judicial bodies, a fact that is totally undisputed and encouraged in public positions by the heads of both the prosecutor's offices and the courts.

Yet, gradually, in the public space, voices appeared that challenged the beneficial role of the secret service's involvement within criminal prosecution without, however, changing anything in the legislative framework for a long period of time.

Following the decision of the Constitutional Court no. 51/2016, which declared the provisions of Article 142 para.(1) of the Criminal Procedure Code to be unconstitutional, article which allowed, in the framework of the activity of enforcement

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of the technical surveillance measures, the intrusion, together with the prosecutor, of criminal investigation bodies or other specialized workers from the police, as well as other specialized bodies of the state, without specifying the latter, the public opinion became acquainted in 2018 with the existence of some protocols - until then, secret - between the Romanian Intelligence Service and other institutions, such as the Public Ministry, the National Anticorruption Directorate, the Ministry of Finance.

In fact, the Constitutional Court's decision acted as a catalyst, because by excluding the possibility of “specialized bodies of the state”, yet not explicitly specified, other than the criminal prosecution bodies, the Romanian Intelligence Service was removed from among the institutions that had until then the ability to perform technical surveillance, mainly interceptions and recordings of remote communications and audio, video or photo-surveillance. Prior to the decision of the Constitutional Court, in practice, the situation was such that secret service employees would carry out at the request of prosecutors almost all interceptions in criminal cases, without distinction in consideration of the nature of the offenses, which violated the Law on the organization and functioning of this institution and other laws from the field of national security.

Together with the declassification of the inter-institutional protocols, in 2018, it could be noticed that these were also generated by way of decisions of the Supreme Council of National Defence, but, since these decisions remain secret, only few issues are known in the public space about them. However, it may be noted that they have sometimes added to the letter of the law, extending the scope of application of the legal provisions regulating the field of national security, establishing that the latter included areas such as tax evasion and the fight against corruption, which created the premises for the secret service intrusion into the criminal prosecution of such crimes, although the role of these services and their areas of action were different, according to the law.

The issue under consideration regarding these decisions of the Supreme Council of National Defence concerns the possibility of adding to the letter of the law, given that they originate from an administrative body, and the answer, in our opinion, can be only that the law cannot be amended or supplemented by an authority which is meant to apply it, so that the decisions of this body could not justify, could not constitute the basis of certain provisions from the inter-institutional protocols, since they were not permitted by the law.

Thus, Law no. 51/1991 on Romania's national security defines, in its Article 3, the actions constituting threats to the national security of Romania, without enumerating

amongst them corruption or tax evasion, but only actions that affect the sovereignty, unity, independence or indivisibility of the Romanian State; actions having as purpose, directly or indirectly, the provocation of a war against the country, or of a civil war; facilitating foreign military occupation, subjugation to a foreign power, or aiding a foreign power or organization to commit any of these deeds; treason by helping the enemy; the military or any other violent actions aiming at the weakening of the state power; espionage; actions by which an attempt is made on the life, physical integrity or the health of persons holding important positions in the state; supporting in any way extremist actions, terrorist acts, attacks against a community; the stealing of weapons, ammunition and the like, as well as activities that damage the strategic economic interests of Romania and those that result in the endangerment of natural resources.

2. The role and scope of inter-institutional protocols

In the public space, a document has emerged, entitled “Joint Action Plan for the Effectiveness of Activities to Prevent and Combat Tax Evasion” (Tarata, 2018), concluded in January 2012 between the Ministry of Administration and Interior, the Public Ministry, the Romanian Intelligence Service, the Ministry of Public Finance and the Ministry of Justice, referring to the fact that the respective measures are necessary for the enforcement of decision no. 69 of 2010 of the Supreme Council of National Defence. This document establishes, on an operational level, the Operational Working Groups, which meet regularly and include representatives of all signatory institutions, with a view to streamline the fight against tax evasion. However, beyond this legitimate interest, what particularly draws one’s attention is the measure which establishes “to carry out half-yearly assessments, at the level of each Operational Working Group, in order to establish concrete, locally relevant targets (natural or legal persons) on the basis of the information held by the participating institutions”. Such a provision seems to be more than questionable, since the representatives of the judiciary, of the secret services and the tax authority (the latter authority being directly concerned in the cases in which tax evasion crimes are being investigated, since it would constitute itself into a civil party in them) establish “concrete targets”, which is equivalent to the prior determination of guilt, transforming the selected person into a victim of the system, violating both the right to a fair trial and, obviously, the presumption of innocence, as well as the Public Ministry’s obligations, in the criminal prosecution activity, namely that of gathering evidence both in favor of and against the suspects or defendants. Together with the nomination as a concrete target of a person, it is obvious that all these rights are fading, by establishing *ab initio* the concentration of activities on these particular persons. At the same time, it also seems wrong to choose these targets to be

selected from among those “locally relevant”, as long as the activities of state bodies cannot be biased, and cannot be done on criteria of relevance. Therefore, through the document under discussion, various state bodies have agreed to collaborate in the sense that from among all the possible targets, they would only choose the relevant ones.

One should also discuss the provisions of the “Protocol of cooperation between the Prosecutor’s Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service for carrying out their tasks in the field of national security” (Scutaru, 2018), a protocol concluded in 2009 and declassified on March 29th, 2018.

From the outset, from its contents what draws our attention are the provisions of Article 2, according to which the parties cooperate in the activity of capitalizing the information from the field of preventing and combating crimes against national security, acts of terrorism, crimes that correspond to threats to the national security and other serious crimes, according to the law. If the first two areas, namely national security and terrorism, are recognized by law as falling within the competence of the Romanian Intelligence Service, the other offenses covered by the Protocol of cooperation go beyond legal provisions, because it cannot be established on the basis of some legal provisions which would be the offenses that correspond to threats to the national security but, at most, these could be listed by the decisions of the Supreme Council of National Defence, nor can it be determined which are the other serious crimes which, according to the law, are given in the competence of the Romanian Intelligence Service. Therefore, the collaboration between the signatory institutions seems to address a more extensive area than the one given in the competence of the said secret service, despite the fact that it mentions the competence stipulated by the law.

By reading Article 3 of the Protocol, which regulates the objectives of the cooperation, we note at letter (g) that one of them is “the establishment of joint operational teams acting on the basis of action plans for the exercise of the specific competencies of the parties in order to document the facts referred to in Article 2”, which means that the prosecutor was to work closely together, or to form a joint team, with secret service employees, who practically would acquire attributions specific to a criminal prosecution body, which the law did not confer upon them.

Despite the fact that, after the declassification of the Protocols, the representatives of the public prosecutor’s office have publicly challenged the existence in the past of mixed teams of prosecutors and secret service employees, their factual existence is proved both

by the communications of the prosecutor's office in concrete cases, in which certain actions were undertaken with the support of the Romanian Intelligence Service, as well as by the activity reports of the latter institution. Thus, in the activity report of the Romanian Intelligence Service for 2009 (SRI, 2018: p.11), in which the activities of the service are synthesized, we can find on the 11th page that “for some situations, mixed operational teams have ensured the management of the documentation activity and, subsequently, the efficient use of the data and information regarding the perpetration of crimes”, which proves, first of all, the existence of such teams, but also seems to suggest the involvement of the secret service employee within the activity undergone by the prosecutor.

Doubts are also raised by the provisions of Article 6, which regulates one of the responsibilities of the prosecutor's office, where it is stipulated that the prosecutor's office shall communicate, on an operative basis, but no later than 60 days, the manner of capitalizing the information or referrals received from the intelligence service regarding the offenses referred to in Article 2, the period of 60 days running from the date of registration of the information or referral to the prosecutor's office. Such an obligation imposed to the prosecutor's office with such strictness seems to suggest a relation of subordination of this institution to the secret service, which is not the case, according to the law, and yet the immediate reporting of the way the information is being capitalized is not a simple feedback given to the institution which made the referral, but rather seems to suggest an explanation given to an institution which is in control. Although it is normal for the body that made the referrals or submitted the information to be aware, statistically, of the usefulness of its information, namely to know how many of it were of good quality and could be used by prosecutors, we do not consider as normal to set such an immediate term, and in no case longer than 60 days, in which the prosecutor justifies the use of the information, specific to the type of control exercised by someone occupying a higher rank towards those found in their subordination.

The provision of Article 9 was also criticized, which stipulated that the prosecutor's office provided, upon the request of the intelligence service, consultancy by means of its own specialists in the areas of cooperation, a provision that seems to contradict the restriction established for prosecutors and judges by Law no. 303/2004, in its Article 10 para. (2) forbidding them to offer consultation on litigation issues. Although the protocol refers to specialists from the prosecutor's office and not to prosecutors directly, we remark that the prosecutor's office does not have other specialists who might offer consultation outside its prosecutors, so that, *de facto*, this could lead to the violation of the prohibition to offer consultation regarding real cases.

According to Article 13 of the Protocol, the intelligence service has the responsibility to provide data, information and documents to the prosecutor’s office which can support the documenting of the cases in progress, which must contain sufficient elements as to be used during the criminal prosecution, which means that the data provided by the intelligence service may, in certain circumstances, become evidence in the criminal proceedings. Such a matter may be questionable in the context in which the intelligence service, at the time of the conclusion of the Protocol, had no attributions as criminal investigation body recognized under the law, and according to the Government Emergency Ordinance no. 6 of 2016, such powers were recognized only in the field of national security and terrorism, but, as we have shown before, the Protocol does not seem to be limited to these crimes. Under these circumstances, the Protocol creates the premises for an unlawful administration of evidence in criminal files due to the body which has gathered them.

Heated discussions took place in the public space, including from the heads of the prosecutor’s offices, regarding the role played by the Romanian Intelligence Service within the technical surveillance activity, respectively that of recording the intercepted communications or conversations, the prosecutors claiming that the service provided only a technical support, respectively had provided the technique necessary to perform the interceptions. However, relevant here are the provisions of Article 34 of the Protocol, which contradict this idea, since, in its content, in addition to the fact that it provides that the service shall ensure the recording of communications or conversations resulting from interception on data carriers, and shall send them to the prosecutor’s office, it is also stipulated that, in order to support the activities carried out by the prosecutor’s office, the service shall ensure the transcription of the communications or conversations considered relevant, and subsequently, upon the written request of the prosecutor, the service might ensure the rendition of other selected conversations from the recorded traffic. In other words, in addition to the purely technical activity of intercepting and recording communications, the intelligence service also ensured the transcription of the conversations it considered as relevant in the case, so that it would select from all the recorded conversations only those that were considered to be relevant, such an attribution being specific to criminal prosecution bodies, and not to a mere auxiliary, as alleged later, which provided purely technical activities. The ability to select those discussions that are deemed to be relevant for a particular case is to be found only with those bodies which know the case in detail and conduct criminal investigation activities, whilst the activities in question cannot be categorized as purely technical support. Although the protocol provides that, subsequent to their initial

selection and transcription, the prosecutor may request the transcription of other recordings as well, the stipulation is not such as to remove the previous provision, according to which the intelligence service employees are the first to ensure the selection of conversations deemed relevant for certain cases, even if, afterwards, the prosecutor can complete them.

Finally, even the Constitutional Court, through its Decision no. 51/2016, has expressed very clearly the idea that, in the field of technical supervision, the regulation can only be achieved by means of a legislative act, and not by an infra-legal piece of legislation, i.e. normative acts of an administrative nature adopted by bodies other than the legislative, but the Protocol proves that the Romanian Intelligence Service has had attributions in interception matters as early as 2009, without having the necessary legal support.

The recent case-law (Military Court of Appeal, Decision no. 35/2018) found the involvement of Romanian Intelligence Service employees in criminal prosecution activities, as the prosecutor had requested that this institution performed the interceptions in a particular case, and, starting from this idea, and noting also the provisions of the aforementioned protocol, concluded that the criminal investigation activity was carried out by mixed teams of prosecutors and intelligence service employees, which, in the court's opinion, overturned the principle of legality, a principle which is part of the rule of law as the powers of the authorities are defined by law. Or the court considered that the attribute conferred to the intelligence service employees, set up in mixed teams with prosecutors by means of Article 3 letter (g) of the Protocol, is attached to that of the prosecutor, which gives them both the status of official prosecuting subjects, namely that of judicial bodies within the meaning of criminal procedure law, although the regulation in this field can only be achieved through a legislative act, having the force of law. As a result of these findings, it was concluded that the evidence in question was provided by a non-judicial body with a secret identity, provided that the special law protects the identity of the employees of the Romanian Intelligence Service, the sanction being that of the absolute nullity of the evidence thus obtained. In the face of all these aspects, the court ordered the acquittal of the defendant sued for bribery.

3. Conclusions

Synthesizing the content of the inter-institutional protocols indicated in the present paper, we consider that they create the premises for an unlawful administration of the evidence in criminal files given the body that has gathered and made use of them.

In addition to including illegal content, the protocols are also harmful because the employees of the Romanian Intelligence Service, receiving extensive powers beyond the law, have provided the criminal investigating authorities with information that has often been converted into evidence, thus placing the defendant in the situation of being unable to provide the opposite evidence, as long as the employees of the intelligence service cannot be known, as well as their activity, so that, in the end, the right to defense is flagrantly violated. The joint venture action between the institutions has degenerated in establishing a relation of subordination of the institutions to the intelligence service, the former being forced to report the way in which they use the information or referrals received from the service.

Last but not least, as shown by recent practice, intelligence service employees charged with the transcription of telephone or environmental recordings distorted their real content to the detriment of defendants, by introducing words or phrases which, if real, would have attributed a criminal nuance to the discussions. Taking note of such situations, recently, 12 employees of the intelligence service have been prosecuted, the facts being committed in a case filed by the National Anticorruption Directorate, which was subsequently referred to the court.

Regarding the interference of intelligence services in the private life of a person, the European Court of Human Rights has ruled in several cases, among which *Roman Zakharov v. Russia* on the need for such legislation in the field as “to provide adequate and effective guarantees against arbitrariness and the risk of abuse which was inherent in any system of secret surveillance, and which was particularly high in a system where the secret services and the police had direct access, by technical means, to all mobile telephone communications” (ECHR, *Roman Zakharov v. Russia*). Similarly, the recent practice of the European Court of Human Rights shows that any measure ordered by the law enforcement bodies must have a legal basis, and “in order to judge the existence of a ‘legal basis’, we need to consider not only the relevant laws, but case-law as well” (ECHR, *Ben Faiza v. France*).

References list

- ECHR, *Ben Faiza v. France*, Application no. [31446/12](#), 8 February 2018, para. 56.
ECHR, *Roman Zakharov v. Russia*, Application no. [47143/06](#), 4 December 2015, para. 302.
Government Emergency Ordinance no. 6 of 2016, published in the Official Journal of Romania, Part I, no. 190 of 14 March 2016.

- Law no. 51/1991 on the national security of Romania, republished, published in the Official Journal of Romania, Part I, no.190 of 18 March 2014.
- Law no. 303/2004 on the status of judges and prosecutors, published in the Official Journal of Romania, Part I, no.826 of 13 September 2005.
- Military Court of Appeal, Bucharest, Criminal decision no. 35 of 12 July 2018, available online http://portal.just.ro/81/SitePages/Dosar.aspx?id_dosar=810000000000563&id_inst=81.
- Romanian Constitutional Court, Decision no. 51 of 16 February 2016, available online www.ccr.ro/files/products/Decizia_nr._51_din_16_februarie_2016_.pdf

Online Sources

- Tarata, G., (2018, 23 March), Plan comun de măsuri pentru eficientizarea activităților de prevenire și combatere a evaziunii fiscale” (Joint Action Plan for the Effectiveness of Activities to Prevent and Combat Tax Evasion), concluded in January 2012, available online www.luju.ro/dezvaluiri/anchete/protocol-paraalel-pentru-spionarea-romanilor-sri-piccj-ministerul-de-interne-ministerul-finantelor-si-ministerul-justitiei-si-au-facut-plan-de-masuri-pentru-combaterea-evaziunii-fiscale-separat-de-cel-aprobat-prin-hotarare-csat-protocolul-semnat-de-maior-s?print=1, last read on 11.09.2018.
- Scutaru, C., (2018, 30 March), Protocol de cooperare între Parchetul de pe langa Inalta Curte de Casatie și Justitie și Serviciul Roman de Informații pentru îndeplinirea sarcinilor ce le revin in domeniul securității naționale, Protocol colaborare SRI și Parchetul general, (Protocol of cooperation between the Prosecutor’s Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service for the fulfilment of their tasks in the field of national security, the Romanian Intelligence Service Collaboration Protocol and the General Prosecutor’s Office), DC News, available online https://www.dcnews.ro/protocol-colaborare-sri-si-parchetul-general-publicat_586152.html, last read on 11.09.2018.
- Serviciul Roman de Informații, Raport privind activitatea desfășurată în anul 2009, (Romanian Intelligence Service, Report regarding the activity for 2009), p. 11, available online: www.sri.ro/assets/files/rapoarte/2009/Raport%20activitate_SRI_2009.pdf, last read on 11.09.2018.

Zorica Mršević*

UNMARRIED COUPLES IN SERBIA BETWEEN THE CONSTITUTION AND THE LAWS¹

The object of the paper is to point out that the Constitutional equalization of the marital and extra-marital unions is not followed by the legal provisions of several laws. The differences cause unequal treatment in use of existential human rights of unmarried couples. Namely, the Constitution of the Republic of Serbia stipulates that the unmarried couples are equal to the marital ones, and that the family, mother, single parent and child in the Republic of Serbia enjoy special protection. Therefore, marital and extra-marital unions are not only recognized by the Constitution, but also equalized as such. Also, the Constitution provides the family with special protection, whereby the Constitutional Court points out that, when it comes to the family the Constitution makes no distinction between marital and extra-marital unions. But the status of the extramarital partners is not recognized by the Labor rights Law, the Inheritance Law, the Law on Pension and Disability Insurance the Law on Personal Income Tax the Law on Property Tax. For example, Law on Pension and Disability Insurance do not recognize the right to family pension to the survived partner of the deceased insured partner, thereby violating and changing the essence of the Constitution of the guaranteed right to equality of marital and extramarital unions in front of law. The aim of the paper is to indicate the necessity of legal changes that would take into account the modalities that allow the surviving spouse to protect human rights in the form of enjoyment of family pension and legal inheritance in analogy to marital partners. Comparative legal solutions point to criteria such as the duration of the extramarital unions, common children, the absence of a marital union, neither the deceased nor the surviving spouse, etc.

Keywords: *unmarried couples, human rights, surviving spouse, inheritance, family pension, constitution, laws, Constitutional Court decision, unmarried couples in comparative law*

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1. Preface

It is estimated that more than 200,000 people live in an extramarital unions² in Serbia, and every fourth child is born out of this partnership relationship (Avalić, 2018)³. The increasing number of such communities is present everywhere today. There are now more than 2.3 million unmarried couples in the UK; a figure that is set to rise to 4 million by 2033 (The Law Commission, 2011). The topic of extramarital unions concerns the apparently quite a number of citizens of Serbia, so this is a matter of practical and not only a theoretical significance. The existence of extramarital partners living together in community is the first and basic qualification circumstance of the legal concept of the extramarital union (Lazić, 2016). The community of life should be real, complete, so that it can be portrayed as a marital relationship. It is a community that involves meeting the emotional, sexual, ethical, cultural and other needs of one woman and one man. The duration partnership is essential for the formation of the legal concept of an extramarital union. The community must last so long that it is easy to establish a similarity with marriage. In Serbian law, the duration of the extramarital union was raised through a demand that it be a "lasting" community, which means that it does not necessarily have to be long-lasting, but that partners living in an extramarital union had the intention to establish a community of life whose duration was not temporary or limited. The lack of marital obstacles to legal concept of the extramarital community is the third element that refers to the requirement that there was no marital obstacles between the spouses at the time of the establishment of the extramarital union.

The problem is that the constitutional equalization of the marital and extra-marital unions is not accompanied by the legal provisions of several laws that make a difference in terms of the use of the existential rights of members of these unions. Namely, the Constitution of the Republic of Serbia stipulates that the non-marital union is equal to the marital, in accordance with the law (Article 62, paragraph 5), and that the family, mother, single parent and child in the Republic of Serbia enjoy special protection, in accordance with the law (Article 66, paragraph 1). This is why both marital and non-marital unions are not only recognized by the Constitution, but are, as such, even equal. The constitutional equalization of the marital and extra-marital unions sounds modern, democratic, open and tolerant, very European. But the problem is that there is no real

² In literature written in English are used various terms, among which the most frequently in use are, extra marital unions/communities and non-married unions/partners. Bot are used in this article.

³ More than 200,000 Serbs live in an extramarital community, but they do not know that they have no rights: there is no inheritance of property and pension.

legislative will for the marital and extra-marital unions to be equalized or at least be made similar. In the whole set of regulations, the existing gap (almost fear) of equalization is very clear (Reljanović, 2018).

2. Legal distinction between marital and non-marital unions

A number of laws are certainly still far from recognizing an extramarital union as an equal to marital union of two people's lives. For too long, discriminatory provisions that do not recognize the existence of the extramarital unions and their formal equality have been proclaimed (but not introduced into legal life) since 2006.

Family law is the only one who however recognizes and gives but only some rights to unmarried couples. A marital union is defined as a lasting community of life of a woman and a man, among whom there are no marital obstacles (extramarital partners) (Article 4). Marriage is a marital obstacle for establishment of an extramarital union. If there was a marital obstacle at the time of acquisition of property in an extramarital union, life in an extramarital union can not be the basis for the acquisition of the property of an extramarital partner. (From the Judgment of the Appellate Court in Kragujevac, GZ 2213/2011 of 19 June 2012). (Porodično pravo, 2012). An unmarried partner has the rights and duties of a spouse under the conditions specified by that law, but which relates solely to the obligation to support. Namely, the provisions of article 152 foresee that a spousal partner who does not have sufficient means of subsistence, is incapable of work or is unemployed, has the right to be supported by other spouse in proportion to his or her abilities. In this respect, the marital and extra-marital unions are equalized because the provisions of this law on the maintenance of spouses are appropriately applied to the maintenance of a spousal partner. The legal equality of extra-marital and marital communities ends at this point.

The Law on Obligations (Article 201, paragraph 4) provides the right to a fair financial compensation for the suffering of mental illness due to death or serious disability, which is also entitled also to an unmarried partner, if there was a durable community of life between him and the deceased or injured.

The Law on Inheritance under the provisions of Article 8 provides that, on the basis of the law, there are hereditary orders. The deceased is to be inherited by: his descendants, his adoptive parents and their descendants, his spouse, his parents, his adoptive parents, his brothers and sisters and their descendants, his descendants and grandmothers and their descendants and his other ancestors. The first hereditary order is made by the

deceased's descendants and his spouse. Resident children and the spouse inherit equally (Article 9). The second hereditary order is made by the deceased's spouse and the deceased's parents and their offspring. The surviving spouse inherits half of the legacy, and the second half to equal parts is inherited by the deceased's parent (Article 12). Finally, the necessary heirs (those who can not be completely excluded by the will) are deceased's: descendants, adoptive parents and their offspring, spouse, parents, adopter, brothers and sisters, grandfathers and babies and other ancestors. A necessary successor can be only one who is called upon to inherit by the legal order of inheritance (Article 39).

The Law on Pension and Disability Insurance according to the provisions of Article 28 as members of the family of the deceased insured person shall be considered of: 1) spouse; 2) children (born in marriage or out of wedlock or adopted, stepchild supported by the insured person, or beneficiary of rights, grandchildren, brothers and sisters and other children without parents, or children with one or both parents who are completely incapable of work, and which the insured, that is the beneficiary of the rights, has maintained); 3) parents (father and mother, step-father and step-mother and adoptive parents) that the insured person, or the beneficiary of the law, supported. It is interesting that a divorced spouse can also be enjoyed under the right to a family pension if the court decided that he/she has the right to be supported. Therefore, the criterion is only the existence of a formal marriage, although it has long been divorced (not mentioned when). This gives an absolute priority over, for example, by the fact that at the time of the death of the insured person he may have been living in an extramarital union for decades. According to the provisions of Article 34, members of the close family of a deceased insured person, i.e. beneficiaries of rights, are considered spouse and children (born or unmarried, stepchild and grandchildren) in the sense of this law. A un married spouse has no place, nor among members of the extended family of a deceased insured person, that is, the beneficiary of the right, who in the sense of this law are parents (father, mother, stepfather, stepmother and adopter), brothers, sisters and other children without parents, one or both parents who are completely incapable of work, which the insured, that is, the beneficiary of the law, has endured. The spouse of a professional military person, according to the regulations on the Serbian Army that died during the official activities, acquires the right to family pension regardless of the prescribed years of his life, provided that he did not make a marriage again, that is, if he / she has children, that the children have completed their education 30a).

The Labour Law, Article 77. which regulates paid leave, mentions only the delivery to a spouse, and not partners in an extramarital union. When it comes to paid leave due to

the severity of the illness or death of a close family member, the Law recognized only a married spouse, children, brothers, sisters, parents, adopters, adoptive parents and guardians who only are identified as a narrow family. There is no extra marital partner. However, the legislator has left the possibility that by a general act (collective agreement, rulebook on work) or a contract of work with employees, other persons will be foreseen - where the unmarried partner could be found. Paragraph 5. of the same article states that the employer may authorize the absence of an employee and relatives not explicitly listed as well as for other persons living in a joint family household with an employee for the duration of the determined employer's decision. So, the employer can do so but does not have to do so. In Article 79, which regulates the suspension of employment, among other things, it is stipulated that the employment relationship is suspended if he is absent from work for being sent to work abroad from the employer or within the framework of international technical or educational-cultural cooperation, diplomatic, consular and other representative offices. Paragraph 3 of the same article stipulates that the same rights as an employee who is being sent abroad also has his / her spouse. The unmarried spouse is not mentioned, so it can only be stated that he / she has none of these rights. A unmarried spouse / partner is left without work in Serbia and without the right to complain about such an act by the employer. In Article 119 of the Labour Law, which regulates the so-called "other employee benefits", it is stipulated that the employer is obliged to pay the employee compensation for the costs of funeral services in the case of the death of a close family member, and as members of the close family in case of death of an employee is only a spouse. Unlike paid leave, and as in the case of a standstill, there is no attempt to correct a discriminatory provision by a general act or employment contract - a provision of imperative character and the employer must respect it - for example, it will mean that it will not have a legal basis to pay off compensation of funeral expenses to an unmarried partner in the case that the employee dies, while it will have to do so if the behind the died employee remains a spouse behind.

The Law on Income Tax is considered as family members a spouse, and the parents, children, adoptive parents and the adopter of the taxpayer (Article 10). Notwithstanding the provisions of the Family Law that provides for the obligation to support non-marital partners, the Law on Income Taxes in taxable household dependent family members implies only a spouse but not an unmarried partner. Namely, to the dependents of the family, in the sense of this law, the following persons are considered as persons who are dependent: minors, or adoptees; children, that is, adoptees in regular education or during unemployment, if they live with a taxpayer in the same household; grandchildren, if the

parents do not support them and if they live in the household with the taxpayer; a spouse; parents, or adopters. The right to tax exemption in the sale of rights. Capital gains or losses in terms of this Law shall not be deemed to be resulting from the transfer of rights, shares or securities when: 1) they were acquired by inheritance in the first inheritance order; 2) transfer between spouses and blood relatives in the right line (Article 72a).

Law on Property Tax. The tax on inheritance and gift is not to be paid: by the successor of the first order, the spouse and the parent of the deceased, or gift receiver of the first hereditary order and the spouse of the donor, Article 21. The tax on the transfer of absolute rights is not to be paid for the transfer of property right to an apartment to a physical person who buys the first apartment, Article 31a. The family household of the buyer of the first apartment, in the sense of paragraph 1 of this Article, shall be considered a community of life, business and spending of the income of the buyer of the first apartment, his spouse, the buyer's children, the buyer's adoptees, the children of his spouse, and the other. Despite the existence of a community of life.

3. Decision of the Constitutional Court in respect of non-recognition of rights on family pension to extra-marital partners

The provisions of Articles 28, 29, 30 and 34 of the Law on Pension and Disability Insurance are challenged before the Constitutional Court because they do not recognize the right to family pension to the deceased partner of the deceased insured, thereby violating and changing the essence of the Constitution of the guaranteed right to equality of marital and extra-marital union before the law. In the process of assessing the constitutionality and legality of the IUz-90/2008 Law on Pension and Disability Insurance 30.06.2011. the Constitutional Court concluded that, in accordance with the provisions of Article 105 of the Law on the Constitutional Court, the Court will send a letter to the National Assembly indicating the need for the disputed provisions of Article. 28, 29, 30 and 34 (but also by the provisions of Articles 28a and 30a) of the Law on Pension and Disability Insurance, which regulates the right to family pension, which is recognized only to the spouse of the insured person, recognize the rights of extra-marital partners, and widows, in accordance with the Constitution and recognized international acts. Such a decision was made because the initiator did not request the annulment of the controversial legal provisions but the adoption of the different ones. Since the Constitutional Court does not have a positive legislative right, but only a negative one, it could only initiate the adoption of legal provisions harmonized with the Constitution.

4. About extra-marital unions

Extra-marital unions are also referred to as cohabitation in the literature, and are defined as the union of life of two persons of the opposite sex, who are not in formal, legally-sanctioned marriage. Based on a set of demographic data, surveys and other sources, it can be concluded that extra marital unions are the most prevalent among young people, which is usually completed by marriage, as in the form of a permanent community or alternative to life in couples (Bobić, 2003). Many couples avoid marriage so that they do not bother with papers and administration, but only later realize that bureaucracy is even more an enemy of extramarital communities.⁴

The problem is the stereotypical view of extramarital communities as a phenomenon that is the result of individualism and the realization of mostly “selfish” personal aspirations, which happen in the conditions of material security, so these values are present among members of educated and financially safer categories of society. This presupposes the traditionalism of the existence of extramarital unions as a form of “marriage on trial” as well as long-term, lifelong unions with children. It is assumed that this form of anachronistic type of cohabitation exists in the form of open exploitation of women by men who in extra-marital partnerships in their (most often) rural households receive practically free female labor. After cease of love, or a need, after a couple of years, a man simply releases a woman, replacing her by the other one, without any obligation to none of them. Such unions may take a longer period of time, perhaps practically for the rest of the life of one of the spouses. If a woman survives, she is in an extremely unfavorable situation, having spent all her life working on her husband's property, building together the house and raising children with him, nursing a mother-in-law and a father-in-law, and finally inheriting nothing, and even not being entitled to family pension. She remains therefore, without a roof over her head and without any remuneration, just because the union with all the characteristics of marriage, in which she lived her entire life, was not formally concluded. She is practically on the street, if the children (who may not be mutual with the already deceased partner) do not allow to stay in the house.

We would somewhat agree that the dispersion of extramarital unions in Serbia reflects well-founded norms of marriage, as the most suitable ambience for raising children. They can be in many cases also the stage of the marital process and most often make an

⁴ More of about 200.000 Serbs living in extra marital union do not know that they have no rights at all: not inheritance, neither pensions. (Avalić 2018).

introduction to marriage, "marriage on trial", but rarely alternative to marriage (Penev & Stankovic, 2012). But our disagreement begins with the view that informal unions in Serbia end after a birth of a child or the desire to get offspring because this is not always the case. Marriage also is a reflection of well-founded norms of marriage, but as a union in which a man is traditionally provided by a dominant position with the right to form this community according to his needs. This makes the community the stage of gender-based violence and exploitation. When a hegemonic man dictates an outright community, then there is no longer a community of equal partners (Mršević, 2014:20). Hegemonic masculinity is a model of practicing full male domination over women. The term "hegemonic" refers to the contextually tolerated ways in which men practice masculinity, which includes violence to subjugate women, deny the victim the right to leave the community with a hegemonistic man, or have possibility to change the conditions of a mutual life (Mršević, 2013:55).

From the statistics we find out that the number of persons in extramarital unions is higher in urban than in other settlements, in both sexes. The differences are less pronounced in women than in men. The percentage of men living in extramarital unions is larger in urban settlements than in women, and in other settlements, the share of men and women is almost identical. In statistics are practically invisible all these discriminatory, exploitative models of extra marital unions.

The percentage of persons living in extramarital communities in the total population in younger age groups is higher in women, in the youngest four and a half times, and in the group of 20 to 24 years it is twice as high. The largest share in women is in the group of 25 to 29 years and with increasing age it is continuously decreasing. In the age group of 30 to 34 years, in which the proportion of men is greatest, full differences are almost disappearing. In the 35-39 age group and in all of the following, the proportion of men is constantly higher, by up to half the share of women's share, except in the oldest group of 75 years or more, where the difference is almost triple (Negovanović, 2017).

Whenever there is a difference in the number of women and men who live in not married (but also in marital) unions, the question arises how is it possible, i.e. who lives with that surplus of persons, (since statistical data do not include same-sex communities). It is clear that this is about giving socially desirable answers that do not always reflect the actual situation. Thus, for a young woman, life in a non-marital union might be seen as a desirable category from the point of view of the expected offspring and perspective of a formal marriage. Both are seen as stereotypical understanding of favorable and desirable outcome of women's ambitions. But their partners, men of the

same or similar age, would prefer to be represented as unmarried guys without obligation. Elderly men, however, may feel that the life of a lonely old man is "proof" of his life's failure. If they are not already formally married, they might prefer to declare themselves as to live in extramarital unions, although they may have only sporadic informal relationships. As there is obviously tinkering with fact in responding with intention to their own positioning in the domain of social acceptability, the negative forms of extramarital communities collared by gender-based discrimination and exploitation are not included in the statistics. Namely, few men would volunteer said to exploit women through extramarital communities, nor exploited women are willing to plead to be victims of such extramarital practices.

The Family Law of the Republic of Serbia regulates the extramarital community as a lasting community of life of a woman and a man, among which there are no marital obstacles, which is formed by the commencement of a common life. Regarding property relations and mutual duties of support, the same terms apply to marriage, and the most important difference between marriage and non-marital unions is the lack of legal inheritance between spouses.

The National Strategy for Gender Equality for the Period from 2016 to 2020 as the main strategic document of the Republic of Serbia does not contain anything at all about non-marital unions, partnerships, cohabitations, informal marriages, informal partnerships, coexistence, informal union or anything similar, not even in the chapter named as Gender equality in partner and family relationships - the economy of aging and the distribution of time, or anywhere else. But nevertheless, it is correct to assume that, formally speaking, women and men in the Republic of Serbia have equal rights. However, the indicators show that the overall socio-economic status of women is in a much worse position than men and that there is a deep gap between the proclaimed principles and concrete practice in the implementation of policies. This is the main and common conclusion of a series of research on the position of women conducted by the Ministry of Labour, Employment, Veterans' Affairs and Social Issues during 2014.

5. Inequality of women in marital and family relations

Women spend considerably more time in unpaid work, and in total they exceed men for one hour a day. Under unpaid activities, the so-called "domestic chores: dealing with food, household maintenance, child or adult care of a household member, making and care of textiles, shopping and services, repairs, gardening, as well as trips related to these activities. In total, 95% of women and only 77% of men participate in unpaid

activities every day. Such a family is a base for reproduction of gender roles and an unequal relationship of power whose consequences can also turn into violence.

Property inequities based on gender are very pronounced. The rural women's homes are in 88% of the cases owned by men, they do not own land in 84% of cases and almost do not own agricultural products. Women make up 55% of the unemployed rural population and 74% of unpaid assisting members of agricultural holdings. There are significant differences in informal employment between men (28.8%) and women (43.4%), while women from rural areas are eight times more represented in informal employment than women from urban areas (5.5%). They are considerably less covered by pension and health insurance schemes than men household members. A total of 12% of women do not have health insurance, and over 60% of women are not covered by pension insurance. In women who are in the status of so-called auxiliary household members, the situation is even more unfavorable - even 93% do not pay pension insurance, mainly due to lack of money. This situation places them at higher risk of poverty.

6. Legal solutions of some European countries

Since the right to inherit the non-married partners seems to be the most controversial, because the hereditary right is more than any other branch of rights painted by tradition and deeply rooted mentality, we present the legal provisions of some European countries. In a large number of EU legislations, in a relatively short period of time, the lawful successor was recognized also a non-married partner, which simultaneously raised the issue of significant differences in the many aspects of the succession legislation of the extramarital unions (Vidić - Trninić, 2014). A non-marital union in most legislations is the basis for calling for inheritance only if it is a same-sex non-marital union. These are the legislations of Sweden, Denmark, Finland, the Czech Republic, Hungary, England, Austria and Germany. In a lesser number of legislations, the extra-marital unions is the basis for invoking inheritance, irrespective of whether it is a heterosexual or same-sex marital union. This is the case in the legislation of Slovenia, Croatia, Belgium, the Netherlands, Ireland and Malta. In Greek law, inheritance is possible only on the basis of heterosexual extramarital unions.

7. Conclusion

If they were equalized, fraudsters could appear that would prove in various ways that they were in an extramarital union with a deceased person and claimed their “rights” to somebody’s property and pension (Avalić 2014). Also, as one civil servant once said (regarding the exercise of one of the rights in the field of social protection): "To equalize them, so that anyone from the street can take someone's hand and claim their rights"? Or how the people might argue, "if she was right, the marriage would be made; women chose it by themselves, they are equal and have the same rights, therefore they themselves have chosen to live in an extramarital union by accepting the disadvantage of such union in relation to marriage; marriage at least today is available to all; why she did not think about the consequences in time." Such a mentality will not take us far, but it is currently quite widespread (Reljanović, 2018).

It is in the interest of every society to recognize what is happening in life and to facilitate these situations, and not to make it more difficult. The facts that are rightfully able to compensate for the lack of a legal form are: the length of life in a non/married union, the fulfilment of rights and duties equivalent to the rights and duties of spouses, the absence of marital obstacles in the establishment of a marital union and the birth of joint children (Lazić, 2016).

As an excellent example of institutionally non-discriminatory treatment of marital and extramarital unions, is the recent Grant Contest issued by the Provincial Institute for Gender Equality calling the couples from the territory of the Autonomous Province Vojvodina to apply for funds with intention to purchase the rural houses with gardens. The subject of the Contest is the deliverance of grants for purchasing of rural houses with gardens, to both, married spouses and non-married partners with permanent residence in the territory of the AP Vojvodina that do not have a residential property owned or co-owned. The objectives of the competition are focused on: encouraging the development of rural environments, increasing the number of women who own the real estate, reviving and rejuvenating Vojvodina villages through the arrival of children and increasing the birth rate, initiating the process of improving the demographic structure as a precondition for initiating economic activities. Although on the paper the Contest is really not discriminative, but is be seen how would it works in practice, would it really include non-married couples on equal stand as the married one.

Literature

- Bobić, M. (2003) Prekomponovanje braka, partnerstva i porodice u savremenim društvima. *Stanovništvo*, 41(1-4), str. 65-91.
- Mršević, Z. (2013) Femicid. *Pravo i politika*, VI, br 1, str. 51-69.
- Mršević, Z. (2014) Nasilje i mi – domaće nasilje u Republici Srpskoj. Beograd: Institut društvenih nauka.
- Negovanović, O. (2017) Zastupljenost i osnovne karakteristike vanbračnih zajednica u Srbiji i Evropskoj uniji. *Demografija*, 14, str. 65-82.
- Porodično pravo. Beograd: Poslovni biro. 20. april 2012.
http://www.poslovnibiro.rs/files/File/SUDKSA_PRAKSA/3.1.5.%20PORODICNO%20PRAVO.pdf
- Stanković, B. & Penev G. (2012) Rađanje van braka: neki prostorni aspekti. *Demografija*, 9, str. 181-199.
- Vidić Trninić, J. (2014) Vanbračni partner kao zakonski naslednik u savremenim pravima Evrope. Ur. Irena Pejić. (str. 433-453). U: *Zbornik radova Pravnog fakulteta u Nišu*, 68, godina LIII.

Zakoni

- Ustav - Službeni glasnik Republike Srbije, broj 98/2006.
- Porodični zakon – Službeni glasnik Republike Srbije, broj 18/2005, 72/2011, 6/2015.
- Zakon o obligacionim odnosima – Službeni list SFRJ, broj 29/78, 39/85, 45/89-odluka USJ i 57/89, Službeni list SRJ, broj 31/93 i Službeni list SCG, broj 1/2003-Ustavna povelja.
- Zakon o nasleđivanju - Službeni glasnik Republike Srbije, broj 46/95, 101/2003-odluka USRS i 6/2015.
- Zakon o penzijskom i invalidskom osiguranju - Službeni glasnik Republike Srbije, broj 34/2003, 64/2004 –odluka USRS, 84/2004, 85/2005, 101/2005, 63/2006-odluka USRS, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 75/2014, 142/2014 I 73/2018.
- Zakon o radu - Službeni glasnik Republike Srbije, broj 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017-odluka USRS I 113/2017.
- Zakon o porezu na dohodak – Službeni glasnik Republike Srbije, broj 24/2001, 80/2002, 135/2004, 62/2006-ispr., 31/2009, 44/2009, 18/2010, 50/2011-odluka US, 7/2012-usklađeni din. izn., 93/2012, 114/2012-odluka US, 8/2013-usklađeni din. izn., 47/2013-ispr., 108/2013, 6/2014-usklađeni din. izn., 57/2014, 68/2014, 5/2015-usklađeni din. izn., 7/2017-usklađeni din.izn., 113/2017 I 7/2018-usklađeni din. izn.
- Zakon o porezu na imovinu – Službeni glasnik Republike Srbije, broj 26/2001, Službeni list SRJ, broj 42/2002-odluka SUS I Službeni glasnik Republike Srbije, broj 80/2002, 135/2004, 61/2007, 5/2009, 101/2010, 24/2011, 57/2012-odluka US, 47/2013 I 68/2014.

Internet izvori

- Avalić, G. (2018, 15. februar) Više od 200.000 Srba živi u vanbračnoj zajednici, a ne znaju da nemaju nikakva prava: Nema nasleđivanja imovine i penzije, a ovo je logično objašnjenje. *Telegraf*. Dostupno na: <http://www.telegraf.rs/vesti/srbija/2935420-vise-od-200000-srba-zivi-u-vanbracnoj-zajednici-a-ne-znaju-da-nemaju-nikakva-prava-nema-nasledjivanja-imovine-i-penzije-a-ovo-je-logicno-objasnjenje>, pristupljeno 6. oktobra 2018.
- Lazić, A. (2016) *Vanbračna zajednica*, Institut za pravo i finansije. Dostupno na: <http://ipf.rs/vanbracna-zajednica/>, pristupljeno 7. oktobra 2018.
- Reljanović, M. (2018) Zakon o radu vs. vanbračna zajednica. *Peščanik*. Dostupno na: <https://pecanik.net/zakon-o-radu-vs-vanbracna-zajednica/>, pristupljeno 1. avgusta 2018.

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MEDIA REPORTING ON NATIONAL MINORITIES IN SERBIA – THE ROLE OF INDEPENDENT INSTITUTIONS

This paper analyses public policies and legal framework of media reporting on national minorities in Serbia, the role and practice of independent bodies with regard to media reports which are not in line with legal and professional standards, and the impact of such reporting on the status of national minorities and the level of implementation of minority rights. We analysed public policies and legal framework and professional standards in media reporting on national minorities in Serbia, as well as their implementation by independent bodies. The legislation regulating media reporting on national minorities, primarily the Law on the Prohibition of Discrimination and a set of media laws proscribe the expression of ideas, information or opinions that instigate discrimination, hatred or violence against minorities. Journalists are bound by professional standards defined in the Serbia Journalists' Code of Ethics to oppose anyone who violates human rights or advocates any type of discrimination or hatred or instigates violence. The Code of Ethics requires journalists to be aware of the threats of discrimination the media can spread and to give their best to avoid discrimination. The practice of the Commissioner for the Protection of Equality with cases of discriminatory reporting on national minorities in the media, as well as the practice of the Press Council, as an independent self-regulatory body, indicates that the protection of the rights of national minorities in media needs improvement.

Keywords: national minorities, media, discrimination, hate speech, Commissioner for the Protection of Equality, Press Council

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Introduction

The media have an obligation to encourage equality and tolerance, to promote and protect minority rights and contribute to inclusion in a democratic society. To that end, a crucial role of the media is to raise awareness on respect and understanding of the other and the different, to develop tolerance and sensitivity to any discrimination and respect for national minorities' constitutional and legal rights. The media's strong criticism of those who are responsible for regulating the status and implementation of minority rights in a society is vital. (Matić, Valić Nedeljković 2014) The media are one of the societal factors with the strongest impact on opinion forming and, accordingly, on the state and level of discrimination in a society. Citizens also see the media as a factor contributing to the rise of discrimination, spreading of prejudice and negative perception of national minorities, but they also believe that the media could play a significant role in curbing discrimination and in improving the status of minorities.¹ The right to freedom of expression is one of the human rights guaranteed by international conventions and national media regulations. The right to freedom of expression is not absolute and may be limited to enable the preservation of other rights. One of the allowed limitations is hate speech.

This paper analyses the strategic and legal frameworks of media reporting on national minorities, as well as the practice of the Commissioner for the Protection of Equality and of the Press Council's Complaints Commission in cases of media reports on national minorities that were in contravention of the anti-discriminatory legislation and professional standards.

Strategic framework for media reporting on national minorities in Serbia

The public policies that regulate media reporting on national minorities in Serbia in most detail and most comprehensively were created in the process of European integrations. **The Action Plan for Realisation of the Rights of National Minorities,**² corresponding to the Action Plan for Chapter 23³ (hereinafter: AP CH 23), regulates media reporting in two fields: Prohibition of Discrimination (Field II) and Culture and the Media (Field III). Its activities in the context of prohibition of discrimination

¹ Rezultati istraživanja javnog mnjenja: *Odnos građana i građanki prema diskriminaciji u Srbiji*, Poverenik za zaštitu ravnopravnosti /Report on Public Opinion Survey: *Citizens' Attitudes on Discrimination in Serbia*, Commissioner for the Protection of Equality/, Belgrade, 2016.

² Adopted at the Government of Serbia session on 3 March 2016.

³ Adopted at the Government of Serbia session on 27 April 2016.

include: raising awareness among the general public, members of national minorities, and officials and employees in public authorities at all levels, on the existence of national minorities in the country, their rights, and the rights to affirmative measures where they are necessary (measure 2.2), suppressing hate speech in the media (measure 2.3), initiating the process of protection from hate speech at the initiative of national councils of national minorities (measure 2.4), reporting by public service broadcasters with the aim of strengthening awareness of citizens on the causes and consequences of hate crimes and zero tolerance for such crimes (measure 2.6).

The part of the Action Plan concerning Culture and the Media, through the specific strategic aim *Improvement of the situation in the media and development of media content of importance for members of national minorities*, specifies the following activities: raising awareness on the rights of minorities and respect for cultural and linguistic diversity by supporting the production of media content (measure 3.5) and professional training of journalists and other media professionals with the aim of improving media reporting on minority issues and encouraging balanced and objective reporting (measure 3.12). Another measure included is to conduct a cost analysis of potential introduction of programmes in national minority languages translated into the Serbian language to improve access of all citizens to media content in national minority languages and the benefits of social integration and development of the multicultural society as a whole, to be implemented by the RTS and RTV (measure 3.13).

Following an analysis of all seven quarterly reports on the implementation of the Action Plan,⁴ it was concluded that according to the Government of the Republic of Serbia all of these activities are being successfully implemented, with the exception of measure 3.13 (cost analysis of translating programmes in national minority languages into the Serbian language), which the Government regards as partially realised. The Fourth Report on the Implementation of the Action Plan for Realisation of National Minority Rights 2017/2 contains a "rough" estimate by the RTS that translating some programmes in national minority languages into the Serbian language requires a minimum of EUR 100,000⁵ although the Republic of Serbia Budget for 2017, according

⁴ Government of Serbia's reports on the implementation of the Action Plan for the Realisation of Rights of National Minorities; accessible at <http://www.ljudskaprava.gov.rs/sh/node/21795>

⁵ See the Fourth Report on the Implementation of the Action Plan for Realisation of Rights of National Minorities (2017/2): "In order to realise plans and broadcast additional contents, primarily the News (Vesti) and Journal (Dnevnik) in minority languages, Radio Television of Serbia should additionally engage translators and announcers-presenters who are not employed in RTS. In a rough calculation, for implementation of the aforementioned project, RTS states that it would be necessary to provide a minimum of 100 thousand euros."

to the Action Plan, allocated EUR 8.642 for a more precise calculation of these costs. After monitoring the language structure of TV Vojvodina Channels One and Two in 2017 it was established that 55% of programmes were broadcast in Serbian, 11% in Hungarian, 3% in Romanian, Ruthenian and Slovak each, and about 5% of programmes in minority languages, subtitled in Serbian.⁶ In recent years, Channel One of TV Vojvodina has been broadcasting the programme called *Paleta*, which offers a review the most important content across television programmes in national minority languages with Serbian subtitles.⁷ The *Paleta* review is a unique programme in the region, affirming multiculturalism by informing the majority population on the events, phenomena and people from national minority communities (Veljanovski, Valić Nedeljković, 2016:10) Translation of national minority programmes into the Serbian languages makes national minority issues more accessible to the majority population, which undoubtedly represents good practice in a multicultural society.

Strategy of Prevention and Protection against Discrimination for the period from 2014 to 2018 and the Action Plan for Implementation⁸ also provide detailed descriptions of the activities concerning media reporting on national minorities. The General Section specifies the following activities: increasing the number of media reports promoting non-violence and tolerance for vulnerable social groups (measure 3.1.13), support to the production of media content enabling the realisation of equal rights (measure 3.2.1), taking measures to prevent the spreading of hate speech in the media and to reduce the incidence of hate speech spreading in the media, along with increased content condemning hate speech (measure 3.2.3). A separate part of the Action Plan – *Youth, Sport, Culture and the Media* (4.5) - has, as one of its aims, strengthening the culture of tolerance for vulnerable groups through media, i.e. improving the manner of media reporting by organising training for journalists and editors, and also introducing stimulating measures in reporting, such as open competitions, contests, funding for media projects and similar.

The Office for Human and Minority Rights, in its most recently published, Fifth Monitoring Report on the Realisation of the Action Plan for the Implementation of the Strategy of Anti-Discrimination,⁹ states that within the IPA 2013 Twinning Project

⁶ Annual Report on the Activities and Work of RTV for 2017, Radio-Television Vojvodina, Novi Sad, 2018.

⁷ Annual Report on the Activities and Work of RTV for 2015 and Annual Report on Activities and Work of RTV in 2016.

⁸ *Official Gazette of the Republic of Serbia*, no. 107/2014

⁹ Report for the first and second trimesters of 2017, p 139.

“Support to the Advancement of Human Rights and Zero Tolerance for Discrimination” it organised a national media campaign titled “Together, We are Serbia” with the aim of promoting respect for diversity and raising awareness in the general public of the existence of national minorities (measure 3.1.12). A video clip produced in this project and published on the Office for Human and Minority Rights YouTube channel has had only about 1,100 views.¹⁰ Neither this nor other periodical reports contain information on the activities completed with regard to measures 3.2.1, 3.2.3 and 4.5, relating to reporting on national minorities, although they do point out that the Ministry of Culture and Information has not reported on the implementation of measures in this reporting period.

Based on the analysis of reports on the implementation of the aforementioned measures, a conclusion is drawn that in the first three years of the implementation of the Strategy of Anti-Discrimination, there were no significant activities or results in media reporting on national minorities and in the prevention and protection from discrimination of national minorities in the media. The sole activity that was realised resulted in a low-scale campaign.

Strategy for Social Inclusion of Roma in the Republic of Serbia for the period from 2016 to 2025¹¹ – through its operational aim number 4 (to create the conditions enabling the expression of identity, cultivating the language and culture, and exercise of all minority rights of the Roma in education), it provides a general framework for media reporting on national minorities: the media should promote the language and culture of the Roma, the Roma community's contribution to the cultural heritage of the Republic of Serbia as well as traditional and contemporary Roma cultural creations.

The **Strategy for the Development of the Public Information System from 2011 to 2016** protected minority rights in the media only in principle. It specified that it was in the public interest to provide varied and good quality media content for all individuals and social groups: professional, age, educational, including all minority groups: ethnic, religious, linguistic and sexual, special needs groups and other, and that it was in the public interest and of particular importance to produce and broadcast media content if, inter alia, it was of importance for the promotion of the rule of law and social justice, the principle of civil democracy, human and minority rights and freedoms and European

¹⁰ Video clip available at: <https://www.youtube.com/watch?v=Ay08ly62F7Y>; accessed on 10 September 2018.

¹¹ *Official Gazette of the RS*, no. 26/2016

principles and values. The Specific Stimulating Measures (Chapter 8.3) allowed for examining the possibility of introducing additional stimulating measures, in accordance with the regulations for allocating state assistance, one of which was assistance to the media and journalist and media associations for training programmes for journalists in a range of fields (economy, defence, minority rights, the interior, agriculture, new technologies, etc.) The Action Plan for the implementation of this Strategy did not envisage concrete measures regarding media reporting on national minorities.

Since the aforementioned Strategy was close to expiration, the AP CH 23 stipulated that the new **Strategy of the Development of the Public Information System** (hereinafter: media strategy) would be drafted in 2015.¹² The first draft of the new media strategy was drawn up, only to be abandoned in the meantime. The draft did not deal with this area in more detail. Rather, it only focused on the provision of information in national minority languages. Following this unsuccessful attempt at creating a new media strategy, it was announced that it would finally be adopted by the end of 2018. This means that Serbia has not had a strategic document in the field of media for two whole years.

The question remains open whether the new media strategy will regulate this area in more detail or whether its regulation will be left entirely to the strategies in the area of human rights, anti-discrimination and national minority rights. Likewise, another question remains – to what extent is it necessary for media strategies to regulate media reporting on national minorities and to what extent should this be a part of strategies on human rights, and how to determine an effective balance in this relation. In the process of drafting a new media strategy, the aforementioned measures from the field of national minority protection should be considered, also taking into account that so far, their realisation has not been successful, and that a new media strategy will be a new chance for the status of national minorities in the media to be regulated.

Legal Framework in Serbia – Regulations in the domain of human rights and the media

Media reporting on national minorities is regulated by the **Constitution of the Republic of Serbia**,¹³ laws on human rights and those protecting national minority rights and proscribing discrimination, as well as the laws in the domain of media rights. The

¹² Official Gazette of the RS, no. 75/2011

¹³ Official Gazette of the RS, no. 98/2006

Constitution guarantees the right to freedom of thought and expression (Article 45) and freedom of the media (Article 50, but also defines their limitations, which can be imposed, inter alia, to prevent the incitement of racial, national or religious hatred (Article 50). The Constitution protects the rights of national minorities quite exhaustively and guarantees special protection to enable full equality and preservation of their identities. (Krstić, Stjelja etc. 2015:10)

The Constitution prohibits discrimination (Article 21) and incitement of racial, national and religious hatred (Article 49) protects the rights of national minorities and guarantees special protection of national minorities to enable full equality and preservation of their identities (Article 14). In addition, in the Constitution, through measures concerning public information, the state is committed to encouraging understanding, consideration and respect of differences resulting from the specificities of ethnic, cultural, linguistic or religious identity of its citizens (Article 48), and to ensuring that members of national minorities are entitled to the right to: express, preserve, cultivate, develop and express in public their national, ethnic, cultural and religious specificities; to being fully, timely and impartially informed in their language, including the right to express, receive, send and exchange information and ideas; to establish their own media, in accordance with the law (Article 79), while municipalities are responsible for the realisation, protection and improvement of human and minority rights and public information in their territories (Article 190).

The **Law on the Prohibition of Discrimination**¹⁴ defines what hate speech is (Article 11), prohibits the expression of ideas, information and opinions inciting discrimination, hatred or violence against individuals or groups of individuals based on their personal characteristics, in the media and other publications, in gatherings and places accessible to the public, by writing out or displaying messages or symbols in other manners. This law defines causing and inciting inequality, hatred and intolerance based on national, racial or religious affiliation and advocating discrimination through media as severe forms of discrimination (Article 13).

The **Law on the Protection of Rights and Freedoms of National Minorities**¹⁵ stipulates that members of national minorities have the right to be “fully and impartially informed in their own language, and the right to express, receive, send and exchange

¹⁴ Official Gazette of the RS, no. 22/2009

¹⁵ Official Gazette of the FRY, no. 11/2002, Official Gazette of Serbia and Montenegro, no. 1/2003 – Constitutional Charter and the Official Gazette of the RS, no. 72/2009 – other law, 97/2013 – Decision by the Constitutional Court and 47/2018

information and ideas through printed media and other means of public information” and the right to “establish and maintain media in their own language” (Article 17, paras 1 and 3). The same Article requires that the state to provide informative, cultural and educational content in national minority languages in radio and television public service broadcaster programmes. Article 19 of this Law stipulates that the national council for national minorities, as a self-governing body, is in charge of issues relating to informing national minority members.

The **Law on National Councils of National Minorities**¹⁶ regulates in detail the councils' powers in the domain of informing (Articles 19 – 22). Councils are entitled to founder's rights in the domain of public information because they are allowed to establish institutions and companies with the aim of exercising the right to public information in a minority language or foundations, with the aim of realising common-good aims of improving public information in a national minority language. At the National Assembly, based on agreements, national councils nominate two candidates to the Council of the Regulatory Body for Electronic Media. In addition, they have broad authorities in the field of national minority informing: they adopt strategies of informing in a national minority language; issue approvals of project proposals in the field of information in national minority languages delivered by public institutions; submit proposals to managing boards and programme councils of public media services with regard to information in national minority languages; issue opinions on candidate editors of programmes in national minority languages in public service broadcasters; issue opinions on reports by programme councils on the content of programmes in national minority languages.

The **Law on Self-Government**¹⁷ stipulates that one of the responsibilities of the municipality is to look after the realisation, protection and improvement of human and minority rights, gender equality and public information in its territory (Article 20).

The legal system allows for criminal-legal protection of national minorities from unlawful reporting by the media. The **Criminal Code**¹⁸ defines several crimes that could be relevant in this event, i.e. those that could be committed through media and against members of national minorities. These crimes are: inciting national, racial and

¹⁶ *Official Gazette of the RS*, nos. 72/09, 20/14 – US and 55/14

¹⁷ *Official Gazette of the RS*, nos. 129/2007, 83/2014 – other laws, 101/2016 – other laws and 47/2018

¹⁸ *Official Gazette of the RS*, nos. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016

religious hatred and intolerance (Article 137), infringement of equality (Article 128), racial and other discrimination (Article 387) and defamation of reputation based on racial, religious, national or other affiliation (Article 174). Judicial practice has not been developed with regard to some of these crimes. Criminal defamation (Article 170) is an insult through the media and punishable by fines, and should therefore be included in the context of media reporting on national minorities. Here, criminal defamation should be viewed in relation to Article 54a (the so-called hate crime), which was included in the Criminal Code in 2013. This Article actually defines hatred or discrimination as a motive for a crime as an aggravating circumstance which must be included in sentence determination. This aggravating circumstance has not been used in practice so far, but it would be of significance if its application were considered in theory in relation to the crime of defamation.

A set of media laws adopted in 2014 contains provisions aiming to prevent and punish the use of hate speech. The **Law on Public Information and Media**¹⁹ prohibits hate speech (Article 75), specifying that ideas, opinions or information published in the media must not incite discrimination, hate or violence against an individual or a group of individuals on grounds of their race, religion, nationality, (...) or other personal inclination, notwithstanding whether a criminal offence has been committed by such publication. The **Law on Electronic Media**²⁰ also prohibits hate speech (Article 51), specifying that "the Regulator shall ensure that the programme content of the media service provider does not contain information which overtly or covertly encourages discrimination, hatred or violence based on race, colour, ancestry, citizenship, national origin, language, (...) and other actual or presumed personal characteristics." The **Law on Public Service Broadcasting**²¹ specifies that the main activity of the public service broadcaster has the function of realising the public interest as defined by this law, and entails publishing content (...) aimed at realising human rights and freedoms, exchanging ideas and opinions, nurturing the values of democratic society, advancing political, gender, international and religious tolerance and understanding, as well as preserving the national identity of the Serbian people and national minorities (...).

The protection of national minorities in media reporting is primarily regulated by anti-discriminatory legislation, while the laws that directly protect the rights of national minorities do not regulate this area and rather deal solely with information in minority

¹⁹ Official Gazette of the RS, no. 83/14

²⁰ Official Gazette of the RS, no. 83/14

²¹ Official Gazette of the RS, no. 83/14

languages. Criminal legal protection of national minorities from unlawful reporting is possible, but has not been developed in court practice. A set of media laws established a framework for the protection from discrimination in the media, with the aim of preventing and punishing the use of hate speech in the media, presenting additional guarantees for the protection of national minority rights in the media.

Practice of the Commissioner for the Protection of Equality in cases involving discrimination of national minorities in the media

The Commissioner for the Protection of Equality has acted in several procedures raised by complaints dealing with discrimination of national minorities in the media, mostly filed by civil society organisations. The Commissioner's annual reports contain statistical data on the number of complaints in different fields, including a significant number of complaints in the area of public information and media. According to the 2017 Annual Report, the number of complaints filed in the area of public information and media is the third largest group, i.e. about 7% of all complaints were filed in response to discrimination in this field (preceded by discrimination in the provision of public services and use of public buildings and spaces – 12% and in education and professional training – 8%).²²

The total number of complaints filed in the area of public information and media in 2017 was 53; the largest number of them concerned discrimination based on sexual orientation and gender identity (33) and all were filed by civil society organisations, while only three complaints were filed for discrimination based on national affiliation and ethnic origin – one by an individual and two by civil society organisations.²³ The total number of complaints filed in the area of public information and media in 2016 was 28, with the largest number concerning discrimination based on sexual orientation (15), again, all filed by civil society organisations, while those filed for discrimination based on nationality and ethnic origin were only five – two by individuals and three by organisations.²⁴ The total number of complaints filed in the area of public information and media in 2015 was 69, with the largest number, again, for discrimination based on sexual orientation (21), while those for discrimination based on nationality and ethnic

²² Regular Annual Report of the Commissioner for the Protection of Equality for 2017.

²³ *Ibid.*

²⁴ Regular Annual Report of the Commissioner for the Protection of Equality for 2016.

origin included 11 complaints, three of which were filed by legal entities, two by individuals and six by organisations.²⁵

The role of civil society organisations in combating discrimination in public information systems and the media is very important – as confirmed by the fact that a majority of complaints were filed by them. One of the reasons for this situation is the fact that hate speech is easily perceivable in the media, it is easy to identify those responsible and is easily provable: no requirement for witnesses, procedures for taking statements or testifying.

A conclusion drawn from the practice of the Commissioner is that when reporting about national minority rights is concerned, the media with national coverage dealt with these issues to a lesser extent, while local and regional media published more articles and reports, primarily focused on the improvement of the status of the Roma community. The media were also interested in subjects concerning the inclusion of Roma children in the education system and Roma employment.²⁶ The Commissioner's practice indicates that the victims of hate speech in the media were the most vulnerable social groups, including LGBT and national minorities, Roma in particular, while some procedures concerned discrimination against Albanians in the media.

As mentioned earlier, the largest number of complaints against discrimination in the media and public information based on nationality involves members of the Roma minority. In procedures where discrimination in media and public information against Roma nationals was identified,²⁷ the Commissioner issued recommendations that reports violating the dignity of this national minority be not broadcast and that programmes and reports should contribute to changing the pattern, customs and practices that create stereotypes, prejudice and discrimination against members of this national minority. A frequent form of violation of the Law on the Prohibition of Discrimination is disclosing the nationality of crime suspects in situations when their nationality is of no relevance to the crime committed and where disclosing this information does not contribute to better understanding of the incident. Such reporting

²⁵ Regular Annual Report of the Commissioner for the Protection of Equality for 2015.

²⁶ Regular Annual Report of the Commissioner for the Protection of Equality for 2017.

²⁷ Reference procedures: Commissioner's Opinion no. 07-00-337/2016-02, issued in the procedure following a complaint filed by R.Ž.C.B against the daily paper K; Commissioner's Opinion no. 07-00-688/2015-02, issued in the procedure following a complaint filed by Educational and Cultural Community R.R. against author of a TV programme Ž.P; Commissioner's Opinion no.07-00-147/15-02, issued in the procedure following a complaint filed by organisation P. against V.N., etc.

practice draws attention to members of this national minority (in practice, it is the Roma national minority that is mentioned most often); they are labelled as prone to committing crimes, which, in turn, strengthens the negative stereotypes and discriminatory treatment.²⁸ This situation is consistent with the findings of the survey on "Citizens' Attitudes towards Discrimination in Serbia"²⁹ conducted in 2016. According to the results, as much as 36% of the participants believe that Roma are the most discriminated social group.

With regard to media reporting on national minorities in Serbia, the cases before the Commissioner concerning referring to Albanians as "Shiptars" in texts printed on cover pages in two publications in 2015 present important examples. A civil society organisation filed complaints in these cases.³⁰ During the procedure it was established that for almost half a century, referring to the Albanian people as "Shiptars" has been considered offensive and insulting to members of this national minority, and that the use of this term may, particularly in conflict situations, encourage intolerance towards the Albanian people and members of the Albanian national minority. The Commissioner for the Protection of Equality analysed expert texts on the origin of the word "Shiptar", its meaning in the contemporary context and the feelings it provokes in members of the Albanian national minority living in Serbia. This type of reporting, using a colloquial and derogatory term for a specific ethnic group deepens the gap between members of the Albanian national minority and the majority population, inducing aversion in the majority population against Albanians and the feeling of insecurity in the Albanian population as well as labelling their entire community. The Commissioner's opinion stated that the use of the term "Shiptar" violates the dignity of members of the Albanian national minority, thus violating the provisions of the Law on the Prohibition of Discrimination. For this reason, a recommendation was issued to these daily newspapers that in the future they not publish articles violating the dignity of members of the Albanian national minority and that, through their articles, they should contribute to changes in patterns, customs and practices that create stereotypes, prejudice and

²⁸ Regular Annual Report of the Commissioner for the Protection of Equality for 2016.

²⁹ Report on a public opinion survey: *Citizens' Attitude towards Discrimination in Serbia*, Commissioner for the Protection of Equality, Belgrade, 2016.

³⁰ In 2015, the daily paper *Informer* and *Telegraf* portal published articles with the following titles: "Spider Shiptar Arrested", "Edi Rama – A Shameless Shiptar", "Chaos on the Way: Shiptars Already in Knez Mihailova, a war of football fans looming?", "Exclusive Video: Here's How Shiptars Smuggled the Flag of Greater Albania into Belgrade!", etc. See: Commissioner's Opinion no. 07-00-90/2015-02 issued in the procedure following a complaint filed by organisation P. against media portal T. and Commissioner's Opinion no. 07-00-88/2015-02, issued in the procedure following a complaint filed by organisation P. against the daily paper I.

discrimination against members of the Albanian national minority, and to make sure that in the future they not violate legal regulations on the prohibition of discrimination.

The same media content was the subject of a procedure conducted before the Complaints Commission of the Press Council, which likewise established discrimination and infringement of the relevant provisions of the Serbian Journalists' Code of Ethics. The decision of the Press Council's Complaints Commission was successfully used as evidence in the complaint procedure before the Commissioner and the decision of this self-regulatory body was reviewed in the statement of reasons of the Commissioner's decision which ascertained that this was a case of discrimination.

Procedures initiated by civil society organisations against media reports on migrants during the migrant crisis in 2015 were also significant. However, in a large number of procedures initiated in these cases, discrimination was not identified. Rather, it was established that the media reported within the boundaries of freedom of expression. The Commissioner found that the complainant should have borne in mind that one cannot assume the existence of freedom of speech if we expect that anything stated by anybody else must be in accordance with our own personal values, that the essence of the freedom of speech is our entitlement to have a personal opinion and to express it, and that the others can also express their opinions and dilemmas. Freedom of expression is very important in any democratic society and includes, above all, the freedom to have one's own opinion, freedom to express information and ideas, but also the freedom to receive information and ideas. This type of freedom is protected and may be restricted only in exceptional cases – this can either be in the interest of national security, territorial integrity or public security, for the purpose of preventing unrests or crimes, protection of health or morals, protection of the reputation or rights of others, preventing disclosure of intelligence obtained confidentially or for the preservation of authority and neutrality of the judiciary. The Committee of Ministers of the Council of Europe states that “all restrictions of this law are considered incompatible with the nature of a democratic society”. Also, according to the opinion of the European Court of Human Rights, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms does not protect only information or ideas that are favourably received or regarded as inoffensive or something that does not cause reactions, but also those that offend, shock or disturb, because such are the demands of

that pluralism, tolerance and broadmindedness without which there is no democratic society.³¹

The Commissioner for the Protection of Equality and civil society organisations have a very important role in suppressing hate speech. Given that civil society organisations are the ones that initiate proceedings against discrimination of national minorities most often, they should be encouraged to continue to call attention to the use of hate speech or other irregularities in media reports on national minorities. Experience shows that organisations need training on freedom of expression and its boundaries. This is indicated by a large number of unsuccessful complaints filed by civil society organisations in the alleged cases of discrimination of migrants in the media in 2015,³² where some organisations failed to understand that there can be no freedom of speech if one expects that anything said by anybody else must be in accordance with our own values.

The role of the Commissioner in the implementation of preventative measures, and in improving media reporting on national minorities and suppressing hate speech was recognised by the Council of Europe's European Commission against Racism and Intolerance (ECRI), which issued a recommendation to Serbia to organise intensive training for journalists on the Journalists' Code of Ethics, suggesting that it be carried out by the institution of the Commissioner, together with the Press Council and the Regulatory Body for Electronic Media.³³

The Role of the Press Council's Complaints Commission

The Press Council is an independent, self-regulatory body that brings together publishers, owners of printed and online media, news agencies and professional journalists. It was established to monitor the implementation of the Serbia Journalists' Code of Ethics³⁴ in printed and online media and news agencies, and address complaints

³¹ Regular Annual Report of the Commissioner for the Protection of Equality for 2015.

³² See more on these cases in the Regular Annual Report of the Commissioner for the Protection of Equality for 2015, p 186 and at: <https://www.praxis.org.rs/index.php/sr/praxis-watch/item/1093-the-commissioner-for-protection-of-equality-established-that-vecernje-novosti-daily-did-not-discriminated-against-asylum-seekers-refugees-and-migrants> and <https://www.praxis.org.rs/index.php/sr/praxis-watch/item/1095-the-commissioner-for-protection-of-equality-established-that-kurir-daily-did-not-discriminated-against-refugees-and-migrants>

³³ ECRI Report on Serbia, 5th Monitoring Cycle, Council of Europe, 2017; available at: <https://rm.coe.int/third-report-on-serbia/16808b5bf4>.

³⁴ Serbian Journalists' Code of Ethics, available at: <http://www.savetzastampu.rs/english/serbian-journalists-code-of-ethics>.

on the content published by these media, filed by individuals and institutions. The Council is also responsible for mediating between complainants – individuals or institutions – and editorial staff, as well as for issuing warnings for violations of ethical standards as defined by the Serbia Journalists' Code of Ethics. The Press Council also organises training on the Journalists' Code of Ethics and works to strengthen the role of the media in Serbia.³⁵ The Serbian Journalists' Code of Ethics was adopted in 2006 by the Independent Journalists' Association of Serbia and Journalists' Association of Serbia and was amended in 2013. Serbia Journalists' Code of Ethics also protects the rights of national minorities in two chapters: Chapter IV – Journalists' Responsibilities and Chapter V – Journalists' Attention.

Article 1 of Chapter IV specifies that “A journalist is primarily responsible to their readers, listeners and viewers. This responsibility must not be subordinate to the interests of others, particularly the interest of publishers, government and other state institutions. A journalist must oppose all those who violate human rights or promote any kind of discrimination, hate speech and incitement to violence.” Articles of the Code of Ethics are put to operation by guidelines for their implementation and the guidelines for this Article are as follows: journalism as a profession is incompatible with the spreading of any kind of sexual, gender, ethnic, racial, social, or religious stereotypes. Prejudices that journalists have privately must not be broadcast / published in any context, neither openly nor covertly; it is unacceptable to name specific groups colloquially, in a derogatory manner and imprecisely; in reporting on crimes, national, racial, religious, ideological and political affiliation, as well as sexual orientation, social and marital status of suspects or victims, should be mentioned only if the orientation, affiliation or status are directly related to the type and nature of the crime committed.

Article 4 of Chapter V stipulates that “a journalist must be aware of the danger of discrimination being spread by media and will do everything to avoid discrimination based, among other things, on race, gender, age, sexual orientation, language, religion, political or other opinion, national or social affiliation.” The guidelines for this Article elaborate as follows: belonging to a particular ethnic, political, ideological, or other group, as well as their marital status, religious beliefs, social belonging, is indicated only in such cases when the information is necessary for complete understanding of the context of events being reported on; journalists should avoid phrases that are chauvinist, sexist, or other discriminatory connotations (e.g.: “the fairer sex”, “member of the stronger sex”, “Montenegrin laziness” and the alike).

³⁵ Press Council, <http://www.savetzastampu.rs/english/>.

According to the practice of the Press Council, the most frequent infringements of the Code of Ethics involve disclosure of national identities of crime perpetrators and, most frequently, this affects the Roma. The Commission has issued a number of decisions establishing that such reporting is not in accordance with the professional standards and that it can provoke fear and animosity of the majority population towards the entire minority group to which the suspect belongs. In its decisions, the Commission noted that such media reporting gives excuses to individuals or groups to intensify their discriminatory activities, also providing legitimacy for further discriminatory action so that anything done to members of the Roma nationality becomes acceptable for the majority population precisely because "An underage girl was raped by a Roma man" or because "An underage Roma boy killed for money" or because "Migrants were mugged by Roma".³⁶ In practice, other frequent complaints filed with the Commission concern derogatory or colloquial terms for national minorities, mostly affecting the Roma and Albanian nationality members.

The role of civil society organisations is important in these procedures too because, as with procedures before the Commissioner for the Protection of Equality, most of them are initiated by civil society organisations. Likewise, activities should be undertaken to strengthen this institution and protection mechanism, which is consistent with recommendations of the European Commission against Racism and Intolerance (ECRI)³⁷ and with the opinion of the European Commission, which stated in its Serbia 2018 Report that Serbian authorities need to provide active support to independent bodies, human rights defenders and independent journalists, and promptly react to and publicly condemn hate speech and threats.³⁸

Concluding remarks

The strategic and legal documents of relevance for media reporting about national minorities include those from the field of human and minority rights and those regulating the media. The strategic measures envisaged in Serbia's public policies in the field of human and minority rights have largely remained unrealised. For instance, in the first three years of the implementation of the Anti-discrimination Strategy, there have been no significant activities or results in the prevention and protection from

³⁶ See more on these procedures at: www.savetzastampu.rs/latinica/zalbeni-postupci/2502 and www.savetzastampu.rs/latinica/zalbeni-postupci/3408 i www.savetzastampu.rs/latinica/zalbeni-postupci/2179

³⁷ ECRI Report on Serbia, Fifth Monitoring Cycle, Council of Europe, 2017 available at: <https://rm.coe.int/third-report-on-serbia/16808b5bf4>.

³⁸ Serbia 2018 Report, European Commission.

discrimination of national minorities in the media despite the fact that a large number of measures have been envisaged with this aim.

As for legal protection, it is primarily regulated by anti-discrimination legislation, while the laws specifically dealing with the protection of the rights of national minorities, rather than regulating this area, focus solely on information in minority languages. The criminal legal protection of national minorities from unlawful media reporting is possible, but has not developed in court practice. It is important to note that a set of media laws adopted in 2014 provides a framework for protection from discrimination in the media, with the aim of preventing and penalising hate speech in the media. This provides additional guarantees for the rights of national minorities in the media.

The Commissioner for the Protection of Equality has acted in a number of procedures following complaints for discrimination of national minorities in the media, mostly filed by civil society organisations. According to the Commissioner's and Press Council's Complaints Commission practice, legal norms and professional standards were infringed by disclosing the nationalities of crime perpetrators and by the use of derogatory or colloquial terms for minorities. The Commission has also dealt with a large number of complaints filed by civil society organisations in cases where minorities were discriminated. The role of the civil sector in the protection of these rights is key, but in some cases it transpired that civil society organisations sometimes do not understand the boundaries of the freedom of speech and tend to interpret them rather extensively, which resulted in a number of rejected complaints. Bearing in mind the shortcomings identified in the implementation of public policies, along with the chronic problem of incomplete application of the legislation, the role of independent institutions is very important in the regulation of media reporting on minorities and their protection and prevention from discrimination.

Bibliography

Scientific and professional literature:

- Istraživanje javnog mnjenja: *Odnos građana i građanki prema diskriminaciji u Srbiji*, Poverenik za zaštitu ravnopravnosti /Report on Public Opinion Survey: *Citizens' Attitudes on Discrimination in Serbia*, Commissioner for the Protection of Equality/, Belgrade, 2016
- Krštić, Ivana; Stjelja, Ivana; Vujić, Kristina, *Studija o oblicima diskriminacije i pravnom i strateškom okviru o zaštiti od diskriminacije u Srbiji* /Study on the Forms of Discrimination in the Legal and Strategic Frameworks for Protection from Discrimination in Serbia/, Equal Rights Trust i Praxis, Belgrade, 2015

Matić, Jovanka i Valić Nedeljković, Dubravka, *Značaj medijskog integriteta: Vraćanje medija i novinarstva u službu javnosti* /The Importance of Media Integrity: Bringing the Media and Journalism Back to Public Service/, Novi Sad School of Journalism, Novi Sad, 2014

Veljanovski, Rade i Valić Nedeljković, Dubravka, *Kultura na javnim servisima, Analiza programa RTS i RTV, januar – jun 2016* /Culture in Public Broadcasting Services, Analysis of RTS and RTV Programmes, January-June 2016/, Novi Sad School of Journalism, 2016

Public policies:

Action Plan for Realisation of National Minority Rights, adopted at the Government of Serbia session held on 3 March 2016

Action Plan for Chapter 23, adopted at the Government of Serbia session held on 27 April 2016

Action Plan for the Implementation of the Strategy for the Prevention and Protection from Discrimination for the period from 2014 to 2018 (*Official Gazette of the Republic of Serbia*, no. 107/2014)

Fourth Report on the Implementation of the Action Plan for Realisation of Rights of National Minorities (2017/2), Republic of Serbia Council for National Minorities

Reports on the implementation of the Action Plan for Realisation of Rights of National Minorities (2017/2), Republic of Serbia Council for National Minorities

Strategy of the Development of the Public Information System in the Republic of Serbia by 2016 (*Official Gazette of the RS*, no. 75/2011)

Strategy for Social Inclusion of Roma in the Republic of Serbia for the period from 2016 to 2025 (*Official Gazette of the RS*, no. 26/2016)

Legislation:

Criminal Code (*Official Gazette of the RS*, nos. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016)

Constitution of the Republic of Serbia

Law on Electronic Media (*Official Gazette of the RS*, no. 83/14)

Law on Public Service Broadcasting (*Official Gazette of the RS*, no. 83/14)

Law on Public Information and Media (*Official Gazette of the RS*, no. 83/14)

Law on Local Self-Government (*Official Gazette of the RS*, nos. 129/2007, 83/2014 – other laws, 101/2016 – other laws and 47/2018)

Law on National Councils of National Minorities (*Official Gazette of the RS*, nos. 72/09, 20/14 – US and 55/14)

Law on the Prohibition of Discrimination (*Official Gazette of the RS*, no. 22/2009)

Law on the Protection of Rights and Freedoms of National Minorities (*Official Gazette of the FRY*, no. 11/2002, *Official Gazette of Serbia and Montenegro*, no. 1/2003 – Constitutional

Charter and *Official Gazette of the RS*, no. 72/2009 – other law, 97/2013 – Decision by the Constitutional Court and 47/2018)

Reports and practice of national and international organisations and institutions:

Serbia 2018 Report of the European Commission

Annual Report on the Activities and Work of RTV for 2015, Radio Television Vojvodina, Novi Sad, 2016

Annual Report on the Activities and Work of RTV for 2016, Radio Television Vojvodina, Novi Sad, 2017

Annual Report on the Activities and Work of RTV for 2017, Radio Television Vojvodina, Novi Sad, 2018

ECRI Report on Serbia, 5th Monitoring Cycle, Council of Europe, 2017

Serbian Journalists' Code of Ethics, Press Council, adopted on 2006

Commissioner's Opinion no. 07-00-688/2015-02, issued in the procedure following a complaint filed by Educational and Cultural Community R.R. against author of a TV programme Ž.P.

Commissioner's Opinion no. 07-00-147/15-02, issued in the procedure following a complaint filed by organisation P. against V.N.

Commissioner's Opinion no. 07-00-337/2016-02, issued in the procedure following a complaint filed by R.Ž.C.B against the daily paper K.

Fifth Monitoring Report on the Realisation of the Action Plan for the Implementation of the Strategy for the Prevention and Protection from Discrimination for the period from 2014 to 2018 – for the first and second trimesters of 2017

Regular Annual Report of the Commissioner for the Protection of Equality for 2015

Regular Annual Report of the Commissioner for the Protection of Equality for 2016

Regular Annual Report of the Commissioner for the Protection of Equality for 2017

Web-sites:

<https://ec.europa.eu>

www.coe.int

www.ljudskaprava.gov.rs

www.ravnopravnost.gov.rs

www.savetzastampu.rs

Ana Batrićević*

**THE ROLE OF INDEPENDENT INSTITUTIONS IN THE
PROTECTION OF THE RIGHT TO HEALTHY
ENVIRONMENT¹**

At the time of intense rising of environmental awareness and increased environmental risks caused by the impact of negative anthropogenic factors, the protection of human right to healthy environment is given more and more attention. The protection of this right is guaranteed by the Constitution, laws and subordinate legislation and, depending on the gravity of its violation or endangerment, it can be achieved in criminal, misdemeanour, civil or administrative procedure. Special role in this belongs to independent institutions such as: Ombudsperson, Commissioner for Information of Public Importance and Personal Data Protection, as well as to the Environment Protection Agency that functions as legal person within the Ministry of Environment Protection. In this paper, the author highlights the importance of providing an adequate, prompt, efficient and comprehensive protection of the right to healthy environment in Serbia, with special focus on the aforementioned institutions and offers recommendations directed towards the improvement of conditions in this field.

Keywords: *independent institutions, ombudsperson, environment, human rights, legal protection*

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1. Introduction - the Right to Healthy Environment as a Human Right

The right to healthy and ecologically balanced environment represents one of so-called “solidarity rights” or “third generations rights”, together with, for example, the right to development, the right to peace and international safety, the right to the common heritage of mankind (in its cultural dimension), the right to communication and the right to international humanitarian assistance (UNESCO, 1980). These human rights obtained their international recognition in 1981, with the adoption of African Charter on Human and Peoples' Rights (also known as the Banjul Charter)², which proclaimed the principle of solidarity in its Article 23 within the right to national and international peace and security. According to Article 23 of the Charter: *“The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States”*. Moreover, in its Article 29, the Charter introduces the obligation of an individual *“to preserve and strengthen social and national solidarity, particularly when the latter is threatened”*. The solidarity rights or the third generation rights are also referred to as the “proclaimed rights” or the rights that still cannot be efficiently enforced, i.e. applied. However, this still does not diminish their importance and recognition within the palette of all other human rights (Paunović, Krivokapić, Krstić, 2018: 244-245).

Due to the increase in environmental pollution, the negative consequences of climate change and serious environmental disasters that have been occurring in the past couple of decades, the right to healthy environment, as one of solidarity rights, has been getting more and more attention of both - experts and general public. This right is referred to in several international legal documents, either directly or indirectly. For example, the aforementioned African Charter on Human and Peoples' Rights in its Article 24 claims that *“all peoples shall have the right to a general satisfactory environment favourable to their development”*.

Although the International Covenant on Economic, Social and Cultural Rights adopted in 1966³ does not explicitly mention the right to healthy environment, its provisions

² African Charter on Human and Peoples' Rights (the Banjul Charter), adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986), available at: http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf, accessed 15.08.2018.

³ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, available at: <https://www.ohchr.org/en/professionalinterest/pages/ceschr.aspx>, accessed 15.08.2018.

indicate that this source of international law indirectly promotes this human right. Namely, in its Article 7, it proclaims *“the right to safe and healthy working conditions”*, whereas in Article 12 it emphasises that *“the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”* and obliges them to take the steps necessary for, *inter alia*, *“the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child”*. It is obvious that the goals set by these provisions of the Covenant cannot be fully accomplished without the healthy and relatively preserved living and working environment.

The Declaration of the United Nations Conference on the Human Environment adopted in 1972⁴ confirms in its first principle that the right to healthy environment represents one of human rights by proclaiming that *“a man is both – creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth”* and by confirming that *“both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.”*

In its Article 1, the Rio Declaration on Environment and Development adopted in 1992⁵ claims that human beings are *“entitled to a healthy and productive life in harmony with nature”*. However, the Declaration does not seem to emphasise strongly enough the fact that the right to healthy environment should be considered a human right, which led to further debates and arguments about the position of human rights in the course of development of international environmental law (Paunović, Krivokapić, Krstić, 2018: 247).

Another international convention relevant to the affirmation of the right to healthy environment as a human right is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, also known as the Aarhus Convention, adopted in 1998⁶. In its Preamble, this Convention recognises that *“every person has the right to live in an environment adequate to his or*

⁴ Declaration of the United Nations Conference on the Human Environment, from Report of the United Nations Conference on the Human Environment, Stockholm, June 1972., available at: <http://www.un-documents.net/unchedec.htm>, accessed 15.08.2018.

⁵ The Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992), available at: http://www.unesco.org/education/pdf/RIO_E.PDF, accessed 15.08.2018.

⁶ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998, available at: <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>, 15.08.2018.

her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations”. The Convention guarantees the right to information on various aspects of environment as the access to justice in matters related to environmental protection and clearly points out the link between environmental protection and fundamental human rights, including the right to life (Paunović, Krivokapić, Krstić, 2018: 248).

The United Nations sustainable development agenda named Transforming our world: the 2030 Agenda for Sustainable Development⁷, which includes a set of goals aimed to end poverty, protect the planet and ensure prosperity, explicitly reaffirms the principles of the Rio Declaration in its Article 12. The principle that sustainable development has got three mutually interrelated aspects: social, economic and environmental is promoted throughout this international document. In its introductory part, the Agenda also confirms that the United Nations are “*determined to end poverty and hunger, in all their forms and dimensions, and to ensure that all human beings can fulfil their potential in dignity and equality and in a healthy environment*”. It also states that they envisage the world “*in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger*” (Article 9). Furthermore, the Agenda recognises “*the link between sustainable development and other relevant ongoing processes in the economic, social and environmental fields*” in its Article 55, which is particularly important for the protection of the environment and the right to healthy environment as one of human rights.

2. The Right to Healthy Environment in the Constitution of the Republic of Serbia

The right to healthy environment is recognised as one of fundamental human rights in the legislative framework of the Republic of Serbia. As such, it is guaranteed by Article 74 of the Constitution of the Republic of Serbia⁸, entitled as “*Healthy Environment*”. According to this constitutional provision, “*everyone shall have the right to healthy environment and the right to timely and full information about the state of environment*” (Article 74, Paragraph 1). Moreover, the Constitution declares that environmental

⁷ Resolution adopted by the General Assembly on 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development A/RES/70/1, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E, 15.08.2018.

⁸ Constitution of the Republic of Serbia, Official Gazette of RS, No. 98/06.

protection represents the duty of all natural and legal persons by claiming that *“everyone, especially the Republic of Serbia and autonomous provinces, shall be accountable for the protection of environment”* (Article 74, Paragraph 2). Finally, the Constitution also prescribes some duties and obligations regarding environmental protection by saying that *“everyone shall be obliged to preserve and improve the environment”* (Article 74, Paragraph 3).

Apart from explicitly proclaiming the right to healthy environment in Article 74, the Constitution of the Republic of Serbia contains some other provisions pertinent to environmental protection by which this right is re-affirmed as one of fundamental human rights. Namely, in Article 83, regulating the freedom of entrepreneurship, it is stated that *“entrepreneurship may be restricted by the Law, for the purpose of protection of people's health, environment and natural goods and security of the Republic of Serbia”*. Furthermore, in Article 97, dealing with the competences of the Republic of Serbia, it is proclaimed that the Republic of Serbia organises and provides for, *inter alia* the *“system of protection and improvement of environment”* as well as the *“protection and improvement of flora and fauna”* (Article 97, Paragraph 1, Subparagraph 9). Article 183, dedicated to the competences of autonomous provinces prescribes that autonomous provinces shall, in accordance with the Law, regulate the matters of provincial interest in several fields enumerated in the text of the Constitution including environmental protection (Article 183, Paragraph 2, Subparagraph 2). The Constitution, in its Article 190, also proclaims that the municipality (through its bodies and in accordance with the Law) is responsible for *“environmental protection, protection against natural and other disaster and the protection of cultural heritage of the municipal interest”* (Article 190, Paragraph 1, Subparagraph 6).

3. Independent Institutions in Serbia and their Roles in the Protection of the Right to Healthy Environment

3.1. The Protector of Citizens and the Protection of the Right to Healthy Environment

In Serbia, the institution of the Protector of Citizens (also referred to as Civic Defender or Ombudsperson) is introduced by Article 138 of the Constitution of the Republic of Serbia, according to which this institution represents an independent state body that is in charge of protecting citizens' rights and monitoring the work of public administration bodies, body in charge of legal protection of proprietary rights and the interests of the Republic of Serbia, as well as other bodies and organisations, companies and

institutions to which public powers have been delegated (Article 138, Paragraph 1). However, this institution is not entitled to monitor the work of the National Assembly, President of the Republic, Government, Constitutional Court, courts and Public Prosecutor's Offices (Article 138, Paragraph 2). The Ombudsperson is elected and dismissed by the National Assembly, in accordance with the Constitution and Law (Article 138, Paragraph 3) and accounts for his/her work to the National Assembly (Article 138, Paragraph 4).

According to Article 1, Paragraph 1 of the Law on the Protector of Citizens⁹, the Protector of Citizens is established as an independent body the role of which is to protect the rights of citizens and to control the work of the following entities: government agencies, the body authorized for legal protection of property rights and interests of the Republic of Serbia and other bodies and organisations, enterprises and institutions that have been delegated public authority. The aforementioned Law obliges the Protector of Citizens to ensure that human freedoms and rights are protected and promoted (Article 1, Paragraph 2), which implies that this independent institution is also empowered and obliged to protect the right to healthy environment. It is important to highlight that the Protector of Citizens acts as an independent and autonomous body in the performance of his/her duties as well as that nobody has got the right to influence his/her work and activities (Article 2, Paragraph 1).

Previously cited legal provisions suggest that the independent and impartial position of the Protector of Citizens allow him/her to contribute to the protection of freedoms and rights, the principle of equality and the dignity of the citizens (Savić Božić, 2018: 156). This refers to all human rights, including the right to healthy environment. Moreover, the Protector of Citizens accepts the fact that the right to healthy environment belongs to the corpus of human rights and, accordingly, dedicates a significant amount of attention to that issue.¹⁰ The empowerments of the Protector of Citizens established by the Law clearly indicate that this body may have a very strong impact on the protection of the right to healthy and relatively preserved environment as well as on the work of a wide variety of state bodies whose work may produce direct or indirect environmental impact. Namely, the Protector of Citizens is empowered to: 1) control the respect of the rights of citizens, 2) discover the violations resulting from the

⁹ Law on the Protector of Citizens, Official Gazette of RS, No. 79/05 and 54/07.

¹⁰ The Protector of Citizens, Environmental Protection - the Right of the Citizens guaranteed by the Constitution and the Laws, available at: <http://www.ombudsman.rs/index.php/2014-12-08-10-08-18>, 17.08.2018.

acts of administrative authorities or their actions or failure to act if these represent the violations of the laws, regulations and other general acts of the republic (Article 17, Paragraph 1). Moreover, the Protector of Citizens is entitled to control the legality and regularity of the work of administrative bodies (Article 17, Paragraph 2).

The Protector of Citizens can also have an important role when it comes to creating the drafts and proposals of the laws pertinent to the areas he/she is in charge of (Article 18, Paragraph 1). This institution is also entitled to initiate the amendments and/or alterations of laws, other regulations and general acts if he/she holds the opinion that the violations of citizens' rights come from the imperfections of legislative acts, as well as to initiate the adoption of new laws, other regulations and general acts if he/she considers them important for the respect of citizens' rights (Article 18, Paragraph 2). The Government and the National Assembly are obliged to take into consideration the initiatives submitted by the Protector of Citizens (Article 18, Paragraph 3). The Protector of Citizens also has the authorisation to initiate the procedure before the Constitutional Court in order to assess whether a law or other regulation or general legal act pertinent to the freedoms and rights of citizens is in accordance with the provisions of relevant laws and the Constitution (Article 19).

There are several possibilities that the Protector of Citizens may use when citizens' rights, including the right to healthy environment, are violated. He/she can publicly initiate the dismissal of an official who is responsible for the violation of citizen's right, i.e. to initiate disciplinary proceedings against an employee of the administrative authorities who is directly responsible for the committed violation, provided that the repeated behaviour of these persons suggest that they intend to refuse to cooperate with the Protector of Citizens or when it is revealed that a significant financial or other serious damage has been caused by the violation (Article 20, Paragraph 1). If the activities of an official or of an employee of the administrative authorities appear to contain the elements of criminal or other punishable acts, the Protector of Citizens is entitled to initiate criminal, misdemeanour or other suitable procedure before relevant state bodies (Article 20, Paragraph 2).

Administrative authorities have to cooperate with the Protector of Citizens as well as to allow him to access their premises and information they possess if they are relevant to the procedures he is running, i.e. for the accomplishment of the purpose of his preventive activities, regardless of the level of the confidentiality of such information, unless if the revealing of such information would not be in accordance with the law (Article 21, Paragraph 1). The Protector of Citizens is also entitled to interview each

employee within an administrative body if this could be of significance for the procedure he is running (Article 21, Paragraph 2).

The Protector of Citizens can initiate the procedure either following the complaint of a citizen or on his own initiative (Article 24, Paragraph 1). Furthermore, he/she also has the right to act in a preventive manner by offering good services, negotiating and giving advice and opinions related to issues from his competency with the purpose to improve the functioning of administrative bodies and the protection of human rights and freedoms (Article 24, Paragraph 2). Every natural or legal person of domestic or foreign origin that believes that his or her rights have been violated by the activities of administrative bodies is allowed to submit a complaint to the Protector of Citizens (Article 25, Paragraph 1). Prior to submitting a complaint to the Protector of Citizens, a citizen is required to attempt to protect his/her rights in appropriate legal procedure (Article 25, Paragraph 3). This means that the Protector of Citizens shall not act unless all legal remedies have been exhausted (Article 25, Paragraph 4). However, the aforementioned does not refer to the situations in which the complainant would sustain irreparable damage or if the complaint is related to violation of good governance principle, particularly incorrect attitude of administrative authorities towards the complainant or other violations of rules of ethical behaviour of administrative authorities employees (Article 25, Paragraph 5).

Another important means to influence the work of administrative bodies in order to improve the protection and respect of human rights and freedoms that the Protector of Citizens has at his/her disposal is the Regular Annual Report. Namely, the Protector of Citizens submits a regular annual report to the Assembly that includes the information on activities in the preceding year, noted irregularities in the work of administrative authorities and recommendations to improve the status of citizens in relation to administrative authorities (Article 33, Paragraph 1). Moreover, the Protector of Citizens is also entitled to submit special reports throughout the entire year if they appear to be necessary (Article 33, Paragraph 3). For example, in the Annual Report for 2016, the Protector of Citizens highlights that there have been certain legislation activities in the area of environmental law aimed at harmonizing with the European Union legislation. But, the Protector also emphasises that *“there is still an unfortunate situation that in many local self- government units, the illegal landfills (depots) continue to be the main method of disposing of communal and other waste.* Furthermore, it is pointed out in the Report that the local self-governments have not provided for sufficient funds necessary for the protection of environment in their budgets, or that they tend to direct them without a fixed plan or clear previously defined criteria and priorities. The Report also

suggests that the Ministry of Agriculture and Environment Protection has failed to provide financial support in order to meet numerous obligations that have been set forth by the law (Protector of Citizens, 2017: 27).

Analysed constitutional and legal provisions suggest that the Protector of Citizens is entitled to control the functioning of a large number of state bodies as well as that its role in the protection of citizens' freedoms and rights may be: repressive, preventive, promotive and protective (Petković, Milošević, 2018: 31). All these aspects of Protector of Citizens' work may refer to the protection of the right to healthy environment, just like any other human right guaranteed by international conventions, constitution, laws and subsidiary legislation.

3.2. The Role of Commissioner for Information of Public Importance and Personal Data Protection in the Protection of the Right to Healthy Environment

The Commissioner for Information of Public Importance and Personal Data Protection contributes to the protection of the right to healthy environment through protecting the right to access to information about the environment, guaranteed by the previously analysed Aarhus Convention as well as by the Constitution of the Republic of Serbia. According to the Law on Free Access to Information of Public Importance¹¹, the Commissioner for Information of Public Importance represents an autonomous government body, independent in the exercise of his/her powers (Article 1, Paragraph 2). As such, the Commissioner is autonomous and independent in the exercise of his/her powers and neither seeks nor accepts orders or instructions from government bodies or other persons (Article 32, Paragraphs 1 and 2). The Commissioner is empowered to: 1) monitor the compliance of public authorities with the duties provided for in the Law and report to the public and the National Assembly thereof; 2) initiate the drafts or amendments of laws for the purpose of the implementation and promotion of the right to access information of public importance; 3) propose to public authorities measures to be taken to improve their operations governed by the Law; 4) take necessary measures to train employees of government bodies and to advise them on their duties regarding the rights to access information of public importance, in order to ensure the effective implementation of the Law; 5) act upon complaints against the decisions of public authorities that violate the rights provided for in by this Law; 6) disseminate to the public the content of this Law and the rights regulated by this Law and 7) perform other duties (Article 35, Paragraph 1). The Commissioner is also entitled to initiate the

¹¹ Law on Free Access to Information of Public Importance, Official Gazette of RS, No. 120/04, 54/07, 104/09 and 36/10.

procedures to assess the constitutionality and legality of laws and other general instruments (Article 35, Paragraph 2).

The Law defines information of public importance as an information “*held by a public authority body, created during or relating to the operation of a public authority body, which is contained in a document and concerns anything the public has a justified interest to know*” (Article 2, Paragraph 1). This can be any kind of information, regardless of its source, medium that carries the document containing the information, the date of its creation, the way in which it has been obtained etc. (Article 2, Paragraph 2). Within the meaning of the Law, a public authority body includes the following entities: 1) a central government body, a territorial autonomy body, a local self-government body or an organization vested with public powers and 2) a legal entity founded by or fully or predominantly funded by a government body (Article 3). “*Justified public interest to know*” exists in the cases when the information held by a public authority represents a threat to, or protection of, public health and the environment, whereas with regard to other information held by a public authority, justified public interest to know is deemed to exist unless the public authority concerned proves otherwise (Article 4). The aforementioned clearly indicates that the information about the environment, particularly about its current condition held by various state bodies, can and should be considered information of public interest.

The right to access the information of public importance belongs to everyone, in accordance with the principle of equality (Article 6) and everyone has the right to be informed whether a public authority holds an information of public importance and/or whether such is otherwise accessible to him/her (Article 5, Paragraph 1). Moreover, everyone has the right to access information of public importance by: 1) being allowed to examine a document containing information of public importance, 2) being entitled to make a copy of that document and 3) being entitled to receive a copy of such document on request, by mail, fax, electronic mail or otherwise (Article 5, Paragraph 2). In some cases enumerated by the Law, the right to access information of public importance can be precluded or limited (Article 9).

The Commissioner submits his/her Annual Report to the National Assembly on the activities undertaken by the public authorities in the implementation of this Law and his/her own activities and expenses, but he/she is also entitled to submit to the National Assembly any other report that he/she considers appropriate (Article 36). A government body is, *inter alia*, obliged to submit an annual report to the Commissioner, containing detailed descriptions of the activities undertaken within it with the purpose to implement

the Law of free Access to Information of Public Importance and the information that have to be included in that report are enumerated by that Law (Article 43). A public authority is responsible for any damage caused by the failure of a media outlet to publish information because that public authority had unjustifiably denied or limited its rights to access information of public importance and/or because that public authority gave preference to a journalist or media outlet, in contravention of the principle of non-discrimination (Article 45). The violations of the provisions of the law regulating the access to information of public importance are incriminated as misdemeanours for which appropriate fines are prescribed for responsible persons within public authorities (Article 46, 47 and 48).

The Report on the Application of the Law of free Access to Information of Public Importance and the Law on the Protection of Personal Data for 2017 contains information relevant to the protection of the right to access information about the environment. Namely, according to the Report, the number of complaints submitted to the Commissioner that were dealing with the information relevant to environmental damage and protection in 2017 was 59, which makes around 1.68% of the total number of complaints submitted to this institution in the same year (Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti, 2018: 35). Another important indicator of the frequency and density of violations and potential violations of the right to access information about the environment refers to the number of requests and complaints submitted to the Commissioner in 2017 against the Ministry of Environment. In 2017, there were altogether 124 requests and 9 complaints, which, similarly to the number of complaints regarding the information about environmental damage and protection, represents a relatively small number in comparison to requests and complaints submitted against other state bodies (Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti, 2018: 36-37).

3.3. Environmental Protection Agency and the Protection of the Right to Healthy Environment

As a body with the status of a legal person within the Ministry of Environmental Protection of the Republic of Serbia, the Environmental Protection Agency is authorised to conduct several professional activities pertinent to various aspects of environmental protection, enumerated in the Law on Environmental Protection¹² (Agencija za zaštitu životne sredine, 2018: 4). Although it does not function in exactly the same way as

¹² Law on Environmental Protection, Official Gazette of RS, No. 135/04, 36/09, 36/09, 72/09, 43/11 and 14/16.

independent institutions such as the Protector of the Citizens or Committee for the Information of Public Interest and Personal Data Protection, the Agency does have the status of an independent legal person that functions within the Ministry of Environmental protection though. Moreover, the tasks delegated to this institution by the Law on Environmental Protection suggest that it does have some empowerments and authorisations of an independent institution that may strongly and significantly contribute to the protection of the right to healthy environment.

According to Paragraph 74 of the Law on Environmental Protection, the Environmental Protection Agency is in charge of running the Information System, established with the aim to facilitate efficient identification, classification, analysis, keeping up with and evidencing natural values as well as to allow a more effective environmental management (Article 74, Paragraph 1). The information system allows: creating, classification, analysis, maintenance, presentation and distribution of numerical, descriptive and spatial databases about: the quality, mediums, condition and protection of the environment as well as on the legislative, administrative, organisational and strategic measures and scientific and technical information about planned preventive measures and the exchange of information with other information systems (Article 74, Paragraph 2). This system facilitates the access to other information systems and the harmonisation of all relevant data and information on national and international level (Article, 74, Paragraph 4). The Environmental Protection Agency is also in charge of establishing and running a part of the Information System called National Meta-register of information about the environment. This is an electronic database and portal to existing databases and documents containing information pertinent to environmental protection retrieved from various bodies and organisations (Article, 74, Paragraphs 5-6).

By integrating the work of national expert, scientific and educational institutions, through the cooperation with international organisations on the creation and realisation of various projects and programmes, the Agency provides for a centralised access to data and information about the environment. On the grounds of the information collected throughout the year, the Agency publishes its Annual Report and makes it available on its website. The Report allows and insight into current state of the environment in the Republic of Serbia and contains the measures and recommendations that should be applied in order to enhance its improvement. The Report is adopted by the Government and presented before the National Assembly (Agencija za zaštitu životne sredine, 2018: 28).

It is important to mention that the Agency functions in accordance with the principle of transparency and participation of the public, proclaimed by the Law on Environmental Protection. This means that all the information in the possession of the Agency that are related to its work have to be presented to the person who asks for them, apart from the cases when this right is limited or excluded in accordance with the Law on Free Access to Information of Public Importance (Agencija za zaštitu životne sredine, 2018: 26). There is several information of public importance that has been most frequently required throughout 2018. They include, but are not limited to: the information about: emissions of pollutants in the air, the parameters contained in the Integral Registry of Polluters, the level of allergens in the air etc. (Agencija za zaštitu životne sredine, 2018: 26).

4. Conclusion

The Protector of Citizens belongs to the institutions established by the Constitution, with strong guarantees of independence and an extensive range of rights and duties. The activities of the Protector of Citizens are not strictly focused on the protection of a particular right or category of human rights, like the activities of the specialised ombudspersons (such as, for example, child rights, the rights of persons deprived of liberty, minority rights, gender equality etc.). On the contrary, he/she is entitled to control the respect of all rights guaranteed by national and international legal documents, which is in accordance with the concept of national institution in charge of human rights protection (Lazarević, 2017a: 34). This means that the Protector of Citizens can play an important role in the protection of the right to healthy environment through the control of the work of all state bodies that may have an impact on the respect of this right as well as through his/her regular annual reports. In that sense, the Protector of Citizens represents a self-governing and independent entity that stands between the citizens and executive authorities (Savić Božić, 2018: 165). However, it seems that the status and the influence of the Protector of Citizens in the Republic of Serbia could be improved, particularly when it comes to the interest that National Assembly shows for his/her Annual Reports (Lazarević, 2017a: 38). Another issue is related to the communication between the Protector of Citizens and the citizens themselves. Namely, the Republic of Serbia has accepted the model of direct communication between the Protector and the citizens, which, in spite of being the most secure way to provide his/her direct and precise insight into citizens' problems and needs may also cause the overload of applications and diminish his/her efficiency (Lazarević, 2017b: 519).

The Commissioner for Information of Public Importance and Personal Information Protection is entitled to act in the cases pertinent to the protection/violation of one specific human right – the right to access to information of public interest. Having in mind the principles of the Aarhus Convention, the right to access various information related to the state of the environment represents a substantial component of the right to healthy environment, i.e. the right to healthy environment cannot be fully realised if there is no correct, full and timely information about the state of the environment or if the decision-making processes regarding environmental issues are not transparent and accessible to relevant stakeholders and general public etc. In that context, the role of the Commissioner is to facilitate the protection of the right to healthy environment through the strengthening of one of its essential components – the right of access to information of public interest. This right can also be interpreted as the freedom to access information, which is derived from the universally recognised principle of transparency of work of governmental bodies, including their obligation to guarantee the accessibility of information they have because these information are considered to belong to all citizens (Milenković, 2010: 21).

When it comes to the role of the Environmental Protection Agency, its role may seem less influential than the roles of two previously analysed independent institutions. Nevertheless, in spite of being a legal person that functions within the Ministry of Environmental Protection, the Agency still represents an independent entity, especially when it comes to the fulfilment of the tasks related to information collection, sharing and dissemination. However, giving the Agency the status of a completely independent expert body instead of being a part of the Ministry Agency could be taken into consideration in the future. This would, at least formally, increase the reliability of its reports and findings, since it would be able to function as an independent team of experts, organisationally and financially separated from the Ministry of Environmental Protection.

References

- African Charter on Human and Peoples' Rights (the Banjul Charter), adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986), available at: http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf, accessed 15.08.2018.
- Agencija za zaštitu životne sredine (2018) *Informator o radu, 2018*. Beograd: Ministarstvo životne sredine Republike Srbije, Agencija za zaštitu životne sredine, available at: <http://www.sepa.gov.rs/index.php?id=4&akcija=showAll>, accessed 21.08.2018.

- Constitution of the Republic of Serbia, Official Gazette of RS, No. 98/06.
- Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998, available at: <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>, 15.08.2018.
- Declaration of the United Nations Conference on the Human Environment, from Report of the United Nations Conference on the Human Environment, Stockholm, June 1972., available at: <http://www.un-documents.net/unchedec.htm>, accessed 15.08.2018.
- International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>, accessed 15.08.2018.
- Law on Environmental Protection, Official Gazette of RS, No. 135/04, 36/09, 36/09, 72/09, 43/11 and 14/16.
- Law on the Protector of Citizens, Official Gazette of RS, No. 79/05 and 54/07.
- Lazarević, M. (2017a) Evolucija i širenje nadležnosti Zaštitnika građana kao nacionalne institucije za zaštitu ljudskih prava u Srbiji. *Godišnjak Fakulteta političkih nauka*, 11(18), str. 25-42.
- Lazarević, M. (2017b) Model komunikacije građana i ombudsmana u Srbiji. *Kultura polisa*, 14(34), str. 507-520.
- Milenković, D. (2010) Priručnik za primenu Zakona o slobodnom pristupu informacijama od javnog značaja. Beograd: Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti.
- Paunović, M., Krivokapić, B., Krstić, I. (2018) *Međunarodna ljudska prava*. Beograd: Pravni fakultet Univerziteta u Beogradu.
- Petković, D., Milošević, V. (2018) Različita shvatanja položaja i nadležnosti Zaštitnika građana Republike Srbije. *Nauka, Bezbednost, Policija*, 23(1), str. 15-34.
- Protector of Citizens (2017) *Regular Annual Report of the Protector of Citizens for 2016*, 13 June 2017, available at: http://www.ombudsman.org.rs/attachments/article/134/Introduction_2016%20Annual%20Report.pdf, 17.08.2018.
- Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti (2018) Izveštaj o sprovođenju Zakona o slobodnom pristupu informacijama od javnog značaja i Zakona o zaštiti podataka o ličnosti za 2017, available at: <https://www.poverenik.rs/images/stories/dokumentacija-nova/izvestajiPoverenika/2017/LAT2017GodisnjiIzvestaj.pdf>, accessed: 20.08.2018.
- Resolution adopted by the General Assembly on 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development A/RES/70/1, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E, 15.08.2018.
- The Protector of Citizens, Environmental Protection - the Right of the Citizens guaranteed by the Constitution and the Laws, available at: <http://www.ombudsman.rs/index.php/2014-12-08-10-08-18>, 17.08.2018.

Savić Božić, D. (2018) Faze razvoja institucije zaštitnika građana. *Strani pravni život*, 62(2), str. 155-167.

The Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992), available at: http://www.unesco.org/education/pdf/RIO_E.PDF, accessed 15.08.2018.

UNESCO (United Nations Educational Scientific and Cultural Organisation) (1980) The Rights of Solidarity: an Attempt at Conceptual Analysis, Symposium of the Study of New Human Rights: the „Rights of Solidarity“, Mexico, 12-15.08.1980., available at: <http://unesdoc.unesco.org/images/0004/000407/040770eo.pdf>, accessed 15.08.2018.

CHAPTER III

Justice and Illegality

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LEGISLATIVE OBLIGATIONS OF SERBIA IN THE ACCESSION PROCESS TO THE EUROPEAN UNION - THE CASE OF FUNDAMENTAL RIGHTS

Obligation to harmonize the law of the Republic of Serbia with the EU acquis began with the entry into force of the Interim Agreement with the Stabilization and Association Process, especially in adjustments relating to free movement of goods and services. However, Accession Negotiation spread area of harmonization to the entire EU law, and in fact, the whole process of negotiations is an agreement on the terms, the necessary measures and ways of this harmonization. A New Approach to Negotiations, which the Union created for the Western Balkan countries, bearing in mind the experience of previous enlargements, has brought a lot of innovation in the negotiation process. Changes are exactly in terms of techniques and rules of negotiations, which ultimately affect the legislative obligations of Serbia as a future member of the EU, because unlike previous cases and because of the experience of new Member States, brought much more needs to prove concrete results achieved in all areas. In particular, such a result is necessary to show in the areas that are a priority for the negotiations: the rule of law, reform of public administration and local self-government and economic management. This is, in fact, the first time a candidate country must prove before the accession all three phases of harmonization of national law with EU law - harmonization, implementation and enforcement.

Keywords: *European Union, EU law, the accession negotiations on EU membership, legislative obligations, harmonization of law, rule of law, fundamental rights*

The European Union (EU) has since its beginnings, and the signing of the Paris and Rome Treaties on the establishment of the three European Communities, went a long way with functionalist's spillover transnationality in different areas. From the basic idea of the transfer of competencies in the production of coal and steel from the hands of

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sovereign states to supranational institutions, today's Union is actually the most successful integration of the area of freedom, security, economic stability, rule of law and single currency. One cannot make the claim that the EU functions perfectly, just like nothing does, but the analysis of its overall impact is not the subject of this paper.

The subject that we want to deal with is the question of Rule of Law (RoL), in particular the concept of protection of fundamental rights in the Union, but from the perspective of country that wants to become a member. Candidate country that has an obligation to adjust its own standards and principles and to bring them fully in line with what they used to be called communitarian heritage, today a heritage of the EU or EU law (*acquis*). It should be emphasized that the obligation to comply with the law and its standards, especially in the field of economic and trade parts begins with the conclusion of the Association Agreement, but the domain, scope and obligations of the adjustment is much smaller. On the other hand, the entry into the EU implies that the candidate country is resolved to fully embrace every kind of rights and obligations arising from such membership. Therefore, during its membership negotiations, candidate negotiates the terms and modalities of the harmonization but not on immediate acceptance of all obligations arising from membership. Two important particularities are to be noted when it comes to the field of fundamental rights and harmonization in this area in the EU accession process. First, this is certainly not an area of clear standards that define the EU. Specifically, it has not defined its own standards and rules (*acquis*) in this area, except for a few articles of the Treaty on EU and the Charter of Fundamental Rights of the EU. Union law draws its principles from other international conventions and particular European ones. Another specificity is that the slope of fundamental rights as part of the wider concept of rule of law, now become a basic, key and essential part of the negotiation process for membership.

That is why we put the emphasis in this article on this type of connection: Membership Negotiations and the place of the Rule of law, the term and concept of the Rule of Law in the EU and finally, compliance and the need of legislative changes in the field of fundamental rights as a condition for EU membership.

1. New Approach to the EU Membership Negotiations - the primacy of the Rule of Law Chapters

A large development, progress, stability of its members in the history of EU drove a large number of states to conclude with EU a number of agreements, but also to want its membership. But, because of its specificity and complexity, the Union protected itself

from its contractual partners through requiring the fulfillment of some important conditions, which are not only trade type - one of the key requirements is the respect for fundamental rights. It is no wonder that this is an essential element of the association agreement, which can be seen in the case of the Stabilization and Association Agreement (SAA) which the EU and its Member States have concluded with the Republic of Serbia, October 2008.¹

This Agreement stipulates that fundamental rights are an essential element of the Agreement, which means that in case Serbia does not respect those rights, it may lead to the suspension of the entire Agreement (SAA Article 2). On the other hand, SAA introduces the obligation to harmonize national law with the EU law, as set out in Article 72. It obliges Serbia to endeavor to ensure full alignment of the existing and future legislation, and its true implementation and enforcement. The process begins as a liability on the day of signing and gradually spreads to all elements of the *acquis*. In the early stages it relates to the *acquis* on the internal market and trade-related provisions, as well as in the field of Justice, Freedom and Security – which is the part of EU principles and law where the area of fundamental rights is situated. Harmonization is based on a specific Plan of Harmonization (in the case of Serbia known as National Programme for the Adoption of Acquis, NPAA), and the manner of its monitoring is a subject to the agreement of Serbia with the European Commission. Certainly worth remembering that actually the process of harmonization of Serbia began even before the formal act, as a voluntary decision accepting the need of good cooperation with the EU.

The basic logic of the negotiation process for EU membership is that very membership is strategic goal of a Candidate Country, but also a means through which state needs to modernize its legal, economic and institutional system. For example, as pointed out in Opening Statement for the first Intergovernmental Conference "... the Republic of Serbia sees EU accession as a mechanism for change and adaptation to the conditions that are required of all EU member states and a way to improve the overall efficiency and competitiveness of the EU, but also as a way of raising its reputation in Europe and the world and the accession process gives strong encouragement to political and economic reforms in Serbia".²

¹ <http://www.mei.gov.rs/eng/documents/agreements-with-eu/stabilisation-and-association-agreement>

² The Opening Statement of the Republic of Serbia, Intergovernmental Conference on the Accession of the Republic of Serbia to the EU, 21 January 2014, http://www.seio.gov.rs/upload/documents/pristupni_pregovori/the_opening_statement_of_the_republic_of_serbia.pdf

EU accession negotiations are different from what is usually assumed as international negotiations. In order to become an EU member a state must accept the *acquis communautaire*,³ communitarian legacy / heritage, i.e. the primary and secondary EU law. The central part of the negotiations is about the terms and conditions, under which a candidate country will accept, implement and enforce the *acquis*.⁴ This includes also the approval of eventual transition periods that must be limited in scope and duration. So, during negotiations for EU membership, a candidate country cannot reject any of the essential standards of EU legislation, but it can, using good argumentation, postpone the start of its implementation.

One of the main features of the negotiation process for EU accession is that it changes with each wave of Enlargement.⁵ So, when it comes to Serbia's process, those novelties have been embedded in Negotiating Framework with so called "New Approach" to the accession negotiations. First, it has been defined in the Enlargement Strategy for 2011-2012.⁶ New Approach means that "...issues related to the judiciary and fundamental rights, and justice and home affairs ... should be dealt with early in the accession process and the corresponding chapters opened in accordance with the basis of action plans, as they require providing convincing evidence of capacity application."⁷ The reason for the implementation of the New Approach is based on experience with previous EU enlargements, especially with accession of Croatia, Romania and Bulgaria. It's first use was in the Negotiating Framework for accession negotiations of Montenegro in 2012.

Changing the approach, the EU has established new priorities in conducting negotiations for the candidate countries, in that at the beginning of the negotiations must be opened Rule of law Chapters: Chapter 23 Judiciary and Fundamental Rights and 24

³ A point of clarification – term *acquis communautaire* has been replaced with term *acquis* since entering into force of the Lisbon Treaty, 2009. Namely, since with that newest revision of the Primary Law EU became legal person, with its law, it is much more correct to speak about legal heritage or *acquis* without further denomination.

⁴ Vasile Pușcaș, *EU Accession Negotiations (A Handbook)*, Hulla & Co Human Dynamics KG, 2013, p. 23.

⁵ See more on this Tanja Miscevic, *Ever Changing EU Accession Negotiation Process - The case of Serbia*, *The Review of International Affairs*, Belgrade, Vol. LXVII, No. 1162-1163, April - September 2016, pp. 70-83

⁶ *Enlargement Strategy and Main Challenges 2011-2012*, the EC Communication addressed to the European Parliament and the Council, Brussels, 12.10.2011.

http://www.mei.gov.rs/upload/documents/eu_dokumenta/strategija_za_prosirenje/strategija_prosirenje_2011_2012sr.pdf (accessed 10.31.2017)

⁷ *Ibid*

Justice, Freedom and Security. Then, the negotiations must be accompanied by implementation in these areas, until the very end of negotiations - those are the last chapters that will be closed. That means that a clause of general balance (*Imbalance clause*) has been introduced, which refers to those chapters, and explaining that the general balance must be provided of the progress of negotiations across all chapters. With regard to the relationship between the chapters Judiciary and Fundamental Rights and Justice, Freedom and Security and the values on which the Union is founded, as well as keeping in mind their importance for the implementation of the EU *acquis* in all areas, if progress in the context of the aforementioned two chapter is a significant disadvantage in relation to the overall progress of negotiations, and after implementing all other available measures, the Commission will, on its own initiative or at the request of one third of the member states, propose not to recommend the opening and / or closing other negotiating chapters, as well as to adjust the related preparatory activities, as needed, until the imbalance in the progress has been resolved.⁸ In this way, Chapters 23 and 24 have become a control mechanism for the entire negotiation process,⁹ and unique in that in addition to the benchmarks for opening, there are interim benchmarks too that Serbia needs to fulfill, before receive benchmarks for the closure of these chapters.¹⁰

2. The concept of the rule of law in the EU and its understanding during membership negotiations – “the Dilemma and Double Dilemma of the Rule of Law”

Rule of Law is one of the fundamental concepts of modern understanding of democracy, which is usually defined as the absence of dictatorship of the majority. It is seen as an instrument for other basic values, as well as for democracy as such.

There is no precise definition of the Rule of Law, and it is very difficult to expect that there may be one, primarily because its understanding is conditioned by different nations and legal traditions. It can be, generally speaking, understood as the legal and political system in which the law limits the power of the state, by promoting freedom and creating order and predictability on the basis of which the state operates. Or, even

⁸ General EU Position for the Negotiations on the Accession of the Republic of Serbia, Article 24, http://www.mei.gov.rs/upload/documents/pristupni_pregovori/pregovaracki_okvir.pdf (accessed on 10.31.2017)

⁹ General EU Position, Article 42.

¹⁰ Additional to this, Serbia is unique case in the Accession Negotiations - the same role as Rule of Law Chapters has Chapter 35, dealing with monitoring of all agreements reached during the dialogue of Belgrade and Pristina.

more basic, "... the rule of law is a system that seeks to protect the rights of citizens from arbitrary and any unauthorized use of state power".¹¹ The Rule of Law is different from the concept of human rights and other values, such as democracy, freedom or equality, but "... elements of these values may be implied in the concept of the Rule of Law, but their binding leads to confusion and bad practice."¹²

The Rule of Law is one of the fundamental values on which the European Union is founded, as expressed both in the Treaty on European Union (Art. 2) and in the Charter of Fundamental Rights of the European Union (Preamble). The Treaty on European Union presupposes member states' commitment to the rule of law in domestic and in foreign policy issues.¹³

However, one of the problems that arise in connection with the protection of the Rule of Law concerns the lack of definition of this value. Namely, although established as one of the fundamental values of the EU, none of the European contracts does not specify what was under the rule of law implies the level of integration. This hinders the activation of Article 7 of the Treaty on European Union, and the main mechanism for the protection of the fundamental values of the Union. Having in mind non existing definition of the Rule of Law, cannot be determined with certainty when it came to its disruption, and such arbitrariness creates the potential for abuse. On the other hand, it also creates the problem with its proper implementation, or the perception of this implementation.

As in the case of many of the concepts of democracy, there is a clear distinction between formal and substantive understanding of the concept. History of the development of the Rule of Law has shown that a literal formalization requires the Rule of Law is implemented through executive authority, which is limited by law and act in accordance with applicable regulations, which could lead to a completely different direction than expected, as shown by the history of some of the European states. That is why essential meaning of the concept of the Rule of Law prevails – in order activity of the executive authorities to be considered to comply with the Rule of Law, legal acts

¹¹ Stefanie Ricarda Roos, The "Rule of Law" as a Requirement for Accession to the European Union, http://www.kas.de/wf/doc/kas_15604-544-2-30.pdf

¹² Ibid, p. 13

¹³ Treaty on European Union, Internet,

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN 18/09/2018>.

must meet at least the minimum requirements primarily to protect human rights, which are constitutional category.¹⁴

In the European Union from the creation of three European Communities concept of the Rule of Law was default and was in the very essence of the integration of democratic states. Very often it can be heard that the role of the Rule of Law increases when, after the end of the Cold War and the fall of the Iron Curtain, the countries of the former Eastern bloc expressed its desire to join the Union. However, it remains neglected that this concept first appeared as one of the conditions in the case of the accession of Greece, Spain and Portugal - only the end of the dictatorship and democratically elected governments represented the moment of their ability to apply for EU membership. Certainly the fact that it is precisely at a time when ten countries of Central and Eastern Europe applied for membership (beginning of the 90's), the concept of the Rule of Law received a place among the basic conditions for membership but also was raised to the level of one of the basic European values.

Caring for democracy and the protection of the rule of law became EU responsibility only recently, which is certainly a great area for researching Organization that has as its basis the improvement of these two values. In fact, the EEC Treaty did not mention in any of its provisions protection of human rights and democracy. Some authors believe that the reason for this can be traced back to Messina and to the talks on establishing the European Economic Community (as well as Euratom). During this Conference, EU founding states established a constitutional dual structure: on one hand transnational economic system and on the other, intergovernmental political construction.¹⁵ There was a serious hope of the founders of European integration that the success of economic integrations will 'spill over' to other areas and finally lead to political union. In some respects it happened, and there has been significant development of elements of political system, especially in the field of security of the citizens (*Schengen system*), as well as in Foreign and Security Policy. However, there are those who think that it is not "... in the core, in the DNA of the process of European integration".¹⁶

The result of these changes imposed the need for *ad hoc* definition of the rule of law in the European Union. That is why that European Commission issued an analysis in

¹⁴ Bojan Bugarič, Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge, LSE 'Europe in Question' Discussion Paper Series, Paper No. 79/2014, July 2014, p.2

¹⁵ Bojan Bugarič, Protecting Democracy and the Rule of Law in the European Union p.3

¹⁶ Joseph HH Weiler, In the Face of Crisis: Legitimacy Input, Output Legitimacy and the Political Mechanism of European Integration (2012) Journal of European Integration, vol. 34, no. 2, p. 825.

which Commission defined the Rule of Law by a set of principles that constitute its core, a primarily "...legality, which implies a transparent, accountable, democratic and pluralistic process of law enforcement; legal security; separation of powers; prohibition of arbitrary executive power; independent and objective court system; effective assessment of the constitutionality of including the question of basic human rights; and legal equality."¹⁷

This concept of the Rule of Law with the EU is based on the constitutional traditions of the Member States, which in turn should result or impact on international agreements, notably the European Convention on Human Rights and Fundamental Freedoms of the Council of Europe.¹⁸ This means that "narrow definition" of the Rule of Law could not be applied here, because it is directed only to the legality. In the Communication from the European Commission in 2014 essential elements of the basic rights, which are protected under Article 2 of the EU Treaty, are listed and from there is absolutely evident that they include much more than just legality. This list is largely aligned with the list of the essential elements proposed as a first draft of this document, made by the Venice Commission of the Council of Europe a few years earlier. This list has been completely and finally determined in 2016.¹⁹ This catalogue is made of undisputed issues starting primarily from legality, as the basic element of democracy, and protection of human rights as well as legal certainty, respect for human rights (in particular equality and prohibition of discrimination), protection against arbitrary executive powers (good governance), judicial control where independent Court rules and the application of procedural guarantees.²⁰

However, there are those who believe that this interpretation of the European Commission is in a very narrow sense and in the sense that specifically means the functioning of the justice system, especially in cases of organized crime and

¹⁷ Reasoned Proposal in accordance with article 7 (1) of the European Union on Treaty Regarding the Rule of Law in Poland, European Commission, 2017/0360, Brussels, 20.12.2017.

¹⁸ dr. Günter Wilms, Protecting fundamental values in the European Union through the Rule of Law: Articles 2 and 7 TEU from a legal, historical and comparative angle, Robert Schuman Center for Advanced Studies, European University Institute 2017, p. 52.

¹⁹ The European Commission for Democracy through Law (Venice Commission), Document CDL-AD (2016) 007 e-Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e)

²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, the EU Justice agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union, Strasbourg, 11.3.2014, COM (2014) 144 final, http://ec.europa.eu/justice/effective-justice/files/com_2014_144_en.pdf

corruption.²¹ Of course this leaves a large part of the question outside the scope of a broader interpretation of the concept, and in particular fails to recognize that the Rule of Law is far more than it is respected as a social category. These authors also argue that the EU must adopt a broader definition that is based on the expected results of a desirable but not an easily quantifiable means, and that intrinsic problem call "the Rule of Law dilemma".²²

No matter how interesting the development of RoL concept of the EU, it is even more interesting what place and role this dilemma of the EU Rule of Law's concept has in the process of negotiating EU membership. The starting point is that its role has increased in recent years; it became the basis of negotiations, yardstick and balance for the success of the negotiation process. On the other hand, the concept had to be "translated" from the level of value to the level of the reform plan and the elements that can be measured and evaluated during the negotiations. This, again, means that the EU, notably the European Commission, which is responsible for membership negotiations on behalf of the EU and its Member States, had to additionally make a list of clear conditions and explains European value of Rule of Law, which has no legal rules, and reach an agreement on that list of all member states.

That raises the question whether this is the really objective way to realize truly the ideal of the Rule of Law, or that this only serves for the purpose of achieving membership. This situation we tend to call "*double dilemma of the EU Rule of Law*" – the most important element of negotiations supposed to be to achieve the most of the progress in the area of the Rule of Law. This concept of the EU rule of law, on the other hand, is not very clearly, ideally and comprehensively defined. And yet, its implementation and track record should be proved and assessed by Member States, which have, and we are all very much aware, faced with the problems with its own RoL implementation.

The Rule of Law has become one of the main criteria for membership since the Maastricht Treaty, 1992 (Art. 49 of the Treaty on European Union). Such an understanding of the importance of the Rule of Law for candidates is determined specifically as first of the Copenhagen criteria – fulfilling political criteria must include

²¹ Kalypso Nicolaidis and Rachel Kleinfeld, Rethinking Europe's "Rule of Law" and Enlargement Agenda: The Fundamental Dilemma, Jean Monnet Working Paper 08/12, <http://www.jeanmonnetprogram.org/paper/rethinking-europes-rule-of-law-and-enlargement-agenda-the-fundamental-dilemma/>

²² Ibid, p. 8.

the respect for the Rule of Law.²³ It can be assumed that the accession of the Union, these criteria do not cease to exist, but on the contrary, they should become more significant, and that Membership actually involves their continuous respect. In academic debates on this subject represented is another argument in favor of a European jurisdiction in the case of the rule of law - Member States when acceding EU sovereignly chose to accept certain obligations arising from membership, and their subsequent contention and revision of this concept cannot be considered legitimate.²⁴ But the fact is that until accession there are mechanism and sanctions for non-compliance with the set criteria, very carefully monitored by the European Commission through a process of negotiations, which after gaining full membership disappears.²⁵ Therefore, the Union has the authority to monitor and support the further development of liberal democracy in its Member States arising from supranational constitutional order that originated the development of the EU, but whose implementation has not adequately translated into law.²⁶

The mechanism for the protection of the rule of law in EU member states does not mean intervention, but more stigmatization and isolation of the country which violates fundamental values. Article 7 of the Treaty on EU stipulates two stages of reaction in the event that threatened the fundamental values of the Union - *preventive measures* when there is a clear risk of serious violations (the first degree, Art. 7, para. 1) and sanctions when it's been a severe and prolonged violation (second degree, Art. 7, no. 2).²⁷

It could be very harsh to notice, but it is the fact that in the area of RoL there is no EU law or even specific public policy that deals with it! Yes, elements of the Rule of Law should be sought in a variety of different policies - from the obvious, such as the Justice, Freedom and Security (previously Cooperation in the field of Justice and Police), or in social policy, where are the basics of non-discrimination, to those where at first glance it cannot be identified the importance or existence of the Rule of Law. It is interesting to

²³ Tanja Miscević, Association to the EU, *Sluzbeni glasnik*, 2009, p.89.

²⁴ Amichai Magen, "Cracks in the Foundations: Understanding the Great Debate Rule of Law in the EU", *Journal of Common Market Studies*, Volume 54, Number 5, 2016, p. 1056.

²⁵ How the EU can confront the 'Copenhagen dilemma', *Democracy Digest*, National Endowment for Democracy, 2016, Internet, <https://www.demdigest.org/28437-2/03/09/2018>.

²⁶ Jan-Werner Müller, "Should the EU Protect Democracy and the Rule of Law inside Member States? " *European Law Journal*, Vol. 21, No. 2, March 2015, p. 146.

²⁷ Rule of law concerns in member states: how the EU can act (infographic), Internet, 2018 <http://www.europarl.europa.eu/news/en/headlines/eu-affairs/20180222STO98434/rule-of-law-concerns-in-Poland-how-the-article-7-procedure-would-work> 15.08.2018.

note that non respect of human rights grounds for the termination of contractual relations between the Union and third countries and for coercive measures, according to the Common Foreign and Security Policy.

3. The EU and fundamental rights - legislative obligations of a Candidate Country

To clarify further, during the negotiations on membership, a candidate country strives to meet the basic condition for membership, and that the acceptance and promotion of European values (Article 49 of the Treaty on the EU). Again, the first time the Treaty of Lisbon stipulates that “... the EU is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the right of persons belonging to minorities. These values are common to the Member States in a society where predominate pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women.”²⁸ Also, state negotiating membership must accept and implement the provisions of the Charter of Fundamental Rights of the EU, which contains a catalog of rights, but is not part of the founding treaties, although it has a legal obligation. The Charter stipulates that the EU may accede to the European Convention on Human Rights of the Council of Europe. EU Treaty also defined additional mechanisms, such as the Ombudsman of the European Parliament (protection of EU citizens of maladministration), and of course the Court of Justice of the EU for protection against discrimination, labor rights, social and other rights.

How this is achieved during the negotiations about membership? There are two basic ways: first is to define the place and role of the special chapter dealing with the rule of law in the context of one of them, and fundamental rights. The second is to monitor the implementation of commitments through the process of legal harmonization, alignment and legislative obligations of a candidate country. These are not separate but very linked and conditioned processes: exactly is the implementation of voluntarily assumed obligations of legislative harmonization by the candidate country is the basis for assessing progress in the negotiation chapters and a precondition for the success of the negotiations.

The primary focus on the Rule of Law, as defined by the negotiation chapters 23 and 24, means that progress in this area is benchmark of progress in the negotiations. Those are first to be opened, closed last; progress is monitored every 6 months – on the basis of

²⁸ Article 2 of the Treaty on European Union.

the report of the European Commission (*Non Paper*) that actually assesses legislative activity in the field of fundamental rights and the necessary additional proof of concrete results (*track record*). The importance of the whole of this activity lies in the fact that if there is no progress, it will hold the membership negotiations (*imbalance clause*).

Therefore, chapters 23 and 24 are essentially important during the negotiation process. Chapter 23 is called the Judiciary and Fundamental Rights, and consists of three sub-areas: the judiciary, the fight against corruption, fundamental rights and the rights of EU citizens. Chapter 23 is considered a new chapter in the negotiations, bearing in mind that a separate chapter has been introduced only in negotiations with the Croatia,²⁹ and that in previous Enlargements rounds have been an integral part of Chapter 24. Elements of the third sub-area of this Chapter are, therefore, fundamental rights of human dignity, the right to life, integrity of the person, prohibition of torture, prohibition of slavery and forced labor, the right to liberty and security, respect for private and family life, personal data protection, the right to marry and found a family, freedom of thought, conscience and religion, freedom of expression and the information, freedom of association, the right to property, respect for cultural, religious and linguistic differences, discrimination - the principle, racism and xenophobia as a crime, the rights of the child ...

When it comes to Chapter 24 Justice, freedom and security, it is responsible for ensuring the conditions that, among other things, create the conditions for the effective protection of fundamental rights of previous chapter. For the purposes of the negotiation process is divided into several areas, and to asylum, migration and visa policy, border control and Schengen, the fight against organized crime, the fight against human trafficking, the fight against terrorism, the fight against drugs, police and judicial cooperation in civil and criminal matters and customs cooperation and counterfeiting of the euro (the last two areas are largely negotiated through Chapter 29 - Customs union and 32 - Financial control, except for their criminal aspect, which is expected to synchronize with in Chapter 24).

According to the general EU position for negotiations with Serbia, The European Commission is obliged to regularly inform about the progress of negotiations in Chapters 23 and 24 and to report to the Council twice a year. The Commission does so

²⁹ Croatia Negotiating Framework, Luxembourg, 3 October 2005 https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/st20004_05_hr_framedoc_en.pdf (accessed 10.31.2017) General position of EU accession negotiations Serbia, a member of the 44th report on the rule of law (non-paper) <http://www.mei.gov>.

via the Report on the rule of law (document known as Non-Paper on Rule of Law),³⁰ which is based on the reports of Serbia on the implementation of strategies and action plans, the information provided in the context of the Subcommittee on Justice, Freedom and Security as well as on a number of other sources, including expert (peer review) missions and reports of international organizations and civil society.

Progress in the Rule of Law is monitored and reported also in the annual Progress Reports for Serbia.³¹ It can be observed that this is actually first systematization of the areas that constitute RoL concept for the negotiations. Progress Report assesses and follows five elements: free and fair elections, the functioning of the legislation, and legislative activity and the institutional capacity of the Parliament, its representativeness (women, ethnic minorities), transparency, and protection of the rights of the opposition. There is also the functioning of the executive power - relations in the coalition or law enforcement and administrative capacity, recruitment and promotion work in the civil service and police force. The fourth element is dealing with functioning of judiciary, the assessment of independence, professionalism and efficiency of the judicial system. Last, but for sure not the least important is fight against corruption and the functioning of the criminal courts, ongoing investigations and arrests, as well as in the cases of corruption. There is not only about the legislative harmonization, but to show and prove so called *track record* – final convictions in those cases.

Of course, there are other areas that cover some of the issues important for protecting fundamental rights. For example, in Chapter 2, free movement of workers, candidate country has to create conditions for equal rights for EU workers and service providers, Chapter 7 Intellectual Property is guarantying protection of IP rights, so important in time of globalization. Right on information and new cyber rights are protected in Chapter 10 Information Society and Media. With social and labor rights, special protection and inclusion of vulnerable groups into labor market is dealt with in Chapter 19 Social Policy and Employment. Rights of children, especially of those from vulnerable groups, children with disabilities are the topics for Chapters 25 Education, Culture, Youth as well as 26 Research and development. General protection of health and right on healthy environment are covered in Chapters 27 Environmental protection and 28 Consumer Protection and Public Health.

³⁰ See last of those Non Papers,

http://www.mei.gov.rs/upload/documents/eu_dokumenta/non_paper_23_24/non_paper_pg23_24_srp.pdf, May 2018

³¹ Serbia 2018 Report, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf>

Conclusion

What are the problem/challenge for accommodate protection of human rights in the negotiation process? One may say that Union is not a credible negotiator in this area on behalf of all Member States – for example, Bulgaria and Romania have their own mechanism of monitoring progress in RoL, but have the same vote in the assessment of progress for candidate country. Challenge is also, depending on developments at home, EU is changing the rules during the negotiation process, which creates a lot of insecurities for the Candidate Country. For example, when Montenegro and Serbia entered negotiation process, illegal migration was not a topic at all, but now is of the most importance.

Let us go back to “double dilemma of the RoL” as we called challenge to have a clear set of conditions for the concept of EU Rule of Law, which *per se* is not defined at all. The question remains - how to objectively measure the result of reforms or progress in this area produced by the Candidate country, as those things are no measurable at all? And if it is not measurable, how the assessment can be objective one? All this having in mind that that this progress is a measurement for the progress in negotiations in order to complete the process...

One set of issues will just mention, without dwelling on them, but we find this extremely important to be tackled. Namely, is the imbalance role of the Rule of Law during accession negotiations more important than the imbalance role of the Chapter 35, where the most important political issue is situated? On this we do not have an answer, but the answer that we are sure would be provided by the EU is that they are of the same importance. But, their own work, behavior and not so distant history will proved them wrong. Rule of Law not only that was not as important as political issues, but was non existing at all for negotiating membership – it appears to be important as it is today only six years ago!!!

But let us finish on more gloomy note than this one – the bottom line question is why Candidate Country has to wait to gain the status of candidate to EU membership and then to start working on its Rule of Law?! Well, this is one million dollar question, without logical answer.

Literature

- Amichai Magen, "Cracks in the Foundations: Understanding the Great Debate Rule of Law in the EU", *Journal of Common Market Studies*, Volume 54, Number 5, 2016, p. 1056.
- Bojan Bugarič, *Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge*, LSE 'Europe in Question' Discussion Paper Series, Paper No. 79/2014, July 2014, p.2
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, the EU Justice agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union, Strasbourg, 11.3.2014, COM (2014) 144 final, http://ec.europa.eu/justice/effective-justice/files/com_2014_144_en.pdf
- Croatia Negotiating Framework, Luxembourg, 3 October 2005
https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/st20004_05_hr_framedoc_en.pdf (accessed 10.31.2017) General position of EU accession negotiations Serbia, a member of the 44th report on the rule of law (non-paper) <http://www.mei.gov>.
- Enlargement Strategy and Main Challenges 2011-2012, the EC Communication addressed to the European Parliament and the Council, Brussels, 12.10.2011.
http://www.mei.gov.rs/upload/documents/eu_dokumenta/strategija_za_prosirenje/strategija_prosirenje_2011_2012sr.pdf (accessed 10.31.2017)
- General EU Position for the Negotiations on the Accession of the Republic of Serbia, Article 24, http://www.mei.gov.rs/upload/documents/pristupni_pregovori/pregovaracki_okvir.pdf (accessed on 10.31.2017)
- Günter Wilms, *Protecting fundamental values in the European Union through the Rule of Law: Articles 2 and 7 TEU from a legal, historical and comparative angle*, Robert Schuman Center for Advanced Studies, European University Institute 2017, p. 52.
- How the EU can confront the 'Copenhagen dilemma', *Democracy Digest*, National Endowment for Democracy, 2016, Internet, <https://www.demdigest.org/28437-2/> 03/09/2018.
<http://www.mei.gov.rs/eng/documents/agreements-with-eu/stabilisation-and-association-agreement>
- Jan-Werner Müller, "Should the EU Protect Democracy and the Rule of Law inside Member States?", *European Law Journal*, Vol. 21, No. 2, March 2015, p. 146.
- Joseph HH Weiler, *In the Face of Crisis: Legitimacy Input, Output Legitimacy and the Political Messianism of European Integration* (2012) *Journal of European Integration*, vol. 34, no. 2, p. 825.
- Kalypso Nicolaidis and Rachel Kleinfeld, *Rethinking Europe's "Rule of Law" and Enlargement Agenda: The Fundamental Dilemma*, Jean Monnet Working Paper 08/12, <http://www.jeanmonnetprogram.org/paper/rethinking-europes-rule-of-law-and-enlargement-agenda-the-fundamental-dilemma/>

Non Paper on the Rule of Law, Serbia, May 2018

http://www.mei.gov.rs/upload/documents/eu_dokumenta/non_paper_23_24/non_paper_pg23_24_srp.pdf

Reasoned Proposal in accordance with article 7 (1) of the European Union on Treaty Regarding the Rule of Law in Poland, European Commission, 2017/0360, Brussels, 20.12.2017.

Rule of law concerns in member states: how the EU can act (infographic), Internet, 2018
<http://www.europarl.europa.eu/news/en/headlines/eu-affairs/20180222STO98434/rule-of-law-concerns-in-Poland-how-the-article-7-procedure-would-work> 15.08.2018.

Serbia 2018 Report, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf>

Stefanie Ricarda Roos, The "Rule of Law" as a Requirement for Accession to the European Union, http://www.kas.de/wf/doc/kas_15604-544-2-30.pdf

Tanja Miscevic, Association to the EU, Sluzbeni glasnik, 2009, p.89.

Tanja Miscevic, Ever Changing EU Accession Negotiation Process - The case of Serbia, The Review of International Affairs, Belgrade, Vol. LXVII, No. 1162-1163, April - September 2016, pp. 70-83

The European Commission for Democracy through Law (Venice Commission), Document CDL-AD (2016) 007 e-Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) [http://www.venice.coe.int/web_forms/documents/?pdf=CDL-AD\(2016\)007-e](http://www.venice.coe.int/web_forms/documents/?pdf=CDL-AD(2016)007-e)

The Opening Statement of the Republic of Serbia, Intergovernmental Conference on the Accession of the Republic of Serbia to the EU, 21 January 2014,
http://www.seio.gov.rs/upload/documents/pristupni_pregovori/the_opening_statement_of_the_republic_of_serbia.pdf

Treaty on European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN> 18/09/2018.

Vasile Pușcaș, *EU Accession Negotiations (A Handbook)*, Hulla & Co Human Dynamics KG, 2013, p. 23.

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THE 4th EU DIRECTIVE AND THE HUNGARIAN AML PRACTICE IN 2018

Money laundering is the complex entirety of illegal economic transactions pursued under the concealment of legal economic transactions that aim to justify the origin of wealth obtained through criminal act, this way getting rid of its recognizably illegal nature. It has become one of the most paying and vast businesses in the world. Behind an important number of crimes committed all over the world there is a motive to gain material benefit, and perpetrators of a crime try to avoid to raise the attention of the investigating or tax authorities by newer and newer, diverse methods. The following pages introduce nineteen such techniques. The interest of Hungary is to prosecute money laundering with all the means at its disposal, or at least try to drive it out of the country. In the interest of this struggle, it needs to cooperate with other countries and international organizations.

Key words: *money laundering, tax fraud, cover firms, anonymous deposits, Criminal Code, anti-money laundering regulations*

The AML regulation is continuously enhancing in the last two decades in Europe. The time which was passing by between the EU Directives regarding our topic became shorter and shorter. Experts (criminal lawyers, compliance officers, judges, prosecutors etc.) have to train themselves day by day, if they want to make their job properly.

Money laundering is the complex entirety of illegal economic transactions pursued under the concealment of legal economic transactions that aim to justify the origin of wealth obtained through criminal act, this way getting rid of its recognizably illegal nature. “Therefore the reason and origin of money laundering is always a crime that

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becomes unretractable, while its aim is that the fortune obtained this way should be used in the legal economy.”¹

On the other hand money laundering has become one of the most paying and vast businesses in the world. According to the IMF estimations in the last two decade the volume of money laundering amounts to 2-5% of the unified GDP of all the countries on Earth. This seems to be true in 2018 too. Translated to concrete sums this means at least 590-1.500 billion USD annually² ten years ago, but in 2018 we can estimate this sums about more than 10.000 billion USD. In 1999 John Walker estimated this amount to be 2.850 billion USD annually in his work about modeling the tendencies of money laundering.³ According to the estimations of the FATF the sum of the annually laundered “dirty money” equals to the total annual production of the economy of Spain, that also underlines the largeness of the danger.⁴ This number does not seem to be exaggerated if we take into consideration that behind an important number of crimes committed all over the world there is a motive to gain material benefit. (To the question why he had robbed banks, the notorious American bank robber, Willie Sutton gave the laconic answer: “Because money is there.”⁵) We could almost regard it as logical that perpetrators of a crime try to avoid to raise the attention of the investigating or tax authorities by newer and newer, diverse methods. On the following pages we introduce nineteen such techniques.

Who has money deriving from crime in his possession first has to decide whether there is need for money laundering. That is to say up to a certain amount (for an average Hungarian citizen this is about 50.000 EUR) the sum can be spent without any problem or it can be used in legal economic activity (this latter is also qualified as money laundering). In cases of financial or bank transactions with the division of the sum (for example 50.000 EUR can be divided to five 10.000 EUR) the limit of 3.600.000 HUF (approximately 11.500 EUR) can be easily avoided.

¹ Ferenc Kósa: The criticism of the bill against terrorism and preventing money laundering www.jogiforum.hu/publikaciok/index.php?p=47&print=1 (5 November 2001)

² Patrick Moulette: Money laundering: staying ahead of the latest trends. In: Observer No. 220. April 2000. 28. oldal

³ Peter Lilly Dirty transactions. The world of money laundering Perfekt Economic Consulting, Educational and Publishing Spa., Budapest, 2001 page 39

⁴ Jackie Johnson: In Pursuit of Dirty Money: Identifying Weaknesses in the Global Financial System (Journal of Money Laundering Control, Henry Stewart Publications London, Autumn 2001. 122. oldal)

⁵ Steven Mark Levy: Federal Money Laundering Regulation (Banking, Corporate, and Securities Compliance) New York, 2003. Chapter 1 page 3.

If the sum of money of suspicious origin reaches a certain amount that can make the “smooth” use risky, then still there is possibility for the perpetrator to account for the origin of the guilty money in case of the danger of being caught: the source is a family gift, succession, loan from a friend. There is no need for anything else just to invent a credible legend (expression used at Secret Service) about the origin of the money. The main point is the adequately worked out strategy for crisis and of course it is advisable to consult a lawyer continually.

If it is about a really huge sum (of course it is relative what sum is to be considered “big”) then there might be the need for money laundering. A sum around half million EUR absolutely “claims“ laundering. Naturally the amount is very relative: if someone has already had a fortune of some million and pursues legal economic activity (also), for that person not even the spending of half million EUR of illegal origin means risk. So we can say that “above a certain level”, steered with adequate economic (and political) relations there is no need for the laundering of the money obtained in an illegal way, it can be spent “filthily”...

Moreover if the perpetrator has at least one legally registered firm, then about 30% of the turnover of the firm can be laundered through it annually with the help of an accountant with enough expertise (and “venturesome”). The adequate technique for example is fictitious billing. In this sense money laundering is nothing else then the complementary transaction for tax fraud. Tax fraud is usually committed by keeping in secret a part of the income or by showing costs bigger than they are in reality. It is a basic economic relation that the profit is the part of the total income decreased by the total costs that is usually indicated with the following formula: profit is the total revenue minus the total costs. As we define the variant of money laundering with the help of economic activity as the complementary transaction for tax fraud, the logic of the commission of this crime is reversed, that is either the costs should be showed as less than in reality or (and this is more common) income should be showed as more than in reality. It is nearly a well-known fact that in Hungary it is not a serious problem for anyone to decrease his income before taxation by fictitious cost bills. (We could only suppose it with some malice that when creating taxation laws, the tax creator reckons in advance that a lot of people admits a lot less of income than it is really, so the rates of taxes are adjusted to this de facto situation...) The generality of fictitious billing is backed up also by the fact, that so called “bill factories” – that means firms that do not pursue real economic activity and produce bills in unlimited amounts for some percentage of the bills without real economic performance and after a while the actual owners disappear with the money (the registered owners of the firms are either non-

existing people or homeless from whom of course the remaining public debts cannot be recovered) – are regularly pinched. After this it is easy to see that if it is relatively easy to get fictitious cost bills, then it is even more easier to get fictitious income bills and for this even some percent of commission can be asked for and not even the tax authority will suspect a thing if someone accepts to pay the rates and taxes after his fictitious incomes. It is conceivable that the cost of money laundering is here the least as the rates and taxes that have to be paid after the fictitious income bills can be decreased by the “commission” received for the bills. Moreover the rates and taxes are to be paid after the income decreased with costs; meanwhile “commission” can be asked for the total value of the bill. This way such a situation can occur that the operation of money laundering will not be loss-making.! (Just think it over: 50% of average cost level, 30% of rates and taxes and if the buyer pays 15% of the value of the bill for the fictitious bill then the result of the operation will be 0, so there is not going to be neither profit nor loss.) It is worth for the perpetrators to use this method even if 10-20% loss is formed, furthermore the danger of getting caught is possibly here the least.

Even those might need money laundering who realize income regularly from crimes and have no civil job, so who perpetrates crime as a life style. The easiest technique even here is to establish a cover firm.

There are countries that conduct a very profitable business through the tacit suffering of money laundering, by allowing phantom firms to be formed and, by the very strict interpretation of banking secrets, make anonymous bank deposits possible. As “unclean” money very quickly finds such areas, these countries come into outstandingly high incomes through money laundering. We have to admit, however, that Hungary must not choose this route not only for sheer moral reasons (although these alone would be enough), but also for reasons dictated by economic rationality. An average-sized European country with a democratic political culture would lose more as a result of the sanctions introduced by the international community and the organisations dealing with money laundering than the profits it would gain from the capital to be laundered coming in to be laundered in the country. We could also say that we are neither small, nor large enough to put up with money laundering. Every opinion in between, any tiny allowance could be equally dangerous as tacitly letting money launderers gain ground. Therefore, the interest of Hungary is to prosecute money laundering with all the means at its disposal, or at least try to drive it out of the country.

In the interest of the struggle against money laundering as an objective, we need to cooperate with other countries and international organisations. With respect to this, we

have already undertaken several international obligations but we are to be ready to conclude further agreements or the reinforcement of the earlier ones; at the same time, we are also to initiate such.

The reason there was no money-laundering in the *1970-1980s* in Hungary is not that there were no organised criminals or that no extra profit was produced but that the underdeveloped nature of the banking system and the lack of the convertibility of the Forint prevented it.

A couple of years later, however, everything changed drastically. The standard of living was dropping continuously in the second part of the 1980s, while inflation speeded up. It became obvious that something had to be done to the economy, and the political change of regime was also around the corner. By the summer of 1989, “the movements going on in the political sphere became modified in their direction, contents and dynamism as well; in addition to the change of models advertised, the emphasis – at least in the manifestation of some organisations and certain layers of society – shifted in the direction of the change of regime.”⁶ Following the *political and economic change of regime*, the establishment of a market economy started in 1990. This paved the way for the spending of moneys that had been accumulated earlier. The banking system was not yet able to satisfy the hunger for capital; usurious interest rates and the collection of money related to it flourished in the underworld. The long-term decrease of the standard of living, the increase of the tensions of income distribution gave an impulse to crime, and, additionally, subsistence crime also spread. Criminals of outstanding abilities and good organisational skills started building their domestic criminal organisations, for which they also had sufficient amounts of cash. The disarrangement of the police also contributed to the launch forward of the criminal underworld. The *economic and social transformation* related to the change of regime, as well as the *privatisation of state property* necessarily went together with the appearance of certain business crimes. The significant increase of the number of criminal activities and the increase of the average amount of damage calculated for one criminal activity – even with the rate of inflation deducted – continuously produces the wealth that can also be the basis of money laundering. In addition to this, on 1 January 1987, the *one-tiered banking system was replaced by the two-tiered system*, and, in the early years, the too broad interpretation of the circle of banking secrets provided a favorable area for money launderers. However, the creation of anti-money laundering regulations and the criminal law protection took years to develop.

⁶ Dr. Horváth József: A tábornok vallomása Budapest, 1990. Page 315

In Article 86 of the *Articles of Partnership of Hungary, created with the European Community* in 1994, we undertook the obligation to make all efforts to prevent money laundering, and to introduce sufficient regulation that is of equivalent value with those regulations that the Community and other international forums working in this area – including the Financial Action Task Force (FATF) - accepted.

In 1994, the Parliament passed a law covering the prevention and obstruction of money laundering, and the Government issued an executive order; furthermore, the definition of the crime of money laundering, and that of the sanctions of the crime, took place in the Criminal Code: Law IX of the year 1994 integrated money laundering as §303 in the Criminal Code. The law ordered that the laundering of money be sanctioned with regard to material goods emerging in connection with the areas most affected by organised crime, that is crimes committed in connection with drug abuse, arms smuggling, and terrorism. In harmony with the planned modifications of Law number LXIX of the year 1991, on financial institutions and activities of financial institutions (the predecessor of Hit.) sanctioned the failure to perform the obligation of reporting defined in the law in the case of both willful and negligent commission.

As aggravated cases, the legal regulations contained habitualness, and, similar to drug abuse, commission within the framework of an organisation; furthermore, the law ordered that those perpetrators who – through their position (rank, occupation, profession) – found it easier to help with the covering up of the origins of the money one came into in an unlawful way, be punished more severely.

Furthermore, Hungary joined the Convention on money laundering, the search for, seizure and confiscation of items originating from criminal activity, ratified in Strasbourg, on 8 November 1990, the announcement of which was ordered by *Law CI* of the year 2000.

The facts of the case of money laundering as it is described in the Criminal Code went through continuous change, it was modified practically every second year so that the delict had no real practice.

However, these steps did not satisfy the international financial organisations. Hungary (as the first and so-far only OECD member country) *was put on the money laundering “black list” of FATF at the end of June 2001*, among non-cooperating countries. Even though along the law-making process there were legal regulations created at the end of 2000, according to which it should not have been possible to open a bearer and code-

named savings deposit⁷, as well as withdraw money from those already existing without identification, from the day of the accession of Hungary to the EU, the FATF did not consider this solution sufficient, with special respect to the fact that the neighboring countries – that were in similar shoes as Hungary – tied the termination of identification to a fixed date.⁸

Three months after the decision of FATF, under the influence of the September 11 terrorist attacks, the international cooperation against terrorism definitely started to strengthen, and the strengthening of anti-money laundering regulations on the agenda anyway was accelerated. It was in the wake of this that Law number LXXXIII of the year 2001, on the struggle against terrorism, the strengthening of the decrees on the prevention of money laundering, and the order of particular restricting measures, was born. This legal regulation tried to remedy the problems and shortcomings brought up by FATF, in the following manner:

- a) The prevention of going around the legal regulation on money laundering is served by the fact that through the modification of Law-decree number 2 of the year 1989, on savings deposits, the possibility of opening anonymous deposits is terminated. The law contains sufficient measures with respect to the already existing bearer and code-named savings deposits as well. In the case of safety deposits transformed into bearer deposits following 30 June 2002, and reaching or exceeding the amount of 2 million HUF, every credit institution is obligated to send the data of identification of the client to the National Police Department with the aim of the prevention and obstruction of money laundering. After 1 January 2005, upon the client’s written request and with the approval of the National Police Department, the non-bearer safety deposits can be transformed into bearer ones.
- b) For reasons similar to those of savings deposits, the law orders – with the modification of Law number CXI of the year 1996, on the marketing of securities, the investment services and the securities stock exchange - that securities can only be issued and publicly marketed in series only in a bearer manner.

⁷ Such were banking papers under the given names of “Jubileum” (Jubilee), “Garas” (Penny), “Dénár” (Denarius), “Zafir” (Sapphire), etc.

⁸ Koós-Hutás Katalin: A pénzmosás elleni szabályok szigorítása: megszűnő anonimitás (Cég és Jog 2002. 3. szám, page 44)

- c) A significant part of the turnover of money is performed in cash. The monitoring of this in international turnover is served by the above-mentioned law by forcing those crossing the country border – if they have Forints or foreign currency reaching or exceeding one million Forints in their possession – to report this fact to the customs authorities and provide the particulars, and the information on the amount and currency of the money in their possession to the customs authority.
- d) After 1 January 2002, only the credit institution or the agent of the credit institution can get permission from the State Supervision of Financial Institutions to carry out money-changing activities. Through this, the performance of money-changing activities, and the strengthening of their conditions of operation, as well as their increased monitoring, take place on the basis of regulations identical with those with respect to enterprises performing the other financial services.⁹

As a result of the measures introduced, in June 2002, we were removed from the list of Non-complying Countries and Territories.¹⁰ In 2003, the former money laundering law was replaced by a new law: at its sitting on 24 February 2003, the Parliament passed Law XV of the year 2003, on the prevention and obstruction of money laundering. This law, as well as the previous measures, forced the decision-makers of FATF to *terminate the former special monitoring mechanism against Hungary at its Berlin meeting ending on 20 June 2003*. After the Law XV of the year 2003 we have had two more AML Law, the Law CXXXVI. of the year of 2007 and the newest and current one, the Law LIII. of the year 2017.

We cannot give up on the development and continuous improvement of the legal regulations in view of the fact that the problem of money laundering cannot be solved through exclusively criminal law means. Criminal law – as we can unfortunately experience nowadays – is not able to remedy the deleterious social phenomena; furthermore, it cannot even solve the problems emerging in connection with crime. Crime is a social phenomenon in connection with which criminal law – to use a medical expression – can only provide symptomatic treatment. In spite of this, this branch of law cannot be neglected or replaced by anything else either. In the fight against money

⁹ 2001. évi LXXXIII. tv. Indokolása (ComPLEX CD-Jogtár)

¹⁰ On the most recently published list, (FATF-GAFI Annual Review of Non-Cooperative Countries and Territories, 20 June 2003) we can find the following countries: Cook Islands, Egypt, the Philippines, Guatemala, Indonesia, Myanmar, Nauru, Nigeria, the Ukraine)

laundering, however, we should give priority to non-criminal law means; that is, we should develop the financial system in such a way that money laundering in Hungary would be possible only through extreme difficulties. This way, a great percentage of “unclean money” would avoid the country and would move towards areas where it would not meet such strong opposition. If we achieve this, while simultaneously taking part in the cooperation conducted for the fight against money laundering, we can say that we have performed the obligations we have undertaken internationally. However, we can still not lean back as the methods of money laundering are continuously being perfected, perpetrators are developing newer and newer techniques. As far as we can see, the fight will never end, consequently, the main aim can only be that we are a step ahead of the perpetrators, and we preserve this step for the longest possible time.

The fourth Anti-Money Laundering Directive (EU) No. 2015/849 entered into force on 26th June 2015. After it entered into force, Hungary started to make the new AML regulation. This is the Act LIII. of the year 2017. which contains the most important elements of the new Hungarian AML regulation, and totally comply with the 4th EU Directive.

The key elements of the 4th Directive according to a recent article published in this topic are the followings:

“Under the 4th AMLD, a key role is accorded to the principle of risk analysis and the corresponding adequate safeguards. Both the EU Commission and jointly the European supervisory authorities EBA, EIOPA and ESMA (ESAs) shall conduct an analysis of money laundering and terrorism financing risks. The EU Commission is instructed to send its findings and its recommendations based on this analysis to the Member States and the obliged entities under the Directive so that the Member States can better understand and counteract such risks more effectively.

In addition, the 4th AMLD will also provide for an extension of the scope of anti-money laundering legislation requirements: for example, by reducing the threshold for cash transactions above which persons trading in goods qualify as ‘obliged entities’ and in particular in which an obligation to identify the customer is triggered. This threshold will be reduced from €15,000 to €10,000.

The 4th AMLD also extends its applicability to providers of gambling services which are now listed as ‘obliged entities’. The Member States can, however,

remove these providers – with the exception of casinos – partially or completely from the list of obliged entities if a low money laundering risk is evidenced.

The scope of the 4th AMLD is also extended by including as obliged entities not only real estate agents involved in the purchase or sale of real estate properties, but also those agents involved in the letting of real estate properties.

As regards beneficial ownership, the EU Member States are obliged under the 4th AMLD to create central registers containing information on the beneficial ownership of corporations, including Anglo-American trust structures.

The 4th AMLD provides that the competent national authorities (such as the Financial Intelligence Units) and obliged entities have to have access to the central register under the national anti-money laundering legislation for exercising their customer due diligence. Persons and organisations capable of evidencing a ‘legitimate interest’ in this information (e.g., an interest relating to money laundering) must get access to the central register except for information regarding trust structures.

The 4th AMLD no longer differentiates between politically exposed persons (PEPs) resident in the same country as the obliged entity and in other countries. Further, special obligations apply with respect to PEPs classified as beneficial owner. Furthermore, the 4th AMLD expands the category of PEPs to include members of the governing bodies of political parties, which will result in the necessity to update existing PEP lists.

Whilst already under the current European legislation, banks and certain other companies in the finance sector are obliged to establish group-wide compliance systems, including due diligence requirements relating to money laundering, this obligation will in future also apply to other obliged entities under the Directive.

As regards sanctions, the 4th AMLD is following an approach pursued in recent European legislation of requiring specific and far-reaching powers of the Member States to be exercised in case of non-compliance with the requirements of the Directive.

The approach of ‘naming and shaming’, which can likewise be observed more frequently in recent European legislation, is also being pursued. That means that

the competent authorities shall publish the decisions based on breaches of the requirements laid down by the 4th AMLD, unless overriding reasons require an anonymous publication.”¹¹

In the former decade the number of the money laundering investigations in Hungary was not so high. In the official crime statistics, we could see 5-10 cases in a year. Today something is happening, only in Budapest there are more than 100 money laundering investigations. The number of the reported suspicious transactions was around 10.000 in the last decade every year.

We had a MONEYVAL monitoring process in 2016; the results were published in December 2017¹². “As a result of Hungary’s progress in strengthening its framework to tackle money laundering and terrorist financing since its mutual evaluation in September 2016, MONEYVAL has re-rated the country on 13 of the 40 Recommendations. Hungary has been in an enhanced follow-up process, following the adoption of its mutual evaluation, which assessed the effectiveness of Hungary’s anti-money laundering and counter-terrorist financing (AML/CFT) measures and their compliance with the Recommendations by the Financial Action Task Force (FATF). In line with MONEYVAL’s rules of procedure, the country has reported back to MONEYVAL on the progress it has made to strengthen its AML/CFT framework. This report analyses Hungary’s progress in addressing the technical compliance deficiencies identified in the mutual evaluation report. The report also looks at whether Hungary has implemented new measures to meet the requirements of FATF Recommendations that have changed since the country’s 2016 mutual evaluation. MONEYVAL decided that Hungary should remain in enhanced follow-up and next report back in December 2018 as per Rule 23, paragraph 1 of MONEYVAL’s 5th round rules of procedure.”¹³

¹¹ Jens H. Kunz: Key elements of the 4th EU Anti-Money Laundering Directive <https://www.financierworldwide.com/key-elements-of-the-4th-eu-anti-money-laundering-directive/#.WtMmZC5uaUk> (15. 04. 2018.)

¹² <https://rm.coe.int/moneyval-2017-21-hungary-1st-enhanced-follow-up-report-technical-compl/1680792c61> (15. 04. 2018.)

¹³ <https://www.coe.int/en/web/moneyval/home> (15. 04. 2018.)

Jašarević N. Osman *

CRIMINAL LAW AND PROCESSING STATUS YOUNG ADULT FACES

The motive of this work is to distinctly explain the position of young adult faces in terms of criminal and procedural position, and certain peculiarities in the process, and to explain their significance, determine the facts of the process towards young adults, with special emphasis on their rights through a special criminal proceedings which indicates that this is a special procedure to which the attribute - criminal, from which it is clear that this type of procedure which applies to most of the general rules contained in the basic principles of general criminal procedures. Really the facts indicates that the criminal proceedings are classified as special, suggesting that it apply some special rules that do not exist in the general criminal proceedings, and that some normative regulate general criminal procedures or transformed, or modified, or annulled, or reduced to a procedural different meanings, all of which represent methodological theoretical and legally positive on the differentiation method of the young adults than in the general penal procedure.

Keywords: law, young adults, the Criminal Code, the Law on Juvenile Courts, the Law on Protection and Treatment of Children and Juveniles, criminal proceedings

Introduction

Historically, that is an epoch-making point of view, permanent changes in the field of criminal law and procedure according to Young Adults are conducted in the direction of changes classic purposes of criminal proceedings, so that the procedure would never be led only to establish criminal responsibility and sentencing or criminal liability and determining penalties or criminal sanctions, as in the adult faces, but in order to protect

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the personality and integrity of young adult faces, "the principle of the best interest to young adults, literally speaking to children" and the selection of appropriate measures that ensured his re-re-socialization, which is not effectively be achieved by the provisions of general criminal law / procedures which have proved to be inadequate for the realization of this special "protective purposes".

Newer Anglo-Saxon time and associated him literature develops a strong criticism of the direction of development of the process according to Young Adults in general, because it believes that such a model over the existing concept of social protection and state Protective effects in relation to minors, he at first glance, the privilege with respect to adult accused, but at the same time, through the denial of his autonomous will, a number of legal and procedural provisions, (he) young adult placed in a worse position in relation to the adult defendant. Therefore, assuming that the person (or even younger adult person), responsible for their actions, supporters of the presented ideas, declare justice model, pointing out that the norms of criminal and procedural process should primarily allow exact determination of the relevant facts relating to the crime , its perpetrator and conditions of criminal responsibility and in accordance with these young adults should be given all the legal and procedural possibilities and mechanisms which owns and defendants in general criminal proceedings, but at the same time respecting all already achieved the level of humanization and social reintegration that relate to the position young adult faces in the context of legal and criminal process procedures.

In most criminal procedural legislation in the world, there are two age - age categories of perpetrators and each of them enjoys a more or less distinct legal status. They are separated by age and age limit criminal adulthood, ordinarily determines the reached number Lifetime calendar years young man. In most Central European countries it is 18 years.

The existence of limited border criminal adulthood creates a lot of difficulties in everyday judicial practice, both in Bosnia and Herzegovina and the wider world. These difficulties are greater the greater the difference in the legal position of juvenile and adult offenders.

Conditional, limited border criminal legal age does not correspond to the reality of life, because the development of a young man at the time of psychophysical, body-of-the-art and personal social maturation can not be reduced to normative established legal limits.

Therefore, already in the first half of the last century, the idea that a criminal procedure legislation into normative-legal introduce a new age and the age category of criminal offenders with a view to more or less depreciated and rapid translation from the age of the educational rights of juveniles in adult or criminal law and procedure adult faces. Therefore, by this age categories intended to enable the dissemination and application of sanctions for juveniles and adult offenders who have not yet reached full psychophysical well as legal maturity.

Old-age age categories of persons in criminal law and procedural sense which was discussed, was named young adults, (Eng. Young adults, double. Jeunes Adults, him. Heranwachsende, soils. Minore maggiorenne).¹

Name younger adult person

According to investigations so far, and established facts the name of the younger adult person is already used in the first amendments to the Criminal Code of Yugoslavia from 1959. It is a more adult person who at the time of the conduct of criminal proceedings or trial under twenty one years of age. In principle to such perpetrators applied the general Yugoslav criminal law with exceptional and very limited application juvenile sanctions. The next step in determining the legal procedural position of young adult faces completed the adoption and implementation of the work of the SFRY Criminal Code 1976., When it was abolished more determined application of juvenile criminal law, in order to respect the principle of "best interests of children and young people" increased the number of educational measures to five, when still not been prescribed measures sentencing juvenile prison as the only criminal sanctions prescribed for juvenile law.

Scope and Application of the FBiH²

Member 1.

The Law establishes the specific rules of procedure to children who are in conflict with the law, young adults and children who are victims of or witnesses to whom shall act courts, prosecutors' offices, including authorized officials, authorities guardianship, family, schools, institutions at all levels of society, as well as other actors involved in

¹The passage is slightly altered presentation of authors at the international colloquium "Ius criminale, quo vadis?", Held in Rijeka on April 5, 2008 on the occasion of the tenth anniversary of the Institute of Criminal Sciences Mošćenice Faculty of Law, University of Rijeka.

² The Law on Protection and Treatment of Children and Juveniles in the Criminal ...

the criminal procedure in a manner that is free of discrimination promotes a sense of dignity and personal values of the child, taking into account the age of the child, the best interests of the child, the right to life, survival and development, and allows the child to accordance with the age and maturity express its opinion on all matters relating to him, where all efforts should ensure rehabilitation and his assuming a constructive role in society.

Member 2

The definition of a child and application of criminal sanctions

- 1) The child is in accordance with this law any person who has not attained 18 years of age.
- 2) According to the child at the time of the offense has not reached the age of 14 years (hereinafter: child) can not be imposed criminal sanctions nor apply other measures provided for by this law.
- 3) A juvenile is a child who is in the time of the offense under 16 and under 18 years of age (hereinafter minor) and to which it can impose criminal sanctions and other measures provided for by this law.

Member 3.

Age of minors for the purpose of this law

- 1) Younger juvenile is a juvenile who at the time of the offense reached 14 but not yet 16 years of age.³
- 2) The older juvenile is a juvenile who at the time of the offense reached the age of 16 but not 18 years of age.
- 3) Younger adult person is a person who, at the time of the offense reached 18 but not yet 21 years of age.

³ <http://www.lawyer-prnjavorac.com>

Member 4.

Non-discrimination

To juveniles and young adults in all phases of the process are treated in the same way regardless of: race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status of the juvenile, his parents, adoptive parents or guardians, as well as on other forms of diversity.

Member 5.

A minor belong to the minimum rights that are respected in all stages of the criminal proceedings and those relating to the right of minors to be clearly shows why the accused to be presumed innocent until the contrary is proved, to remain silent, that his confession is not extorting force, the right to legal assistance of an attorney, the right to the presence of a parent or guardian, the right to conduct the procedure 'without delay' , the right to cross-examine witnesses against him and to call and hear their witnesses under equal conditions and the right to an effective remedy.

Member 6.

Language and writing

If the minor does not understand the language and script in which the criminal proceedings, the court determines the interpreter. Intelligibility of language implies the use of terminology adapted to the age and level of development of the child.⁴

Legal status of young adults face in BiH legislation, FBIH

The decisive step forward in regulating the legal status of young adults was made in 1997. when for the first time in some republics of Yugoslavia (Croatia and other countries of former Yugoslavia) normative legal provisions on young adults isolated from the scope of criminal procedural law and incorporated into a special piece of legislation - the Law on Juvenile Courts, and it happened in Bosnia and Herzegovina in the 10-team for years twenty first century, established laws: the Law on protection and treatment of children and juveniles.⁵

⁴ <http://www.lawyer-prnjavorac.com>

⁵ <https://lawyer-prnjavorac.com/laws/The Law on Protection and Treatment of Children and Juveniles.>

The Law establishes the specific rules of procedure to children who are in conflict with the law, young adults and children who are victims or witnesses of offenses committed by young adult face. Family Law of the Federation of Bosnia and Herzegovina - Federation Government.⁶

Legal guardianship for children without parental care and adult persons who are not able to ... Law on Gender Equality in Bosnia and Herzegovina. Family Law of the Federation - Federation Government.⁷

Providing guardianship for children without parental care and adult persons who are not able to ... Law on Gender Equality in Bosnia and Herzegovina. Law on supporting families with djecom.docx - Federal Ministry of Labor and Social Policy.⁸

Law on support to families with children and - basic provisions. Article 1 (case law). (1) This Law regulates the fundamentals support the families of civilian victims of war and protection of families with children in the Federation of Bosnia and Herzegovina.⁹

These laws thorough, detailed and complete, and in a special way is legally arranged to substantive and procedural position of younger adults. Thus, in certain articles of the law on juveniles provided that and for young adults apply general criminal law and procedure, meaning that they are applied sanctions under the Criminal Code, but with principled stance on the application of sanctions for adult prisoners provided two corrections, or amendments: the first consists in the possibilities of a more lenient treatment of young adult faces in imposing sanctions under the criminal Code and other prescribed possibility limited application of juvenile criminal law.

In terms of a more lenient treatment of young adult faces, Law starts from generalized positions in European legislations that provide for young adults as well as age-specific temporary age category to the age of the offender itself sufficient condition for more lenient treatment towards him. Second, it is in alleviating prison sentence Court bound the upper limit of 12 years and this limit can not exceed the punishment of imprisonment up to 15 years only in two cases of serious crimes.

⁶ www.fbihvlada.gov.ba/bosnian/laws/2005/laws/25bos.pdf

⁷ www.fbihvlada.gov.ba/bosnian/laws/2005/laws/25hrv.pdf

⁸ fmrsp.gov.ba/s/images/.../Law%20o%20supportive%20family%20sa%20children.docx

⁹ [pdf]36/99 Law on Social Protection, protection of families with children ...fmrsp.gov.ba/.../Law%20o%20foundations%20social%20protection%20protection%20civi...

When it comes to the application of juvenile criminal law, the Law on Juvenile Courts has increased the number of educational measures to six out of eight how many are prescribed in the law, and it is envisaged the possibility of applying juvenile prison.¹⁰ However, have not exhausted all the possibilities for selection of the most appropriate sanctions when judging young adults, because the court has at its disposal nine sanctions under ordinary criminal law.

So we get an impressive number of 16 differentiated sanctions which allows very large individualization of treatment of young adult perpetrators.¹¹

The development of the legal status of young adults in terms of tightening repression

The progressive development of the legal position of young adult faces stopped the adoption of a new Criminal Code of 2006., Whose general importance tighten repression against all categories of perpetrators, especially toward young adults. Without getting to this point in the provision of a platform underside and (or) the upper limit of the anticipated sentence, provisions restricting the possibility of mitigating the punishment or reducing the possibility of application of suspended sentences, which are equally relevant to all perpetrators of criminal acts, it should be noted that the deterioration the legal position of young adult faces most contributed to change certain articles of the law, which for them was provided for the possibility of imposing penalties long-term imprisonment of 20-40 years. Such a drastic tightening of repression against this age-age category perpetrator is contrary to the clearly expressed tendency in many European jurisdictions that to young adult offenders limit or exclude the application of the strictest punishment. Therefore, instead of a life sentence in Germany can be a young adult prison sentence of 10-15 years, in Austria instead of life imprisonment sentence of five to 20 years, while in Scotland to life imprisonment can be replaced by a reference young adult faces in an institution for young indefinitely. Four of the five countries from the former Yugoslavia prohibit young adults imposing the most stringent penalties: Criminal Code of Macedonia prohibits the imposition of life imprisonment, the Criminal Code of Montenegro imprisonment for a period of 30 years, Penal Code imprisonment of 30-40 years, and under the Criminal Code of the

¹⁰ Dr. Sc. Ante Carić: Young Adults and Long Term Imprisonment: Quo Vadis Croatian Juvenile ... Proceedings of the Faculty of Law in Split, whatever. 46, 3/2009., P. 507th to 511th

¹¹ For a comparative overview of the legal situation of young adults in European criminal legislation, see closely Carić, Ante: Young adult criminal offenders and amendments to the Penal Code in 2006, Proceedings of the Faculty of Law in Zagreb dedicated to prof. Ph. D.. Franjo Bacic, Zagreb, 2007, p. 283rd to 292nd

Federation of Bosnia and Herzegovina can not be a young adult impose long-term imprisonment for a term of 20-30 years.

The introduction of long-term imprisonment for a term of 20-40 years Croatian criminal legislation allows young adults, the imposition of a prison sentence for the longest duration. Thus, the upper limit of imprisonment for young adults in Austria, Serbia, Montenegro and Macedonia 20 years in Germany and Bosnia and Herzegovina 15 years and in Sweden it is 10 years.

It remains unclear which directed the Croatian legislator when it decided on such a sharp turn in the legal criminal policy towards this age category of perpetrators of crimes. Thus, in the final draft law on amendments to the Criminal Code in the explanatory memorandum to art. 4 does not state any reasons for such a step, except that “Changed the age limit for sentencing in prison lowering the twenty one year old to eighteen years”.¹²

In discussions among theoreticians and practitioners that followed the adoption of the amendments to the Criminal Code and the introduction of long-term imprisonment young adults is not caused special attention. However, in the materials of the XIX. Conference of the Croatian Association for Criminal Law and Practice in which he discussed topics, “The legal and practical issues stricter criminal law in the Republic of Croatia” unequivocally stated that the introduction of long-term imprisonment young adults legislator approached, “based on very negative reactions both general and professional public on young offenders the most serious crimes and the impossibility of judging young adults face on long-term imprisonment “. ¹³

Closing Considerations

Based on the collected and considered scientific and practical exposed data relating to the already registered offenders in the considered period of time on the territory of the former Yugoslav visible is their structure based on the life age at the time of the offenses. Clearly had observed downward trend in the percentage representation of the offender aged 18 to 21 years in the overall age structure of the perpetrator.

¹² See the final draft of the Law on Amendments to the Criminal Code, Ministry of Justice, Zagreb, April 2006, p. 40th

¹³ See Kos, Damir: Basic characteristics of the sixth amendment to the Criminal Code, Croatian Annual of kaznenio Law and Practice, Vol. 13, No. 2/2006., P. 411th

Also observed was a downward trend in the representation of juvenile offenders in the overall structure of reported persons for the purpose of committing the crime of abuse of narcotic drugs, especially in Bosnia and Herzegovina or its entities and BD.

Thus, indicators of significant stress reduction percent share of minors in the overall structure of reported offenders, noting that the present downward trend accompanied by a decline in absolute numbers. Due to the phenomenal form of the crimes committed in the analyzed period (2001. - 2005.), about 90% percent of reported minors were reported to accurately certain types of offenses of criminal law.

This ratio is not characteristic only for registered minors. For comparison, we bring the information that is in the structure of total reported facial ratio almost identical, and that about 90% of reported perpetrators were reported for the commission, or for topical nowadays criminal offenses under the Criminal Code.

Problems of Drug Abuse can be traced and the general criminality associated with minors, or through the participation of the crimes of abuse of narcotic drugs in the structure of total reported criminal offenses committed by minors. From the collected data it is evident that within the same time period there was a decline in the share of crimes of abuse of narcotic drugs. These fall in the share accompanied by a decline in absolute numbers, this is a visible downward trend in reported criminal offenses Drug Abuse of juvenile offenders.

Used and consulted literature

- Buljan, R. (1995): criminal behavior in people suffering from epileptic-sown. 13 expert witness (first): The Britvić. D. (1998.): Juveniles as perpetrators of murder and attempted murder. Master's thesis. Zagreb: Faculty of Medicine. -3.
- Caric, A., (3/2009.): Young Adults and Long Term Imprisonment: Quo Vadis Croatian Juvenile ... Proceedings of the Faculty of Law in Split, whatever. 46, p. 507th to 511th.
- Caric, A., Professor, Legal status of young adult faces, Faculty of Law, University of Split in retirement.
- Cajner, Mraović, I., Dosen, A. (1998): Selection criteria for funding the execution of violent tort minors. *Criminology & Social Integration*; 6 (2): 101-112.
- Cajner, I. (1995): The behavioral and family circumstances of juvenile offenders and violent nenasilničkih crimes. Dissertation. Zagreb: Faculty of Special Education.
- Goreta M. (1983), psychoanalytic approach as a contribution to assessment of criminal responsibility. Dissertation. Zagreb. Faculty of Medicine.

- Jašarević, O., Kustura, M., (2013.): Criminology (etiology and phenomenology of crime), Meadow, Str. 187- 189.
- Jašarević, O., (2012): Criminal procedure law I and II (the second edition of the amended) A method of juveniles, Str. 343-362.
- Knezović, Z. Kulenovic, A., Sakic, V., Zarevski, P., Zuzul, M. (1989): Psychological characteristics of convicted persons. Scientific edition of the journal penological topics. Zagreb,
- Koludrović, M. (1989): Forenzidko psychiatric judgment afektiv-term dunes here podinitelja krividnih of murder. Dissertation. Zagreb: Faculty of Medicine.
- Miškaj Todorovic L, Kuharić M Butorac K. (1999): The characteristic behavior of juvenile perpetrators of robbery. Criminology & Social Integration 7 (2): 171-188.
- Momirović, K., Horga, S. (1990): The relationship results in tests in-telektualnih skills and qualities by religious intolerance. Primijenjena dogs. hologija; II: 31-36.
- Pavlović, Z., textbooks in the field of theory of law, criminology and victimology with kričnog procedural law.
- Simovic, M., (2005 and 2006): The criminal presno right 1Y2, Faculty of Law, Banja Luka, Bihac.
- Simovic, M., (1981.): General term corrective measures and natively regulation in contemporary Yugoslav criminal legislation, thesis, Novi Sad.
- Simovic, M., (1992.): The scope, structure and dynamics of juvenile delinquency and policies prosecution of juvenile offenders in BiH, Insitute of Criminological and Sociological Research. Belgrade.
- Singer M, Kuharić M Cajner I. (1992): Balance, movement, structure and territorial distribution of minors in the Republic of Croatia. Poticiji and safety 1: 1-29.
- Skorupan V. (1999): Juvenile perpetrators of criminal acts with elements of violence. Master's thesis., Zagreb: Education and Rehabilitation Sciences.
- Tomori M. (1987): Psychodynamics vedjenja violent in adolescence. Journal detection of crime; 38 (a): 305-312.
- Zarkovic T., Kovacevic, D. (2000), Juvenile perpetrators of the crime of murder. Experts; 20 (2): 52-58.
- www.oss.ba/ documents / Criminal law FBIH.pdf criminal proceedings involving juveniles
- www.apeiron-uni.eu/lycboardclient/Detail.aspx?DocumentID=21649
- <https://www.parlament.ba/law/DownloadDocument?lawDocumentId=82201712...> The Law on Protection and Treatment of Children and Juveniles in Criminal...
- www.fbihvlada.gov.ba/bosanski/ laws /2014/ laws /4.html
- https:// judiciary.ba/vstv/faces/pdfservlet;jsessionid...?p_id_doc=3
- https://www. judiciary.ba/vstv/faces/pdfservlet?p_id_doc=22227
- <https://hrcak.srce.hr/file/39826>
- PDF] Criminal Code BiH
- https://advokat-prnjavorac.com/zakoni/Krivicni_zakon_BiH.pdf
- Protection and treatment of children and juveniles in criminal... - CPRC

YEARBOOK
HUMAN RIGHTS PROTECTION
“FROM UNLAWFULNESS TO LEGALITY“

<https://www.cprc.ba/.../Corrosion> and treatment with children and minors in Context procedure
www.pravda.gov.me/ResourceManager/FileDownload.aspx?rid=41872&rType

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NORMATIVE ENDANGERMENT OF INSTITUTIONAL INDEPENDENCE OF JUDICIARY IN CONTEMPORARY SERBIA¹

This paper analyzes the level of institutional independence of the judiciary in contemporary Serbia and the ways of its normative endangerment. The structural changes and political instability, as a feature of countries in the post-socialist transformation, have led to the weakening of institutions in Serbian society. Institutions are not a simple set of rules, but rather complex structures made up of formal and informal rules, convention, norms and traditions, and as such make judicial reform more difficult. Although judiciary in Serbia remembers several attempts of changes formal institutional rules, informal practices between governing sets survived in all political structures.

We will show that the current domestic regulations guarantee a certain level of institutional independence of the judiciary, but that in each of the existing solutions, is left possibility for the influence of the executive or legislative authority as well as other actors. These cracks are undermining the principle of the separation of powers, as one of the foundations of the rule of law, and endanger the judiciary that needs to be autonomous in relation to the other two branches of government. This status of the judiciary has multiple consequences for the functioning of the state, as well as for the whole society.

Keywords: *Institutional independence of the judiciary, Separation of powers, Rule of law, Serbia*

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INTRODUCTION²

Writing about Justice Aristotle once said that “going to a judge, means going to the justice” (Aristotel, 2013: 100). This principle has been institutionalized through normative solutions and has remained applicable to this day. Since judges make decisions that affect political, cultural and media power centers, we can assume and the previous experience convinced us, that there are various forms of influences on judges as individuals and courts as institutions. Studying the ways of endangerments institutional independence gives insight into the applicability of the principles of separation of power and an independent judiciary, which, as the foundations of each modern state, should guarantee the legal security and freedom to every individual in a society.

This paper is divided in three parts. After introduction, we give a picture of contemporary Serbia, which is in the transition period from the communist regime to a new democracy and the heritage of the past times is very much present. Although it is in the final phase of the post – socialist transformation, representatives of the judiciary in Serbia are often faced with a different types of influence coming from different sources. The purpose of these influences is to make decisions that favour the dominant social groups and their interests.

In the second part of the paper, we define the independence of the judiciary as an inseparable entity of personal (*de facto*) and institutional (*de iure*) independence. Our opinion is that these two aspects are mutually dependent and that only through their combination, the highest level of an independent judiciary can be achieved. Particularly we deal with the aspects of institutional independence, as a condition for personal independence of judiciary. Finally, we give an overview of the legal framework and show oversights in the Serbian legislation regarding the judicial independence. These unresolved issues have created a space for the influences of legislative and executive authorities that severely disturb the separation of powers and create a dependent judiciary.

The importance of this paper is reflected in the mapping of institutional weaknesses of relevant institutions, as well as the forms and strengths of the informal mechanisms that have the effect on endangerment the judiciary independence. The aim of this paper is to

² This paper was created within the research for the master thesis that author defended on the Faculty of Philosophy, University of Belgrade on September 2018.

show that the independence of the judiciary is threatened by various institutional means, which open the door to possible informal influences.

1. WEAK INSTITUTIONS, WEAK STATE

1.1. Post – socialist transformation

Structural changes, that are characteristic for the process of post–socialist transformation in the countries of Central and Eastern Europe, also affected Serbia where this process has two phases – „blocked“ transformation (from the 1990 to the second half of the 1990s) and „delayed“ transformation (from 2000 to the present) (Lazić & Cvejić, 2004: 40).

One of the key objectives of the institutional transformation – the establishment of the principle of the separation of powers that imposes a balance between the legislative, executive and judicial branches of government, has not yet been achieved, because Serbia has a long tradition of political influence on the Parliament and the judiciary (Mićunović, 2011: 20). This proves that the creation of a democratic state is not possible only through changes of the institutional system, but rather requires a “new value–setting policy” (Dimitrijević, 2018: 314-315). This “new value–setting policy” refers to the acceptance of a new cultural pattern namely set of universal value orientations in the field of human rights and freedoms and the introduction of democratic principles that are defined by international regulations (Mićunović, 2011: 21).

For the countries in post–socialist transformation, it is not uncommon that political actors are guided by personal interests and have self–interested strategies, so the outcomes of possible judicial system reforms can be seen as the derivatives of negotiation between the main political actors (Dallara, 2014: 1). Elites in Serbian society benefited from the deep structural changes, institutional and political instability, and used their leadership positions for accumulating capital and maintaining monopoly over the governance of all important areas of social life (Mitrović, 2010: 149-154). This is particularly pronounced in Serbia, where a small group of individuals – political leaders and their parties – use the judiciary as a powerful political weapon. There is a permanent effort by these actors to implement institutional solutions that will enable them to influence on the further work, functioning and decision–making process of judicial authorities (Dallara, 2014: 81).

1.2. Role and importance of institutions

Institutions are not just “set of rules”, rather a complex social structures that create a space for collective action and shape and influence on the interests and behaviour of the actors (Steinmo, 2008: 123). Bell (2018) highlights the dynamic side of the institution, pointing out that they are a “process or set of processes which shape behaviour” and defines them as “established law, custom or practice” (Bell, 2018: 1). Institutions are much more than a simple set of rules, because they represent a „dominant system of interrelated informal and formal elements – customs, shared beliefs, conventions, norms and rules – which actors orient their actions to when they pursue their interests“(Nee, 2005: 55).

From this definition related to the interest, it follows that institutional changes do not simply imply a rewrite of formal rules, but essentially require a redirection of interests, norms and powers (Nee, 2005: 55). Formal rules are only part of the institutional framework, but for effective institutional functioning they must be supplemented by informal restrictions (practices, relationships, conventions, rules of conducts) which remaking is much more significant. If formal rules and informal practices are mutually incompatible, the resulting tension will cause political instability (Nee, 2005: 54). What is characteristic for Serbian society is that formal rules have been altered and harmonized with international law, but “tough” informal relationships have, as such, survived in all government structures.

The role of institutions in the creation of individual and collective behaviour, as well as their importance for the construction of a strong state, is particularly reflected in transitional periods from one form of social organization to another. “Actors do not behave or decide as atoms outside the social context” (Granovetter, 1985: 487), rather the behaviour and positions of political actors are shaped and conditioned by the institutional contexts in which they work (Bell, 2018: 1). The influence of institutions transcends actors as individuals, but it does not have such strong political influence as wider structural factors - for example, the impact of classes, changes in the domestic or international economy, etc. Compared to these macro structures, the impact of institutions is not negligible, if we accept that they play a significant role in shaping and mediating between actors on the macro and micro plan (Bell, 2018: 3).

1.3. Concept and elements of the state

In the most definitions about the state, three basic elements are mentioned – territory, population and government. The last element, government or state power, in the form that is most common today – divided into legislative, executive and judicial power, was created with an aim of preventing possible abuses and limiting power concentrated in the hands of one state body. In the most modern states, the principle of unity of power is abandoned in favour of the principle of the separation of powers. This principle can not completely excluded abuse of power in advance, but can, however, reduce it to a minimum by the relative separation of the branches of government (Mitrović, 2010: 110-141). The separation of powers – where the laws are passed by one power, the second branch of power is responsible for their implementation, and eventual disputes in concrete cases are resolved by a third judicial authority, independent of the first two, is one of the pillars of rule of law.

Regarding contemporary theories about the state, Jessop (2016) added the fourth element „common interest or general will“without the state system can not exist. This element is a crucial distinction between the state and political control or violent repression (Jessop, 2016: 49). When we are discussing about the contemporary understanding of the rule of law, we can differentiate the *formal concept* where the law equally obliges all citizens and where „compliance with the law is the first virtue of a judge“, from the rule of law in a *material sense* in which democracy obtains its full expression protecting citizens as subjects of rights and obligations (Mitrović, 2010: 235).

In order to maintain the legal order it is necessary to fulfil three types of conditions: a) social, b) state–organizational and c) legal conditions. First of all, it is necessary to achieve at least the relative stability and homogeneity of the society, as well as social peace and order. Citizens’ legal awareness should be built in order to create a positive attitude about law (legal culture). Second but not less important – a modern state can not exist without democracy in modern sense and technical and political separation of power. Finally, legal regulations need to be clear, precise and comprehensible. Their aim should be protection of basic human rights and freedoms and their content must not offend human dignity. It is necessary to provide legal work of the administration and judicial control of administrative acts (Mitrović, 2010: 236–238).

2. INDEPENDENCE OF THE JUDICIARY

As Tom Ginsburg (2010) once said “judicial independence has become like freedom: everyone wants it, but no one knows quite what it looks like, and it is easiest to observe in its absence”. (Ginsburg, 2010: 2). So what does it mean to be an independent judge within an independent judiciary? On this, often asked question, many authors tried to give an answer, so we will single out some of the definitions.

2.1. Definition of independence

For some theorists, the independence of the judiciary is the capacity and willingness of the courts to decide cases according the law, regardless of the stands of the other government actors (Ginsburg, 2010: 3). Other authors point out that independence is an autonomy that “implies that a judge is independent in the extent that the decisions he makes reflects his evaluation of legal factors, and the whole process is independent of external influences, first of all from the government”. The definition of independence in full opus emphasizes that it is not enough that a judge be only autonomous, but “his decisions are executed, first of all by the current government”. Only in this way the judiciary is treated as the third branch of government. Independent judges are not only autonomous but influential in the sense that their decisions limit the choices and behaviour of other actors (Linzer & Staton, 2015: 225).

Composing national and international European legal standards, Rakić–Vodinielić (2012) has established the formula of “a good judiciary” in which the court and judges are politically independent. The basic elements of this formula are: 1) in legal texts, the judiciary must be defined as an autonomous and independent branch of government, 2) the work of the court and the trial must be primarily in accordance with the constitution, then with the other laws and legal regulations, 3) judge must be institutionally (*de iure*) independent of political actors, but also from the other influential individuals and social groups, 4) personal (*de facto*) independence of judges is reflected in the guarantee of permanence, as well as in the manner of appointment and termination of judicial tenure, where the judicial bodies needs to be responsible for this not executive, 5) decisions need to be made within a reasonable time after a fair and public hearing, 6) impartiality, measured in relation to the parties, needs to be applicable in order to prevent possible conflict of interests, 7) the court, as well as the judge, is obliged to maintain the appearance of independence of the court and 8) the right to a random judge in a particular case must be respected (Rakić–Vodinielić *et al.*, 2012: 19).

2.2. The history of an independent judiciary in Serbia

Observing the last twenty years or the period of the “delayed” transformation, three separate periods are noted by Rakić-Vodinečić (2010): “The age of Milošević’s authoritarianism”, “The demarcation of democratic power” and “New Serbian legalism”. This path did not run linearly, but it had rises and falls (Rakić – Vodinečić, 2010: 17–20).

In the first period, after the Constitution from 1990, executive power arbitrary interpreted the laws and used legal gaps for arbitrary interpretation of regulations. This legal order had an ideological character of the politically monistic legal order of the Socialist Federal Republic of Yugoslavia (SFRY). Judiciary, *de jure* and *de facto* was not independent and autonomous, and the instrumentalisation of the judges for political games significantly derogated the entire judicial profession. Although the waves of professionalization affected the countries of Eastern, South–Eastern and Central Europe, the intention of judges to establish association in Serbia, in this period, has not been supported by the executive power (Gavrilović & Gređelj, 2011: 12). Those judges who opposed to the pressures of executive power were unlawfully resolved.

In the second period, according to the Rakić–Vodinečić (2010), a series of activities that would improve the position of the judiciary, should have happened - the adoption of new laws on judiciary, the establishment of the High Judicial Council, the admission to the Council of Europe, the changed role of the Constitutional Court and the Supreme Court, and finally, formal evidence of termination with the past, the adoption of the Law on Responsibility for Human Rights Violations (Law on Lustration). As the executive power continued to play a dominant role in the adoption of these laws, their content was often changed and supplemented, and their implementation was often delayed (Rakić – Vodinečić, 2010: 17–35).

During the third period, Ministry of Justice and other representatives of the relevant European institutions in Serbia strongly propagated the necessity of respecting legal norms and procedures. This idea was, in fact, only the appearance of judicial reforms, because the passed laws were never really applied. This refers to the Law on High Judicial Council, which was supposed to achieve the independence of the judiciary from the other two branches of government, but in fact, the composition of this body was controversial, the work was non-transparent, and against their decisions an administrative dispute could not be led to (Rakić–Vodinečić, 2010: 29–35).

2.3. Institutional independence (*de iure*)

This dimension of independence primarily relates to constitutional and legal provisions which aim is strengthening the autonomy of the judiciary by isolating the judiciary from other actors and in this way reducing the potential impacts of them. Clearly defined norms inform the public, government institutions and other interested actors about the consequences of possible threats to the judiciary. In this way, the independence of the judiciary increases, as well as the likelihood that other actors, in the event of a threat to the independence of the judiciary, will cooperate in his protection. This possibility is increased, because the Constitution guarantee of judicial independence has credibility. These provisions will be even more effective in states where exists a checks and balances system between institutions or where there is public support to the courts (Melton & Ginsburg, 2014: 192).

On the other hand, when the Constitution protects judicial independence, it increases its autonomy, but it creates the possibility, for the other two branches of government, of using any gaps in the regulations on institutional independence. In order to be an independent, the judiciary is isolated from the other two branches of government and this creates space for possible influences. The situation is completely opposite when the Constitution increases the powers of executive and legislative branch, because in this way they can strengthen and co-operate (Melton & Ginsburg, 2014: 193).

Melton and Ginsburg (2014) pointed out six ways in which the Constitution, as the supreme law, can enhance the independence of the judiciary (Melton & Ginsburg, 2014: 195–196). First of all, the independence and autonomy of the judiciary in relation to the other two branches of government, needs to be explicitly stated in the text of the Constitution. This regulation should have an „axiomatic character“in contemporary democratic states (Protić, 2018). In the second place, duration of the judicial tenure needs to be longer than that of those who appointed the judge. It is essential that the judge be elected for life time, because only in this way the judge can be independent from the possible pressures from the people who apointed him. In third place, some of the judicial bodies needs to be involved in the appointment process. The fourth way of achieving independence is related to the removal procedure and the actors who can propose the revomal of a judge. If a judge can not be removed, the judiciary will have a higher level of independence. The Constitution also needs to define the special removal conditions, as the fifth guarantee of an independent judiciary. In the end, the salary of the judges, as a form of material independence, needs to be protected from the reduction (Melton & Ginsburg, 2014: 195–196).

In the next section, we will demonstrate that the current Serbian Constitution and laws on judiciary, have gaps which enabled the influence of the other branches of government and different individual actors. All six aspects of independence are very controversial in the domestic legal analysis because they narrow the opus of the judicial independence.

3. LEGAL FRAMEWORK FOR JUDICIAL INDEPENDENCE

The work and functioning of the judicial institutions in our country is regulated by supreme law - the Constitution of the Republic of Serbia, as well as by the Law on Judges, the Law on the Organization of the Courts, the Law on the High Judicial Council, the Law on Public Prosecution, the Law on the State Prosecution Council, The Law on Seats and Territories of Courts and Public Prosecutions and the Law on the Judicial Academy. Judicial independence issues are further elaborated by the National Judicial Reform Strategy for the period 2013–2018 and the provisions of Chapter 23 „Judiciary and fundamental Rights” within the Accession Treaty of the Republic of Serbia to the EU. The institutions in charge for judicial reform are primarily the Parliament, the Government and the Ministry of Justice. Within the judicial authorities, these are the Supreme Court of Cassation and other courts, as well as the Republic Public Prosecution, the High Judicial Council, the State Council of Prosecutors and the Judicial Academy.

3.1. *Laws on judicial independence*

The existing *Constitution of the Republic of Serbia*³ in the article 4 proclaims the separation of powers into executive, judicial and legislative. The right to pass the laws belongs to the Parliament, while the Government is in charge for the adoption of the regulations and the Judiciary have the power to adjudicate in disputes. The main purpose of the separation of powers is, among other things, the protection of the basic rights and freedoms of citizens from their possible violation by the authorities themselves. Therefore, the relationship of the three branches of power is based on balance and mutual control, while the judiciary is being independent.

³ Constitution of the Republic of Serbia, *Službeni Glasnik RS*, no. 98/2006, <http://www.ustavni.sud.rs/page/view/139-100028/ustav-republike-srbije>, 12. August 2018.

The *Law on Judges*⁴ in the article 1 proclaims that a judge is „independent in the decision – making process" and that he has to „decide on the basis of the Constitution, laws and other regulations, ratified international treaties, generally accepted rules of international law“. In the article 4, this Law guarantees the material independence of the judge, as „a right to a salary in accordance with the dignity of the judicial function and his responsibility“. This provision has an aim to provide security for both – the judge and his family. This is of particular importance because the material security of the judges is not only an economic issue, but as well a guarantee of independence. Another aspect of the personal independence of judges is the right to associate and create professional associations “in order to protect their interests, preserve independence and autonomy in their work”. The last, but not the least, is the mutual independence of judges – “a judge is free in representing his understanding, establishing facts and applying the law, in every case he decides” and a judge “is not obliged to explain to anyone, even other judges or president of the court, their legal views and the established facts, except in the verdict or when the law specifically requires it”.

*The Law on the Organization of Courts*⁵ prescribes that courts are independent and autonomous state bodies that protect the freedoms and rights of the citizens as well as “legally regulated rights and interests of the legal entities and ensure constitutionality and legality”. “The judicial power belongs to the courts” and as such is independent of the legislative and executive authorities. With the same objective, the article 6 prescribes the prohibition of any influence on the court and any public appearance that could affect the course and the outcome of the court proceedings. The prescribed independence and autonomy of the court as an institution is a prerequisite for the independence of the judges as holders of judicial power. Otherwise, although proclaimed by the law, *de jure* independence of the judiciary would be in conflict with the actual situation.

⁴ Law on Judges, *Službeni Glasnik RS*, no. 116/2008, 58/2009 – odluka US, 104/2009, 101/2010, 8/2012 – odluka US, 121/2012, 124/2012 – odluka US, 101/2013, 111/2014 – odluka US, 117/2014, 40/2015 i 63/2015 – odluka US, 106/2015, 63/2016 - odluka US i 47/2017), https://www.paragraf.rs/propisi/zakon_o_sudijama.html, 12. August 2018.

⁵ The Law on the Organization of Courts, *Službeni Glasnik RS*, no. 116/2008, 104/2009, 101/2010, 31/2011 – dr. zakon, 78/2011 – dr. zakon, 101/2011, 101/2013, 106/2015, 40/2015 – dr. zakon, 13/2016, 108/2016, 113/2017 i 65/2018 – odluka US), https://www.paragraf.rs/propisi/zakon_o_uredjenju_sudova.html, 09. September 2018.

*The Law on the High Judicial Council*⁶ formed the body, with the same name, whose basic task is to secure and guarantee the independence and the autonomy of the courts and judges. In order to carry out this task, each member of the High Judicial Council (HJC) enjoys immunity as a judge. This means that a member of the HJC can not be held responsible for expressing an opinion or voting in the decision-making process. In addition, a member of the HJC may not be devoid of liberty in the proceeding of the act initiated because of the criminal offense which was committed during one's exercise of his functions as a member of the Council, without the approval of the HJC. The HJC, among other things, appoints judges for life time tenure, adopts the Code of Ethics, determines the number of judges and the number of jury judges for each court etc. Prescribing such strong guarantees for judges, the HJC, along with the Constitution of the Republic of Serbia, can be called the guardian of the judiciary independence.

*National Strategy for Judicial Reform for the period 2013–2018*⁷ sets out five basic principles of the judiciary reform: independence, impartiality and quality of justice, expertise, accountability and efficiency. The independence of the judicial system implies that judicial institutions and bearers of judicial functions are free of any “undue/unacceptable influence and pressure that would interfere with the exercise of justice, regardless of their source”.

3.2. Normative endangerment of judicial independence

Although the general goal – an independent judiciary, is institutionalized in the contemporary Serbian legislation, it is difficult to get rid of the impression that it is in some way Serbia is an “unfinished state” (Dimitrijević, 2003). Like all other institutions that are funded from the state, the Judiciary need to justify the amount of *the budget* they need, so the Ministry of Justice can approve the requested amount. On the other hand, their appointment and functioning rules are based on formal legislation, which was passed by the legislative power. The paradox is more than obvious - judges must remain and be an independent (although they are not actually) in a situation where their appointment depends on the will of the Parliament, and their salary from the Government (Langbroek *et al.*, 2017: 297).

⁶ The Law on the High Judicial Council, *Službeni Glasnik RS*, no. 116/2008, 101/2010, 88/2011 i 106/2015, <https://vss.sud.rs/sites/default/files/attachments/Zakon%20o%20Visokom%20savetu%20sudstva%2001.01.2016.pdf>, 11. September 2018.

⁷ National Strategy for Judicial Reform for the period 2013–2018., *Službeni Glasnik RS*, no. 57/2013, 17, <https://www.vk.sud.rs/sites/default/files/attachments/Nacionalna%20strategija%20reforme%20pravosu%C4%91a%202013-2018..pdf>, 27. August 2018.

As one of the most controversial solutions, is *the first appointment of the judges*. This first appointment of a judge, for a trial period of three years, is done on the proposal of the High Judicial Council, but the final decision is given by the Parliament. Before starting the tenure, the judge takes an oath to the president of the Parliament. If, after the expiration of a three-year probationary term, a judge is assessed with the grade “very successful in performing a judicial function”, he must be *appointed permanently*, that is, his mandate lasts for life. For the life time tenure, the final word is given by the highest judicial authority, the High Judicial Council.⁸

The appointment of the president of the court, which is again done on the proposal of the High Judicial Council, but the Parliament actually decides on this, is very disputable. The president of the court is being elected for a term of four years, with the possibility of being elected once again in the same court. What additionally undermines the independent position of the presidents of the courts is that the decision on his removal brings the Parliament.⁹

Regarding *the material position* of the judges, in the previous as well as in the current Constitution, there are no special guarantees on adequate working environment and the amount of judges’ salaries. The obligation of legislative and executive powers to ensure a better material position of the judges is also not prescribed. Unlike domestic regulations, international regulations require that judges need to have a salary that corresponds to dignity, importance of the position and the burden of responsibility. The amount of the salary should be at a sufficient level to protect the judge from possible pressures (Protić, 2018).

CONCLUSION REMARKS

In spite of the fact that the principle of the separation of powers is proclaimed, with an aim to make balance and the control among the three branches of government, it seems that the Serbian political system is only formally based on this maxim. It is truly difficult to establish an independent judiciary, when current laws and regulations create an atmosphere of judicial dependence on legislative and executive authorities. The weakened structures and institutions, which are the characteristic of all countries in the transformation, have made the lack of independence in the Serbian judiciary.

⁸ Law on Judges, articles 47–52.

⁹ Law on Judges, articles 69–77.

This is especially evident in the fact that various social groups, primarily politicians through the Parliament influence on the appointment process of the judges; through the Ministry of Justice, the Government approves the budget and neither of these two branches of government is working to improve the material position of the judges. All of the above mentioned is a result of porous institutional structures and the lack of financial independence of judges.

We have to ask ourselves – is it possible to achieve an ideally independent judiciary in which every form of compromising independence is completely absent? Unfortunately, the experience teaches us that even democratically developed countries have not created a perfect system, because democracy is not the only condition for judicial independence. Certainly the level of independence will be higher in democratic than in authoritarian states, but the judge as an individual must be prepared for various types of influences. In Serbia, where democracy is “flawed and semi-consolidated” (Stojiljković, 2011: 83) gaps in normative solutions further undermine the institutional independence that is already violated.

References

- Aristotel. (2013). *Nikomahova etika*, preveo R. Šalabalić, Sremski Karlovci – Novi Sad: Izdavačka knjižnica Zoran Stojanović.
- Bell, S. (2018). Institutionalism: Old and New. Downloaded 18. September 2018., <https://espace.library.uq.edu.au/view/UQ:9699/Institutionalism.pdf>.
- Dallara, C. (2014). *Democracy and Judicial Reforms in South-East Europe - Between the EU and the Legacies of the Past*. Switzerland: Springer.
- Dimitrijević, N. (2003). Nedovršena država. *Reč*, 69, 5-20.
- Dimitrijević, N. (2018). Kako iz bezdržavlja?. *Republika XV/2003*. Downloaded 25. August 2018. <http://www.republika.co.rs/314-315/25.html>.
- Gavrilović, Z., Gredelj, S. (2011). *Profesija između korupcije i integriteta*. Beograd: Biro za društvena istraživanja, Fond za otvoreno društvo, Srbija.
- Ginsburg, T. (2010). Judicial Independence in East Asia: Implications for China. *University of Chicago Public Law & Legal Theory*, 295, 1-18.
- Granovetter, M. (1985). Economic Action and Social Structure: The Problem of Embeddedness. *American Journal of Sociology*, 3, 481–510.
- Jessop, B. (2016). *The State – Past, Present, Future*. Cambridge: Polity Press.
- Lazić, M., Cvejić, S. (2004). Promene društvene strukture u Srbiji: Slučaj blokiranе post-socijalističke transformacije. In: Anđelka Milić (ed.). *Društvena transformacija i strategije društvenih grupa: svakodnevica Srbije na početku trećeg milenijuma* (39–70). Beograd: Institut za sociološka istraživanja Filozofskog fakulteta.

- Linzer, D. A., Staton, J. K. (2015). A Global Measure of Judicial Independence 1948–2012. *Journal of Law and Courts*, 2, 223–256.
- Melton, J., Ginsburg, T. (2014). Does *De Jure* Judicial Independence Really Matter? - A Reevaluation of Explanations for Judicial Independence. *Coase-Sandor Institute for Law & Economics*, 612, 187-217.
- Mićunović, D. (2011). Dometi tranzicije od socijalizma ka kapitalizmu. In: Srećko Mihailović (ed.). *Dometi tranzicije – od socijalizma ka kapitalizmu* (15–22). Beograd: Friedrich Ebert Stiftung.
- Mitrović, M. M. (2010). Razaranje društva i nove srpske elite. *Nacionalni interes*, 3, 147–170.
- Mitrović, D. M. (2010). *Teorija države i prava*. Beograd: Dosije.
- Nee, V. (2005). The New Institutionalisms in Economics and Sociology. In: Neil J. Smelser, Richard Swedberg (eds.). *The Handbook of Economic Sociology* (49–74). Princeton: Princeton University Press.
- Protić, D. (2018). *Pravni položaj sudija prema novom Ustavu Srbije – nedopustiva neizvesnost*. Pravda u tranziciji. Downloaded 17. September 2018., http://www.tuzilastvorz.org.rs/pravda_u_tranziciji/SRP/SRP08/1560.pdf.
- Philip M. Langbroek *et al.* (2017). Performance management of courts and judges: organizational and professional learning versus political accountabilities. In: Francesco Contini (ed.). *Handle with care: assessing and designing methods for evaluation and development of the quality of justice*. Bologna: IRSIG-CNR.
- Rakić–Vodineć, V., Knežević–Bojović, A., Reljanović, M. (2012). *Reforma pravosuđa u Srbiji 2008–2012*. Beograd: Pravni fakultet Univerziteta Union, Službeni glasnik.
- Rakić–Vodineć, V. (2018). Kojim putem ka vladavini zakona – Anatomija razaranja treće državne vlasti u Srbiji. *Hereticus – časopis za preispitivanje prošlosti* 2010. Downloaded 18. September 2018., <http://media.hereticus.org/2015/01/Anatomija-razaranja-tre%C4%87e-dr%C5%BEavne-vlasti-u-Srbiji.pdf>.
- Stojiljković, Z. (2011). Demokratija pod upitnikom. In: Srećko Mihailović (ed.). *Dometi tranzicije – od socijalizma ka kapitalizmu* (81–100). Beograd: Friedrich Ebert Stiftung.
- Steinmo, S. (2008). Historical institutionalism. In: Donatella Della Porta, Michael Keating (eds.). *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective* (118–138). Cambridge: Cambridge University Press.

Sources

- Law on Judges, *Službeni Glasnik RS*, no. 116/2008, 58/2009 – odluka US, 104/2009, 101/2010, 8/2012 – odluka US, 121/2012, 124/2012 – odluka US, 101/2013, 111/2014 – odluka US, 117/2014, 40/2015 i 63/2015 – odluka US, 106/2015, 63/2016 - odluka US i 47/2017). Downloaded 12. August 2018. https://www.paragraf.rs/propisi/zakon_o_sudijama.html.
- Law on the Organization of Courts, *Službeni Glasnik RS*, no. 116/2008, 104/2009, 101/2010, 31/2011 – dr. zakon, 78/2011 – dr. zakon, 101/2011, 101/2013, 106/2015, 40/2015 – dr.

- zakon, 13/2016, 108/2016, 113/2017 i 65/2018 – odluka US). Downloaded 09. September 2018. https://www.paragraf.rs/propisi/zakon_o_uredjenju_sudova.html.
- Law on the High Judicial Council, *Službeni Glasnik RS*, no. 116/2008, 101/2010, 88/2011 i 106/2015. Downloaded 11. September 2018. <https://vss.sud.rs/sites/default/files/attachments/Zakon%20o%20Visokom%20sa%20vetu%20sudstva%2001.01.2016..pdf>.
- National Strategy for Judicial Reform for the period 2013–2018, *Službeni Glasnik RS*, br. 57/2013. Downloaded 27. August 2018. <https://www.vk.sud.rs/sites/default/files/attachments/Nacionalna%20strategija%20reforme%20pravosu%C4%91a%202013-2018..pdf>.
- Constitution of the Republic of Serbia, *Službeni Glasnik RS*, br. 98/2006. Downloaded 12. August 2018. https://www.paragraf.rs/propisi/ustav_republike_srbije.html.

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DOMESTIC VIOLENCE – THE MOST IMPORTANT NOVELTIES OF THE LAW ON PREVENTION OF DOMESTIC VIOLENCE AND SOME CRIMINAL LAW ASPECTS¹

With the adoption of the Law on the Prevention of Domestic Violence, the legal protection from domestic violence has been improved in the Republic of Serbia, which clearly shows the strong intention of the state to effectively combat this widely represented social problem. In this way, the significance of the preventive action of the competent state authorities is even more emphasized, and consequently, zero tolerance towards the perpetrators and potential perpetrators of domestic violence has been introduced. The Law on the Prevention of Domestic Violence started to be applied on June 1, 2017, and taking into consideration previous period of application, there are some specific arguable issues that need to be answered properly. That having been said, the subject of the research in this paper is focused on the critical analysis of certain provisions of the Law on Prevention of Domestic Violence, and beside general considerations of the mentioned law, particular attention will be paid to the criminal justice aspect of Domestic Violence as well as to certain procedural aspects related to, above all, police activity in accordance with the relevant legal provisions. Certain issues and problems that have arisen so far in practical application will be pointed out and in the end we will provide certain proposals de lege ferenda in order to improve the current legal solutions and improve the efficiency of the actions of the competent state authorities in case of preventive protection against violence in the family.

Keywords: *Law on Prevention of Domestic Violence, domestic violence, competent police officer, emergency measures.*

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INTRODUCTORY CONSIDERATION

Domestic violence is a phenomenon that draws public attention from day to day and as such must be specifically analysed and observed from the aspect of several different scientific disciplines. In the past the problem of domestic violence was tackled in different ways in accordance to the degree of the development of society and the state's activities, but it should be noted that for a long time domestic violence was not considered a problem and many did not even know it existed, because the prevailing dominant opinion at the time was that all that happens within the family is private matter and defined in that way domestic violence did not represent a dangerous activity for the society. In this respect, it is often concluded that in domestic violence there is a very high numbers that cannot be seen, and for that reason the state takes appropriate measures to reduce these numbers and raise the efficiency of detection and prevention of domestic violence to a higher level. As part of the numerous measures, the adoption of the Law on the Prevention of Domestic Violence ("Official Gazette of the Republic of Serbia", No. 94/2016) has been one of the most important measures of the state recently.

When it comes to legal protection against domestic violence, criminal law protection, legal protection in misdemeanour matters (Law on Public Peace and Order) and family act protection (Kolarić, & Marković, 2016: 5) are of great importance. Speaking about criminal law protection, it should be emphasized that the criminal offense of Domestic Violence was singled out for the first time as a specific criminal offense at the beginning of this century, in 2002, by corresponding amendments and supplements to the prevailing criminal legislation ("Official Gazette of the Republic of Serbia", No. 10/2002) when the Article 118a was added - Domestic Violence. By adopting the 2005 Criminal Code (Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005 – corr. 107/2005 – corr. 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016), the criminal offense of Domestic Violence is stipulated in Art. 194 in Chapter XIX, in a group of offenses against marriage and family. Beside the criminal law protection, legal protection in misdemeanour matters against violence in family is also present, and on that occasion is of special importance the Law on Public Peace and Order ("Official Gazette of the Republic of Serbia", No. 6/2016 and 24/2018) whose provisions define the concept of violation against public order and peace and public place is precisely defined, as well as that offenses under this law can be committed only in a public place. Finally, it is of great importance also the family act protection against domestic violence. In 2005, the Family Law was passed in Serbia ("Official Gazette of the Republic of Serbia", No. 18/2005, 72/2011 - Law, 6/2015), which also regulated

domestic violence for the first time. The provision of protection and the provisions of family law is of particular importance because it enables more efficient and faster protection of the victim, since the procedure is shorter and the measures are designed to stop and prevent further violence (Kovaček - Stanić, 2011: 44).

Beside criminal law protection, legal protection in misdemeanour matters and family act protection against domestic violence, it should be pointed out that the Republic of Serbia is in the process of implementing the provisions of the Convention on the Elimination of All Forms of Discrimination against Women ("Official Gazette of SFRY" - International Treaties, No. 11/81, "Official Gazette Republic of Serbia - International Agreements ", No. 5/2014), adopted other important laws in this area,² and in particular it should be emphasized that in 2013 it also ratified one of the most important international documents in this field, the so-called Istanbul Convention - Council of Europe Convention on the Prevention and Combating Violence against Women and Domestic Violence ("Official Gazette of the Republic of Serbia - International Agreements", No. 12/2013, 4/2014).

CRIMINAL LAW ASPECT OF DOMESTIC VIOLENCE

The criminal offense of domestic violence is classified into a group of criminal offenses against marriage and family (Article 194 of the Criminal Code of Serbia). This is a complex criminal offense and many arguable issues are connected with it. We will try to contribute to resolving these issues.

There is a question of justification of the existence of domestic violence as the criminal offense in our criminal legislation, because all forms of action for committing this crime were incriminated before its adoption in 2002. By introducing this criminal offense, the legislature wanted to "emphasize its significance and to certain extent modify the criminal policy in relation to these criminal offenses, and in this way provide enhanced criminal protection in this area" (Đorđević, 2007: 56). We consider that it is justified to have domestic violence as incrimination in criminal legislation. It is true that some countries do not have in their legislation this crime as a criminal offense. However, those are countries that successfully combat domestic violence by processing offenders

² Law on the Prohibition of Discrimination ("Official Gazette of the Republic of Serbia", No. 22/2009), Law on Gender Equality ("Official Gazette of the Republic of Serbia", No. 104/2009), National Strategy for Improving the Position of Women and Promoting Gender Equality ("Official Gazette RS No. 15/2009), National Strategy for Prevention and Elimination of Violence against Women in the Family and in Intimate Partner Relationships ("Official Gazette of the Republic of Serbia", No. 27/2011).

for standard, usual crimes. In our country the problem of domestic violence has not been solved by the adequate response of the state for decades, which justifies the introduction of a special criminal offense.

From the legal description of the criminal offense it can be concluded that the object and passive subject of this criminal offense is a family member. The term "family member" is defined in Article 112, paragraph 28 of the Criminal Code: " A family member shall mean spouses, their children, spouses' progenitors in the direct line, common law partners and their children, adoptive parents and adopted children, foster parents and foster children. A family member shall also mean siblings, their spouses and children, former spouses, their children and parents of the former spouses if they live in the same household, as well as persons who have a child together or who have conceived a child even though they have never lived together in the same household." The question that arises is whether the term "family member" is determined by this provision in a purposeful manner.

We think that the term of a "family member" in a criminal code is not determined and defined in an appropriate manner. It is indisputable that family members are spouses and their children, but it is unclear why the legislator, while naming the family members, omitted the grandchildren and their offspring and descendants, because of the fact that these persons relatively often live together with other family members in the same household. In theory it is pointed out that the term of "family member" in the criminal law should include stepchildren and their descendants who live in a common household with their stepfather or stepmother (Đorđević, 2007: 56). We think that this opinion should be accepted, because although the stepfather or stepmother are not biological parents, it cannot be said that these persons often live together in one household and that the stepfather or stepmother have role of parents. To support this, we emphasize that the rights and duties of stepfathers and stepmothers as family members are regulated by the provisions of the Family Act. Article 159 of the Family Act stipulates that "Minor stepchild shall have the right to support from stepmother or stepfather." Therefore, we do not see the reason that the stepfather and stepmother are not considered members of the family in the sense of criminal process. It is clear that these persons can commit domestic violence, but they cannot be prosecuted for the crime of domestic violence, as they are not explicitly named as family members by Article 112, paragraph 28 of the Criminal Code.

Besides that, according to the above-mentioned provision of the Criminal Code, the partners live in common-law marriage and their children are also considered to be

members of the family, but it is unclear why the ancestors of common-law partners in the direct line of blood relatives and descendants of the children of common-law partners are not considered as members of the family, regardless of the circumstances and the fact if they live in a common household or not. This having been said, our opinion is that by amendments to the Criminal Code the term "family member" should be extended. An alternative solution is that courts use the analogy and in that way consider as a family member persons who are not listed in Article 112, paragraph 28 of the Criminal Code, if it is the case that these persons live in a common household.

The criminal act of domestic violence can be carried out by undertaking four alternatively named acts of committing: by use of violence, threat of attacks against life or body, insolent or ruthless behaviour. The act of committing violence has not been determined in a clear and precise manner, which is why in theory and practice there are different opinions about what is meant by the act of committing this criminal act. The term of violence is not defined in our criminal legislation, and in relation to domestic violence, it is not clear whether the use of violence implies the exclusive use of force against a family member or whether a wider interpretation of violence involving psychological, economic and sexual violence should be accepted. In one opinion, psychological violence is "any act that can cause psychological suffering, provoke a sense of fear, personal vulnerability or endangered dignity, then insults, attacks or using offending names, as well as other forms of violent intimidation, repetitive behaviours and aim to humiliate the victim; unlawfully restricting the freedom of movement of the victim and influence the victims in that way that they begin to fear for their emotional well-being" (Ilić, 2014: 384). We believe that this is a too broad understanding of the concept of violence, i.e. that the concept of violence should be understood only as the use of force (physical force). This does not mean that for example, insulting family members or economic violence are not criminally relevant in terms of committing domestic violence to some extent. Under certain conditions the mentioned actions may be qualified as some other alternative action for committing this criminal offense (insolent or ruthless behaviour). On the other hand, one should accept the understanding that emotional violence does not deserve to be criminal process, because the prosecution of perpetrators for emotional violence would be contrary to the principle of legality (Vuković, 2012: 130). However, this understanding is not universally accepted in the theory of criminal law. Some authors consider that a perpetrator who engages in emotional and spiritual violence against a family member needs to be prosecuted for family violence. According to this opinion, emotional violence is "a prolonged and continuous failure to express love and attention, the rejection, or neglecting of the

emotional needs of a family member or family community" (Jovanović, 2010: 174). Despite the fact that emotional violence is a negative social phenomenon, we consider that criminal law is not a means which can solve all social problems, but a means that should be used if the fundamental legal assets of our society are violated or endangered.

It is arguable when the offense is considered to be committed - is it sufficient to be committed only once or is it necessary that the perpetrator, by repeated committing of the offense, cause the condition in which the victim's is in a permanent state of endangerment. In this respect, there is no single point of view of the case-law (Simić, 2015: 527-528). According to the Appellate Court in Belgrade: "endangering the tranquillity, physical integrity or mental condition of a member of his family is a permanent consequence, and not just an incident in a family conflict" (Judgment of the Appellate Court in Belgrade, K. 1497/12). We think that the position of the court on this problem can be accepted, if we start from the ground that the protected object of this criminal act is the family (Milošević, 2012: 89). Consequently, if the family functions normally, an incident is not sufficient to claim that a criminal offense of domestic violence has been committed. This means that the injured party can be protected by accusing the perpetrator of another criminal offense (slight bodily injury, serious bodily injury, etc.). However, from the legal description of this offense, it follows that the protected object is not a family, but a family member, although domestic violence is classified into a group of crimes against marriage and family (Škulić, 2012: 72). If we accept this explanation, then one committed act is enough to consider it as a domestic violence. This is the point of view in the judgment of the Supreme Court of Cassation: "Domestic violence implies any behaviour that deviates from the standard of normal behaviour and communication with family members, for which, in order to be qualified as domestic violence, a certain continuity (the durability and the multiplicity of such a behaviour) is not necessary, but , in certain situations, only one act of behaviour that has the character of domestic violence is sufficient "(Supreme Court of Cassation, Rev. 2844/10).

We think that in order to commit this criminal offense, the perpetrator has to behave like this on several occasions, because the legislator used a permanent verb ("endangering", not "endanger") in defining the consequences of the offense. Consequently, if the consequence is a permanent state, it is clear that it cannot be caused by the committing the act only once. The exception can be extreme cases in which permanent state can be caused by committing only one action. For example, the perpetrator takes a knife and threatens to kill a minor child - this has lasting consequences in terms of endangering tranquillity, physical integrity and the mental state of his family members. To support

this view, we point out that it is not only an individual as a family member that is a protected object of this criminal offense. A protected object is also the family, because any act that endangers the tranquillity, physical integrity or mental condition of a member of his family, indirectly endangers the whole family. Finally, in the continuous committing of these and similar acts, the particularity of domestic violence in relation to other similar crimes involving violence and the particular social danger of this offense can be seen (Jovanović, 2010: 172).

Insolent or ruthless behaviour as forms of the acts in committing this criminal offense, are vague terms that are difficult to distinguish. According to the position of court practice, insolent or ruthless behaviour is "behaviour that deviates significantly from the adopted norms of decent behaviour, as well as violent action in respect of things and property in general, but in order that such actions may be considered to be insolent and ruthless, they must be expressed in a stronger degree "(Stojanović, & Perić, 2009: 296). Insolent behaviour is the behaviour that roughly and contrary to the usual rules of behaviour disrupts the tranquillity of another person (Simić, & Petrović, 2004: 273). Ruthless behaviour is when one person does something evil or unpleasant to other person that other persons are not obliged to suffer (Đorđević, 2007: 59). It should be accepted that insolent behaviour is unjustifiably covered by this incrimination, because it is a common fact that a criminal law is the ultimate means of reaction. In other words, insolent behaviour, as a rule, does not characterize family relationships; insolent behaviour is "not socially dangerous enough to be incriminated" (Vukovic, 2012: 131).

The consequence of this criminal offense is endangers the tranquillity, physical integrity or mental condition of a member of his family. Relapse is a feeling of physical and psychological security, that is, the absence of harassment (Delić, 2012: 110). Mental condition is another vague term in the legal description of this criminal offense. By grammatical interpretation we come to the conclusion that under the threat for mental state, one can think about the threat of mental peace.

In one opinion, the consequence of this act is both concrete as well as abstract danger (Đorđević, 2007: 59). We think that by accepting abstract danger as a consequence, the criminal justice protection provided by domestic violence is too wide-ranging. This would mean prosecution because of an indirect threat to the tranquillity, physical integrity or mental condition of a member of his family. In addition, endangering is a feature of a criminal offense of domestic violence, which indicates that in the concrete case it is a matter of close and immediate threat. On the other hand, the abstract danger is never a feature of a criminal offense (Stojanović, 2011: 98). We presume that the

consequence of the domestic violence as an offense is particular danger and this prevails in the theory of criminal law (Delić, 2012: 110).

Finally, there is a question of whether the existence of a particular danger/threat as a consequence of the offense should be assessed by taking into account purely objective criteria or the subjective sense of the vulnerability of the injured person should be taken into account. An objective criteria involve taking into account the actions of committing the offense, or assessment whether it is possible to cause endangering as a consequence of the offense (Vuković, 2012: 132). For example, whether the applied force was of such an intensity that it caused the endangering the tranquillity, physical integrity or mental condition of a member of his family. We believe that the personal sense of vulnerability of a family member cannot be relevant to determining the existence of the consequences of this criminal offense, because this would, inter alia, lead to numerous abuses. Also, the personal sense of vulnerability is different for each person. It appears that if we took into account the subjective sense of endangerment then the application of this offense in practice would be extended to cases that do not deserve a criminal law reaction. It may be necessary to consider the possibility of considering the personal sense of endangerment in assessing the existence of the consequences of the offense in relation to particularly sensitive categories of persons (e.g. children).

CRITICAL REVIEW ON CERTAIN PROVISIONS OF THE LAW ON PREVENTION OF DOMESTIC VIOLENCE

The adoption of the Law on the Prevention of Domestic Violence has improved the legal protection against domestic violence in the Republic of Serbia. Namely, in addition to the already existing criminal law protection, legal protection in misdemeanour matters and family law protection, the adoption of this law also established preventive protection against domestic violence, i.e. this law regulates the prevention of domestic violence and the action of state authorities and institutions in preventing domestic violence and providing protection and support to victims of domestic violence. Therefore, the emphasis has been clearly placed on the preventive action of the competent state authorities and institutions, that is, their activity is aimed at preventing domestic violence that may occur in the future.

The aim of this law (Article 2) is designed in three manners: firstly, to enable effective prevention of domestic violence, secondly, to provide urgent, timely and effective protection to victims of domestic violence, and third, to provide urgent, timely and effective support to victims of violence in family. As it can be seen at the core of this

law is the (potential) victim, that is, a person who has suffered domestic violence or who may suffer domestic violence in upcoming period.

Furthermore, the law says what is considered as the prevention of domestic violence, so it is determined that the prevention of domestic violence consists of a set of measures that reveal if there is the immediate threat of domestic violence and the set of measures that are applied when immediate threat is detected (Article 3, paragraph 1). In this sense is defined the term direct threat where it is said that the immediate threat of domestic violence shall exist in case when behaviour of a potential perpetrator and other circumstances indicate that he/she is ready either to commit for the first time or repeat domestic violence (Article 3, par. 2). Such a legal solution is not sufficiently precise and can create many doubts about the practical application because these provisions on the existence of immediate threat of domestic violence "are based on the intention of the perpetrator to commit violence, and it is generally known that the intentions in law are most difficult to prove" (Jugović, 2017: 421). This issue certainly requires a special analysis, and at this point we will just mention that the law does not define the potential perpetrator, who is one of the main subjects which this law applies to. Also, one logical question arises: what is the behaviour of the possible perpetrator and what are the circumstances that would indicate that the possible perpetrator is ready, in the time immediately ahead, to commit domestic violence for the first time? In fact, it would be a person who has never committed domestic violence before, and on the basis of some circumstances we should determine his willingness to commit domestic violence for the first time and, on the basis of such an assessment, impose an emergency measure, such as temporary removal from the apartment. Of course, this can also raise the question of justification of such behaviour, and certainly such legal provisions increase the possibility of misuse and false reporting.

Also, the law defines what is considered as domestic violence in the sense that it is an act of physical, sexual, psychological or economic violence of the perpetrator against a person with whom the perpetrator is either presently or has previously been in a matrimonial relationship or common-law marriage or partnership relation, or with a person he/she is blood-related to in the direct line, or side line up to the second degree or with whom he/she is in an in-law relation up to the second degree or to whom he/she is an adoptive parent, adopted child, foster parent or foster child or with another person with whom he/she is living or has lived in a common household. (Article 3, par. 3). It can be noted that this definition of domestic violence is wider than the definition of family violence under the Family Law, as it also introduces a category of economic violence in accordance with the provisions of the Istanbul Convention.

The provisions of Article 4 define a group of 16 criminal offenses, in addition to the criminal act of domestic violence, to which the provisions of the Law apply for cooperation in the prevention of domestic violence. Also, the circle of criminal acts to which this law applies is not closed because the provision of Article 4, paragraph 1, point 18 also refers to other criminal offenses, if the offense is a consequence of domestic violence, i.e. it can be any criminal offense from the Criminal Code if it is a consequence of domestic violence.³

The provision which refers to the *lex specialis* character of this law is Article 5 of the Law on Prevention of Domestic Violence. Article 5 of the Law on the Prevention of Domestic Violence stipulates "unless otherwise provided by this Law, to prevent domestic violence, in the proceedings against perpetrators of criminal offenses established by this Law, and to provide protection and support to victims of domestic violence and victims of criminal offenses established by this the Criminal Code, the Code of Criminal Procedure, the Civil Procedure Act, the Family Law and the Law on the Police will be applied." This is a key provision that regulates the primary application of this law because the application of other laws is taken into consideration only if the Law on Prevention of Domestic Violence does not otherwise specify and it applies to all cases of domestic violence prevention (there is no legal restriction) in proceedings against perpetrators. In this respect, in every case of the prevention of domestic violence that may occur in the future, this law will be applied for these offenses. It is completely irrelevant what indicates the immediate threat of domestic violence, whether it is a criminal offense, misdemeanour or any other event.

Also, the justification for the primary application of the Law on the Prevention of Domestic Violence in relation to the Criminal Procedure Code is in the following arguments. The preventive function of the law stems from the general goal of the law, which is, among other things, the prevention of domestic violence that can happen in the future! As it has already been mentioned, in Article 3, the Law on the Prevention of Domestic Violence states that the prevention of domestic violence shall comprise a set of measures identifying the immediate threat of domestic violence and a set of measures to be applied in case of an identified immediate threat. Furthermore, the immediate threat of domestic violence exists when the behaviour of a possible perpetrator and other circumstances arises that he is ready, in the immediate upcoming period, either to commit for the first time or repeat domestic violence. It can be seen that it is not stated if this behaviour (of a possible perpetrator) and if these other circumstances are related

³ For a detailed analysis of this question, see: Kolaric, D., Markovic, S. (2016). p. 26-28.

to a criminal offense or not - it is only important to identify immediate threat of domestic violence. Consequently, it is possible that his behaviour is also related to a criminal offense that indicates more clearly the immediate threat of domestic violence that can be repeated in the immediate upcoming period. Therefore, the preventive function is reflected in the protection against domestic violence that may only follow, and the behaviour beforehand should provide a quality assessment. Acting under the CPC is related to something that happened, for a committed criminal offense, and treatment of the Law on the Prevention of domestic Violence for something that might happen. Also, this provision of the Law clearly indicates that it is possible that a person in question is someone who is ready to repeat domestic violence, but there is no mention of whether he had previously committed domestic violence as a criminal offense, which means all forms of domestic violence. Thus, the prevention of domestic violence implies the application of a set of measures (emergency measures) that apply when immediate threat is detected and it is not mentioned that there will not be any action if it is a criminal offense, even more so. It is possible that the legislator's intention was to enable state authorities to initiate a mechanism in cases of low intensity violence, when there is no reasonable doubt that a criminal offense has been committed, but such intent of the legislator is not adequately elaborated in the legal provisions.

The provisions of the Law regulating the procedure for the prevention of domestic violence are particularly important (Articles 12-23). This section regulates issues related to the reporting and identifying domestic violence, the actions of the competent police officers, taking into account, in particular, powers related to the detention of a possible perpetrator in the organizational unit of the police, risk assessment, issuing urgent measures to a possible perpetrator (the temporary removal of the perpetrator from the apartment and a temporary ban on the perpetrator to contact and approach the victim of the violence), the actions of the competent public prosecutor and the court. A significant part of the law is dedicated to the cooperation of state authority bodies and institutions in the prevention of domestic violence, as well as the protection and support of victims of domestic violence and victims of criminal offenses stipulated by this law.

By passing this law, the police got significant powers, primarily refer to the power to issue an order imposing two urgent measures which could consist of temporary removal of the perpetrator from the apartment as well as the measure of temporary prohibition to contact or approach the victim. The police have autonomous jurisdiction over this issue, i.e. acts *ex officio* and does not need the consent of the public prosecutor or the court. Even more so, if the competent police officer does not impose an emergency measure,

the public prosecutor cannot pronounce it himself, nor instead of certain police officer, nor afterwards.

A subject of great importance in the implementation of the Law on the Prevention of Domestic Violence is the competent police officer who is solely authorized to act in accordance with the provisions of this Law. A competent police officer is one who has completed specialized training so that he can act in accordance with the provisions of this law. In this respect, treatment of a possible perpetrator of domestic violence is possible only by the competent police officer so he is obliged to give the possible perpetrator an opportunity to declare on all relevant facts, collect the necessary information from other police officers, immediately assess the risk of immediate threat of domestic violence and, under the conditions laid down by law, impose an emergency measure to prevent domestic violence (Article 15, paragraph 1). If, after assessing the risk, there is an immediate threat of domestic violence, the competent police officer issues an order ordering the perpetrator to be brought to the organizational unit of the police, and emergency measures are measures of temporary removal of the perpetrator from the apartment as well as the measure of temporary prohibition to contact or approach the victim. It should be noted that by issuing such an order both emergency measures can be imposed and that such a situation often happens in practice, with the fact that the urgent measure imposed by the competent police officer lasts 48 hours after the delivery of the order.

The Basic Public Prosecutor examines the notifications and evaluates the risk assessment of the competent police officer. If, after that, he learns that there is immediate threat of domestic violence, he is obliged to submit a motion to the court to extend the emergency measure, within 24 hours from the time of delivery of the order of the person to whom the emergency measure was imposed on (Article 18). The motion to extend the emergency measure shall be submitted to the basic court on whose territory is the place of permanent residence, or residence of the victim, and the judge shall decide on the proposal. It is interesting to point out that the ruling decision on the proposal is passed without holding a hearing, within 24 hours upon the delivery of the proposal that the emergency measure shall be extended and the court can extend the emergency measure for another 30 days.

CONCLUDING CONSIDERATIONS

The adoption of the Law on the Prevention of Domestic Violence has introduced preventive protection against domestic violence in the Republic of Serbia, in addition to the existing criminal law protection, misdemeanour and family law protection. The previous period of applying this law has indicated that its adoption represents a good step forward in the protection against domestic violence, but also there are numerous problems and dilemmas in practical application that should certainly be addressed with appropriate legislative amendments.

The implementation of the Law on the Prevention of Domestic Violence does not mean that the criminal-legal (criminal law) aspects of domestic violence should be neglected. In this respect, it should be emphasized that the existence of domestic violence is there for a reason as incrimination in criminal legislation, because in Serbia for decades the problem of domestic violence has not been solved by the adequate response of the state, which justifies writing a special criminal offense. Also, the term "a member of the family" is determined by Article 112, paragraph 28 of the Criminal Code but it is not determined in a purposeful manner, and with the appropriate amendments and supplements to the Criminal Code, the term of "the family member" should be expanded. Also, the action of committing this offense are not defined in a clear and precise manner, and therefore there are different opinions in theory and practice about what is meant by the act of committing this criminal offense and whether it is necessary to accept a broad understanding of the notion of violence or the notion of violence should only be understood as use of force (physical strength). It is also disputed if for this offense to be considered committed it is enough to happen once or it is necessary that the perpetrator, by repeating the actions of the offense, causes the victim's endangerment as a lasting state. In that respect, there is no single point of view of the case-law. Finally, there is a question if the existence of a particular threat as a consequence of the actions should be assessed when taking into account purely objective criteria or the subjective sense of the vulnerability of the injured person should be taken into account.

When it comes to certain provisions of the Law on the Prevention of Domestic Violence, it can be concluded that there are many inconsistencies and ambiguous provisions that create unnecessary confusion in practical application. Thus, the part that refers to the implementation of the Law on the Prevention of Domestic Violence in relation to other laws is quite unclear, first of all in relation to the Criminal Procedure Code. Also, the issue of detention under the provisions of the Criminal Procedure Code

and arrest under the provisions of the Law on Prevention of Domestic Violence create uncertainties and doubts about which measure be imposed firstly. Also, there is discussion about a possible perpetrator of domestic violence, which gives possibilities for competent police officers to impose measures in a large number of cases, even if this would not be justified in a certain case.

Of course, the Law on the Prevention of Domestic Violence is a positive step towards a more effective fight against domestic violence in the Republic of Serbia, but it can be clearly seen from the above-mentioned reasons that there is an uneven practice in the implementation of the Law. In that sense, the adoption of an amendment to the Law on the Prevention of Domestic Violence should be considered, or at least, the adoption of a new law that would form the basis for the overall actions of state entities and authorities in the protection against domestic violence.

LITERATURE

- Delić, N. (2012). Krivičnopravni aspekt nasilja u porodici, *Zbornik radova: Nasilje u porodici*, Pravni fakultet Univerziteta u Beogradu, Beograd.
- Dorđević, Đ. (2007). Krivičnopravni aspekti nasilja u porodici, *Pravni život*, 9/2007, Beograd.
- Ilić, I. (2014). Praksa evropskog suda za ljudska prava u slučajevima nasilja u porodici, *Zbornik radova: Nasilje u Srbiji – uzroci, oblici, posledice i društvene reakcije, Tom 2*, Kriminalističko-policijska akademija, Fondacija Hans Zajdel, Beograd.
- Jovanović, S. (2010). *Pravna zaštita od nasilja u porodici*, Beograd.
- Jugović, S. (2017). Pogled na „nove“ zakonske nadležnosti policije u sprečavanju nasilja u porodici u Republici Srbiji, *Nacionalno i međunarodno pravo – aktuelna pitanja i teme*, Pravni fakultet Univerziteta u Prištini sa privremenim sedištem u Kosovskoj Mitrovici, Kosovska Mitrovica.
- Kolarić, D., Marković, S. (2016). *Zakon o sprečavanju nasilja u porodici prema stanju zakonodavstva od 24. novembra 2016. godine*, Službeni glasnik, Beograd.
- Kovaček-Stanić, G. (2011). *Porodično pravo*, Pravni fakultet u Novom Sadu, Novi Sad.
- Milošević, N. (2012). Nasilje u porodici (sa stanovišta krivičnog zakonodavstva i prakse), *Zbornik radova: Nasilje u porodici*, Pravni fakultet Univerziteta u Beogradu, Beograd.
- Presuda Apelacionog suda u Beogradu, K. 1497/12.
- Presuda Vrhovnog kasacionog suda, Rev. 2844/10.
- Simić, D. (2015). Krivičnopravna zaštita od nasilja u porodici, *Kultura polisa*, 27/2015.
- Simić, I., Petrović, M. (2004). *Krivični zakon Republike Srbije*, Beograd.
- Stojanović, Z. (2011). *Krivično pravo – opšti deo*, Beograd.
- Stojanović, Z., Perić, O. (2009). *Krivično pravo – posebni deo*, Beograd.
- Škulić, M. (2012). Krivično delo nasilja u porodici, *Zbornik radova: Nasilje u porodici*, Pravni fakultet Univerziteta u Beogradu, Beograd.

Vuković, I. (2012). Nasilje u porodici kao krivično delo – pojedini problemi u primeni prava, *Zbornik radova: Nasilje u porodici*, Pravni fakultet Univerziteta u Beogradu, Beograd.

Aleksandar R. Ivanović*

HATE SPEECH ON INTERNET THROUGH ILLEGALITY TO PUNISHMENT

The author deals with the problem of combating hate speech on the Internet. In this regard, the author first starts from the problem of making hate speech on the Internet illegal and creating legal frameworks for punishing responsible persons for delivering content on the Internet that contain hate speech. A particular challenge in this business is the establishment of a balance between freedom of speech on the Internet, on the one side, and the fight against hate speech on the Internet on the other. The author points to the key problems in the fight against the hate speech on the Internet, and it involves, first of all, defining when something published on the Internet can be regarded as a hatred, who is responsible for controlling such content on the Internet, in order to delineate the responsibility of the author of the content of the responsibilities of the web administrator, Internet portal editor, social networks, etc., and how to determine the sanctions for this type of behavior. In this regard, the author analyzes the provisions of the Council Framework Decision on the Suppression of Certain Forms and Expression of Racism and Xenophobia through the Criminal Code (2008/913/PUP), then the provisions of Code of Conduct for Combating Illegal Hate Speech, by which the European Commission agreed with Facebook Microsoft, Twitter and YouTube to prevent the spread of illegal hate speech on the Internet in May 2016, as well as the provisions of Germany Act to Improve Enforcement of the Law in Social Networks from 2017. The purpose of this paper is to address problems in process of making hate crimes on internet illegal, and providing effective law means for combating against this sort of behavior.

Keywords: *hate speech, internet, prevention, repression, freedom of speech, illegality, punishment.*

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Introduction

Free speech is important part of foundation of human liberties. Throughout history using freedom of speech people argued passionately about issues, beliefs, ideas, and policies. Human right to say in what they believe and to publish those beliefs was a crucial part of freedom. But in last several decade's free speech in lot morphed into hateful speech. Namely, different forms of angry, threatening, racist, misogynist epithets are going viral on internet. Reasons because this is happening lies in the two main things and both are connected with Internet. Namely, every year number of internet users is increased. People rather interact by social networks than in classical, direct or face-to-face communication. Also, other opportunity which internet offer is anonymity and virality. This means that lot of things can be said or published on internet anonymously and that content can go viral on Internet overnight. Therefore, there is a need to prevent hate speech on the Internet, and to put under control. This is where the problem arises, first of all, problem arises in the form of two main questions, when limits of freedom of speech on the Internet have been exceeded, and when that speech becomes a hate speech. Naturally, this lead to the other question of who is in charge for responding to such phenomena, how to determine someone's responsibility and how to punish such behavior on the Internet. In this connection, in the next part of the paper, we will try to present the current situation and problems, when it comes to this area, with the aspiration that by addressing them, we create the basis for determining guidelines for creating effective law means for suppressing the appearance of hate speech on the Internet.

Freedom of speech on Internet

Before we describe what is mean by liberty of speech on Internet it is necessary first to define right to freedom of speech. Freedom of speech, which is often used synonymously with freedom of expression, has always been thought to cover more than what is literally speech, that is spoken language. For example, no one disputes that it covers written or other form of expression (Alexander, 2005:7). Regarding to that we can say that freedom of speech is protected by right to freedom of expression which is well recognized in international law, among others, in Universal Declaration of Human Rights, the European Convention on Human Rights and International Convention on Civil and Political Rights (Vickers, 2002:63). Freedom of speech is term which is mentioning in the preamble of Universal Declaration of Human Rights which is milestone document in the history of human rights. Namely, freedom of opinion, freedom of expression and the right to information are basic human rights and they are

seen as cornerstones of democracy in any democratic society. These rights are as essential parts of freedom and democracy prescribed by the Universal Declaration of Human Rights in article 19. In this article stand that: “*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*” International Covenant on Civil and Political Rights recognizes the right to freedom of speech as “*The right to hold opinions without interference. Everyone shall have the right to freedom of expression*”. Also, Charter of Fundamental Rights of the European Union in the article 11 prescribed that: “*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (1) The freedom and pluralism of the media shall be respected (2).*” Freedom of expression is not only an intrinsic human right in its own respect, but is also intimately linked to the ability of citizens to pursue and fulfill other basic rights, such as the right to an education, the right to participate in social and political activities and associations, and the right to pursue and fulfill basic social and economic rights such as freedom from hunger. A state which violates freedom of expression is not merely straitjacketing its citizens but is also making itself vulnerable to a range of other crises including dictatorship, intolerance, war and famine. At the same time, however, there are complicated legal, moral and technical issues that surround the exercise of the right of free expression in a modern society. Individuals cannot be free to incite violence or racial hatred, and most societies recognize that there is a need for some forms of regulation of the electronic media (Salam & De Waal, 2001:33). This lead us to the relationship between freedom of speech and hate speech in electronic media, and especially on Internet, but before we start to analyze this relation, we should first say what is the legal treatment of the freedom of speech on Internet. Namely, as United Nations Educational, Scientific and Cultural Organization (UNESCO) recognizes the principle of freedom of expression and human rights must apply not only to traditional media but also to the Internet and all types of emerging media platforms, which will contribute to development, democracy and dialogue. Internet challenges the right to freedom of expression. On the one hand, Internet empowers freedom of expression by providing individuals with new means of expressions. But on the other hand, the free flow of information has raised the call for content regulation, not least to restrict minors’ access to potentially harmful information (Jørgensen, 2001:2). Freedom of speech allows the Internet to be a forum for open and opinionated discussion, but also brings with it a responsibility to act with the law (Dougherty, 2010:9). However, the right to free speech, both online and elsewhere, is

not without some limits. Threats, obscenity, and libelous statements are not allowed, but before we describe how this issue is treated by international law we will first represent what it implied by hate speech.

Definition and form of hate speech

First of all it is important to underline that there is no internationally generally accepted definition of hate speech. Usually under this notion is considering communication that denigrates people on the basis of their membership to a particular group. Also, hate speech represent any form of expression that encourages, promotes, or justifies intolerance, discrimination, and hostility towards a member of another race, ethnicity, religion, gender, sexual orientation, origin and other personal belongings of an individual or group. Hate speech is recognizes on the basis of its goal of causing negative consequences in the form of marginalization of an individual or group, depending on his/her personal character or affiliation. This can include any form of expression, such images, plays and songs as well as speech. Some definitions even extend the concept of hate speech to include communications that foster a climate of prejudice and intolerance – the thinking here is that these kinds of communications may fuel discrimination, hostility and violent attacks later on.

Hate speech is manifested through:

- a) creating contempt for a particular person or group;
- b) the creation of a negative stereotype towards a particular person of the respective group;
- c) encouraging discrimination and hostility;
- d) condemning the environment against a particular person or group;
- e) provoking feelings of insecurity and fear with a certain person / or a member of a particular group;
- f) causing physical and mental pain to a particular person or a member of a particular group;
- g) issuing threats to a particular person or group;

- h) encouraging and provoking violence against a particular person or group;
- i) creating a feeling for a large part of citizens that such behavior towards a certain person / group is socially desirable and justified;
- j) provoking feelings for a wide range of citizens that such behavior will be tolerated and will not be the subject of liability.

The personal character of a particular person or the affiliation to a particular vulnerable group is essential for determining the notion of hate speech. The message expressed in hate speech is always directed towards the personal characteristic or specificity of the characteristics of the vulnerable group. Hate speech is simply expression which articulates hatred for another individual or group, usually based on a characteristic (such as race) which is perceived to be shared by members of the target group (Weinstrein and Hare, 2009:4).

The Council of Europe’s Committee of Ministers’ Recommendation 97(20)1 on “Hate Speech” defined it as follows: The term “hate speech” shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.

Online hate speech

Hate speech is certainly not unknown to the Internet, and even in conventional media, but it certainly found a full negative affirmation on the Internet, and especially social networks. This allows him, above all, the anonymity of the subject, as well as the focus on the largest population, but also the distance from the passive subject that is the hate speech itself (Miladinović, 2013:180).

The utility of the Internet to spread views and opinions has been realized both by the advocates of democracy and by racist and similar hate groups. The Internet is filled by a multiplicity of variegated commercial and private users. Among the views available for consumption on the Web are those that denigrate people based on their race, ethnicity, national origin, gender, and sexual preference. Hate groups take advantage of this

¹ Recommendation No. R (97) 20 of the Committee of Ministers to Member State on „hate speech“, adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers Deputies.

relatively inexpensive medium for ideological distribution. They can spread pamphlets, letters, and images to groups of users who can anonymously participate in racist meetings think tanks, and planning committees. One of the down sides of the Internet is that it provides a global forum for advocates of intolerance and inequality (Tsesis, 2001:832).

Hate speech often shows up online, especially on social media. Facebook, Twitter and Google each has its own specific definition of hate speech and their approaches to dealing with it are evolving. Facebook’s rules forbid bullying, harassment and threatening language (although critics say it does not always enforce these rules properly). Twitter: In 2015, the social media platform banned speech that could incite terrorism, or violence against people “on the basis of race, ethnicity, national origin, religion, sexual orientation, gender, gender identity, age, or disability.”

Relationship between free speech and hate speech on Internet

As it is already pointed out in this paper hate speech is defined as words that offend, threaten, or insult based on race, religion, national origin, sexual orientation, disability or other traits. One of the most complicated questions regarding relationship between freedom of speech and hate speech is issue where does hate speech end and “fighting words” begin? If we start searching of answer on this dilemma among theorist from United States we can conclude that in that sense gray area has never been transformed to black or white in this sense. Namely, libertarians that claim free speech includes hate speech believe that placing restrictions on the person weakness the right of all. They also feel strongly that hate speech should not be restricted by the government unless it’s directly causes a threat to peace. An opposite view is embraced by communitarians. They believe that free speech takes a back seat to the security of a community and all its citizens. Their view is that hate speech should not be allowed when it is being spewed by those who seek to prevent individuals or groups from being treated with dignity and respect. Libertarians claim that such restrictions would severely limit free speech and be subject to interpretations of intent that would be impossible to be agreed upon. (Gitlin, 2018:8).

It is often very hard to precisely define when speech actually leads to harm and that’s the line. Free speech is the concept that you cannot be legally prosecuted for the things that somebody say. Nobody can stop someone from saying something hatred or something that’s prejudiced. That’s its own right to freedom of expression.

But, hate speech, however, is not just somebody opinion or view, but a possibility that he would actually with that speech cause harm to someone. And that is forbidden according to international law.

Somebody can tell to concrete person that he doesn't like her because of its ethnic background or cultural heritage. It's unfortunate, but that's his right. I he can not be arrested or punished by law for say that.

However, if someone threatening to kill some, or publicly call others to attack somebody because it's ethnic background or cultural heritage...that's crossing the line. That's gone from free speech to an actual threat that must be taken seriously.

This means “hate speech” has all of the characteristics of free speech plus some additional ones that are distinguishing. Which characteristics subdivide free speech that is also hate speech is very much in the eye of the beholder.

Illegality of hate speech on Internet

While the Internet has raised questions about how far a person's free speech rights extend, in many ways a person's right to free speech online is given strong protection. As it is already underlined in this paper, the right to free speech, both online and elsewhere, is not without some limits, and that treats, obscenity, and libellous statements are not allowed to according to international law. Namely, while ‘hate speech’ has no definition under international human rights law, the expression of hatred towards an individual or group on the basis of a protected characteristic can be divided into three categories, distinguished by the response international human rights law requires from States. The International Covenant on Civil and Political Rights (ICCPR), UN treaty, calls on governments to prevent hate speech. Article 20(2) says: “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. Also, other forms of hate speech that States may prohibit to protect the rights of others under Article 19(3) of the ICCPR, such as discriminatory or bias motivated threats or harassment. And hate speech that is lawful and should therefore be protected from restriction under Article 19(3) of the ICCPR, but which nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State.

Prohibitions should only focus on the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence, rather than the advocacy of hatred

without regard to its tendency to incite action by the audience against a protected group. To assist in judicial assessments of whether a speaker intends and is capable of having the effect of inciting their audience to violent or discriminatory action through the advocacy of discriminatory hatred, six factors should be considered:

- a) Context: the expression should be considered within the political, economic, and social context prevalent at the time it was communicated, for example the existence or history of conflict, existence or history of institutionalized discrimination, the legal framework, and the media landscape;
- b) Identity of the speaker: the position of the speaker as it relates to their authority or influence over their audience, in particular if they are a politician, public official, religious or community leader;
- c) Intent of the speaker to engage in advocacy to hatred; intent to target a protected group on the basis of a protected characteristic, and knowledge that their conduct will likely incite the audience to discrimination, hostility, or violence;
- d) Content of the expression: what was said, including the form and the style of the expression, and what the audience understood by this;
- e) Extent and magnitude of the expression: the public nature of the expression, the means of the expression, and the intensity or magnitude of the expression in terms of its frequency or volume; and
- f) Likelihood of harm occurring, including its imminence: there must be a reasonable probability of discrimination, hostility, or violence occurring as a direct consequence of the incitement.

States' obligations to protect the right to equality more broadly, with an open-ended list of protected characteristics, supports an expansive interpretation of the limited protected characteristics in Article 20(2) of the ICCPR to provide equal protection to other individuals and groups who may similarly be targeted for discrimination or violence on the basis of other recognized protected characteristics. The term “prohibit by law” does not mean criminalization; the HR Committee has said it only requires States to “provide appropriate sanctions” in cases of incitement. Civil and administrative penalties will in

many cases be most appropriate, with criminal sanctions an extreme measure of last resort.

At the European Union level, the Council’s framework decision Council Framework Decision on the Suppression of Certain Forms and Expression of Racism and Xenophobia through the Criminal Code (2008/913/PUP)² requires States to sanction racism and xenophobia through “effective, proportionate and dissuasive criminal penalties”. It establishes four categories of incitement to violence or hatred offences that States are required to criminalize with penalties of up to three years. States are afforded the discretion of choosing to punish only conduct which is carried out in “a manner likely to disturb public order” or “which is threatening, abusive, or insulting”, implying that limitations on expression not likely to have these negative impacts can legitimately be restricted. These obligations are broader and more severe in the penalties prescribed than the prohibitions in Article 20(2) of the ICCPR, and do not comply with the requirements of Article 19(3) of the ICCPR.

Working towards a consensus on hate speech, as of end of May 2016, Facebook, Twitter, Youtube and Microsoft, signed a code of Conduct on online hate speech with the UN. The Code of Conduct focuses on the speedy removal of illegal content, with all participating companies pledging to review the majority of content reported to them within 24 hours of it first appearing on their platforms. On 31 May 2016, the European Commission signed a “Code of Conduct on countering illegal hate speech online”³ with four United States online companies. This initiative came as a response to what is generally seen as a significant increase in extreme hate speech and a growth in violence against minorities. The EU worked with social media platforms to develop the system in response to the proliferation of racist and xenophobic and terrorist content online. It functions as a kind of honor code monitored by the EU, and is not part of EU law. It is important to notice that Code of Conduct on Countering Illegal Hate Speech introduced new term „illegal hate speech“. This act defining illegal hate speech on the basis of the provisions of Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law states: “public incitement to violence or hatred directed to groups or individuals on the basis of certain characteristics, including race, colour, religion, descent and national or ethnic origin”. It should be noted here that while the Framework Decision on combatting racism and

² 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.

³ European Commission, Code of Conduct on Countering Illegal Hate Speech, signed on 31 May 2016.

xenophobia covers only racist and xenophobic speech, the majority of Member States have extended their national laws to other grounds such as sexual orientation, gender identity and disability. What constitutes and unacceptable online comment and what is protected speech can be a matter of contention, however. It is not always clear which statements are allowable and which are not (Dougherty, 2010:7). The code of conduct’s aim is to remove “illegal” online hate speech. The same rules apply online as offline: any content that is criminal in the offline world should not be free to remain on the internet. By contrast, as set out by the European Court of Human Rights, other content that ‘offends, shocks or disturbs the State or any sector of the population’ is not illegal and the code will not require its removal. The Council Framework Decision on combatting racism and xenophobia obliges Member States to criminalize public incitement to violence or hatred against a person or group on the basis of their race, colour, religion, descent or national or ethnic origin. This is the legal basis for defining illegal online content. For instance, public calls to kill all members of a certain religion or to burn down refugee shelters represent illegal hate speech. This means that every notification concerning illegal hate speech needs to be analyzed against hate speech law and the principle of freedom of expression as assessed by the European Court of Human rights. This includes taking into account factors such as the purpose and context of the expression.

In the Code of Conduct, IT companies commit themselves to:

- 1) “take the lead” on countering the spread of illegal hate speech online;
- 2) have in place clear and effective processes to review notifications regarding illegal hate speech on their services so they can remove or disable access to such content;
- 3) provide Rules or Community Guidelines clarifying that they prohibit the promotion of incitement to violence and hateful conduct;
- 4) review such requests against their rules and community guidelines and where necessary national laws upon receipt of a valid removal notification;
- 5) review the majority of valid notifications for removal of illegal hate speech in less than 24 hours and remove or disable access to such content, if necessary.

Main points of criticism refer to the overly broad definition of “hate speech”, the delegation of enforcement activities from state to private companies, the risk of excessive interference with the right to freedom of expression, the elevation of terms and conditions above the law, and a lack compliance with the principles of legality, proportionality, and due process (Kucezerawy, 2016).

It should be mentioned at the very end of the paper Germany Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act).⁴ Namely, this Network Enforcement Act, also called “Germany's controversial online hate-speech law” and “Facebook law” is approved in Germany Parliament June 30, 2017 and it took full effect on January 1, 2018. The law requires large social media platforms, such as Facebook, Instagram, Twitter, and YouTube, to promptly remove “illegal content,” as defined in 22 provisions of the German Criminal Code⁵, ranging widely from insult of public office to actual threats of violence. The law threatens services with fines of up to €50m if they don't quickly take down posts containing hate speech and misinformation.

Regarding the application of this Law, some criticism has been made by civil society organisation which dealing with human rights, concerning mostly the violation of the right to freedom of expression. Namely, the first criticism is related the fact that the law places the burden on companies that host third-party content to make difficult determinations of when user speech violates the law, under conditions that encourage suppression of arguably lawful speech. Even courts can find these determinations challenging, as they require a nuanced understanding of context, culture, and law. Faced with short review periods and the risk of steep fines, companies have little incentive to err on the side of free expression.

Second, criticism is related to the fact that the law fails to provide either judicial oversight or a judicial remedy should a cautious corporate decision violate a person's right to speak or access information. In this way, the largest platforms for online expression become “no accountability” zones, where government pressure to censor evades judicial scrutiny.

Despite all of this criticism at least three countries – Russia, Singapore, and the Philippines – have directly cited the German law as a positive example as they

⁴ Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act) notified to the European Commission (notification number 2017/127/D) on 27 March 2017.

⁵ German Criminal Code, in its version of 13 November 1998 (promulgated), Federal Law Gazette 1998 I p. 3322, last amended by Article 1 of the Law of 11 June 2017, Federal Law Gazette 2017 I, p. 1612.

contemplate or propose legislation to remove “illegal” content online. The Russian draft law, currently before the Duma, could apply to larger social media platforms as well as online messaging services.

Conclusion

The basic idea of creators of Internet that Internet should be free highway, a public space where everyone can say what he or she has in mind. This wonderful innovation of unfettered platform has backfired. The Internet is open for use and abuse. There is need for providing and promoting responsible use on internet as well as effective fight against those who abuse it. The abuse corrupt public space and has posed many challenges on all levels: individual, the community, the state and the international community. State authorities are in the early stages of learning how to cope and how to combat the abuse of Internet, and that is especially relates on combating of hate speech on Internet.

Appearing of hate speech at Internet and especial on social networks and the absence of a serious reaction to this phenomenon, represents suitable ground for the emergence of hate crimes, interethnic and interreligious conflicts, development and adoption among peoples ideologies which promote extremism, radicalism, national chauvinism and the use of violence. Regarding to that it is very important to provide effective means for combating against hate speech on Internet. Considering all of the foregoing, we can see that when it comes to international legal documents, and above all those relating to the territory of Europe, they foresee the obligations of states to deem such behavior as punishable and envisage measures to suppress and prevent such occurrences. When it comes to criticism of the fight against hate speech on the Internet, or its criminalization and pronouncing as an illegal, as well as punishing it, they are mainly related to concern for respecting the right to free expression, as well as the censorship of the of published content on the Internet. There is tendency for prescribing responsibility and punishment through the criminal provisions of the author of such content and also prescribing responsibility and punishment for social media platforms for non-reporting and non-removing such content. In that sense equality and non-discrimination should not be sacrificed in the name of absolute free speech. Namely, there is public interest to manifest disapprobation for hate speech and to distinguish it from legitimate forms of expression. So state authorities should not allow Internet users to foment worldwide hatred by its expression.

References

- Alexander, L., (2005) *Is There a Right of Freedom of Expression*, New York: Cambridge University Press.
- Dougherty, T. (2010) *Freedom of Expression and the Internet*, Detroit: Luicent Books.
- Gitlin, M. (2018) *When Is Free Speech Hate Speech?* New York: Greenhaven Publishing, 2018.
- Hare, I., Weinstein, J. (2009) *Extreme Speech and Democracy*, New York: Oxford University Press.
- Jørgensen, R. F., (2001) *Internet and Freedom of expression*, Lund: Raoul Wallenberg Institute.
- Kucezerawy, A., (2016) The Code of Conduct on Online Hate Speech: an example of state interference by proxy? <https://www.law.kuleuven.be/citip/blog/the-code-of-conduct-on-online-hate-speech-an-example-of-state-interference-by-proxy/>, available at 28.08.2018.
- Miladinović, A., (2013) *Fejsbuk i kriminalitet*, Banja Luka: Internacionalna asocijacija kriminalista.
- Salam, A.H.A., De Waal, A., (2001) *The phoenix state : Civil Society and the Future of Sudan*, Trenton: Read Sea Press.
- Tsesis, A., (2001) Hate in Cyberspace: Regulating Hate Speech On the Internet, *San Diego Law Review* 817/01, pp. 817-874.
- Vickers, L., (2002) *Freedom of speech and employment*, New York: Oxford University press.

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FREEDOM OF THE WILL OF PERSONS WITH DISABILITIES - EXPERIENCE OF LEGISLATIVE REFORM IN THE REPUBLIC OF CROATIA

This paper analyzes the reform of custody legislation for adults in the Republic of Croatia after the adoption of the new Family Act in 2015. The text deals with the legal position of people with disabilities and legal relevance of their statements of will. This is to say about the statements of will in status, family law, but also those related to medical procedures. Incapability for reasoning is seen either as a legal category (restriction of legal capacity) or as a factual situation (inability to give legally relevant statements due to states such as coma, permanent vegetative stature, etc.). Croatian law is pending the reform of family law in 2015. yearly approval of legal capacity persons, and "substitute" decision-making for persons who are not capable of declaring a legally relevant will. Comparative legislation and practice recognize the relevance of will in a case of future incapacity. This are advance directives, certained by the Council of Europe in the Recommendation¹ 11 (2009). The reform of family legislation in the Republic of Croatia is the first step towards harmonization with the requirements of the UN Convention on the Rights of Persons with Disabilities in 2008 and in part and in accordance with the Recommendation. The reform encompasses a comprehensive revision of the custodial institute for adults and, consequently, other family law institutes where adults under guardianship appear as parties in judicial and administrative proceedings.

Keywords: *Convention on the Rights of Persons with Disabilities, Council of Europe Recommendation 11 (2009), advance directives, Family Act.*

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¹ <https://rm.coe.int/168070965f>

1. Introduction

The United Nations Convention on the Rights of Persons with Disabilities (hereinafter referred to as "the Convention") provides a new insight into the concept of legal protection of persons with disabilities. It is a global document, binding on member states.² The Convention is also the first global international treaty open to signature and regional organizations, and is also signed by the European Union.

The Convention provides for a system of controls and sanctions, and the rights of the individual countries are monitored primarily through the reports of the member states of the Committee on the Rights of Persons with Disabilities. This once again is, the concept of disability in the Convention applies to those persons who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.³ Thus, the notion of disability also applies to persons with mental and intellectual impairments (mental disorders) who will be involved in the work as the most common prerequisite for depriving the child's ability to work and ultimately guarding adult care.

By joining the Convention, part of the Croatian family law legislation that was in force by 2015, more specifically, the part related to custody for adults was a mismatch with the requirements of the Convention. Some people with disabilities in the Republic of Croatia are deprived of their legal capacity and, consequently, are also under guardianship. For persons with disabilities who are deprived of their capacity, the acceptance of the Convention and its general principles represents a change in the overall approach to access to the protection of their rights. Thus, for example, as the general principles of the Convention referred to in Art. 3. emphasize respect for inherent dignity, personal autonomy, non-discrimination, full and effective participation in society, equality of opportunity, accessibility, etc. The concept of personal autonomy under the Convention, and in particular its Article 12, does not correspond appropriately

² Convention and the Optional Protocol were adopted as the resolution 61/106 of the General Assembly, 13 December 2006 Mr. Odin. The Croatian translation of the Convention was published in the Act on the Confirmation of the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention on the Rights of Persons with Disabilities, OG no. 6/2007, 3/2008, 5/2008. The Convention and the Optional Protocol entered into force on 3 May 2008 after 20 ratifications of the Convention and 10 ratifications of the Optional Protocol. The Convention is also the first global international treaty open to signature and regional organizations, and was signed by the European Union on March 30, 2007 and ratified on 23 December 2010.

³ Art. 1 of the Convention.

to the institute of custody of Croatian family law. The above-mentioned provisions of Article 12 of the Convention, most of the provisions of the Convention, apply to persons with disabilities in the sense of persons with intellectual disabilities and their business ability. (Milas: 2005, Milas Klarić: 2010).

St. 2. The Convention states that: "... *States Parties shall accept that persons with disabilities have legal capacity and business ability⁴ on an equal footing as another person in all aspects of life ...*" The Convention, and especially that expressed in Art. 12. promotes full capacity for disabled people. The basic prerequisite of guardianship of adult protection in the Republic of Croatia, until the legislative changes in 2015, was the deprivation of business ability, and in practice, the most commonly the abolition of business abilities.⁵ Also, the European Court of Human Rights (ESLJP) has issued a number of judgments⁶, many of which found that the Republic of Croatia was violating the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, which relate to the rights of persons with disabilities. (Rešetar: 2016). This indicated the necessity of reforming the legal position of persons with disabilities⁷. The Reform of Family Legislation in 2015 is a significant step in the way of alignment with these documents. However, further legislative reforms, a proper response to the practice, as well as changes in the social awareness of the rights and opportunities of persons with disabilities are necessary. Protection of human rights of persons with disabilities and recognition of the principle of autonomy, dignity and self-determination are the most significant in the direction of the reform of guardianship legislation.

⁴ IMK pointed out.

⁵ According to the data of the Ministry of Social Policy and Youth of the Republic of Croatia, by 2015 there were about 18,000 deprived businesses in the Republic of Croatia, out of which approximately 16,000 were completely. With about 3,000 people under parental care after ages, we are talking about over 21,000 adults deprived of their business abilities. The new Family Law provides for a five-year deadline for reviewing all court decisions concerning deprivation of business ability, given the fact that the Family Act of 2015 removes the institutions of complete deprivation of business ability.

⁶ Eg. Gluhaković v. Croatia, Ivinović v. Croatia, Krušković v. Croatia, Xi X v. Croatia. V. <https://hudoc.echr.coe.int/eng#%7B%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%7D%7D>, as well as Rešetar: 201 6

⁷ To be part of the European Union's membership boom. About EU policy in the field of human rights protection of persons with disabilities v. https://ec.europa.eu/europeaid/sectors/human-rights-and-democratic-governance/human-rights/anti-discrimination-movements/persons_en.

2. Amendments to the Guardianship Institute - a brief analysis of the family law reform in 2015

Traditional custody based on legal (in)capacity (Milas: 2005) of person with disability and, consequently, custody of adults regulated by the Family Act 2015, was entirely in contravention of the requirements of the Convention on the Rights of Persons with Disabilities. Also, regulating status matters within the framework of the ordinary legislation is also considered inappropriate, and the status of persons with disabilities who need protection should be regulated outside family law. (Aras, Milas Klarić: 2015.)

The institute of custody (guardianship for adults) was necessary to change in relation to the protection of adults deprived of their legal capacity in accordance with the UN Convention on the Rights of Persons with Disabilities and the Optional Protocol to the 2006 Convention, which provides a clear message to persons with disabilities and society that with regard to persons with disability of fundamental human and civil rights issues, and not, as has often been considered a matter of social welfare. According to the Convention on the Rights of Persons with Disabilities, Croatia has an obligation not to deprive persons with disabilities of their capacity to engage in business, but to take appropriate measures to provide the necessary assistance to persons with disabilities to pursue their business capability. Hence, Croatia was obliged to change the system of substitution-making decisions, such as custody, to support-based decision-making systems. As regards the task that presupposes the existence of the whole of the "infrastructure" developed, the full application of Article 12 of the Convention on the Rights of Persons with Disabilities in the Republic of Croatia was not entirely possible, as it would mean changes to a whole series of existing regulations, new legal reforms, social care id, for which, according to our estimation, Croatia was not ready and did not take the necessary preparatory steps. We believe that reform is necessary to continue, with the amendment of a whole set of existing regulations and the adoption of new ones.

However, in the context of the reform of family act in 2015, the reform of guardianship legislation for adults has been carried out, and the content of the guardianship protection is specified, and it is determined that it must be respected, individualized and consistent with the welfare of the protégé. Added provisions to protect the dignity of the residents and the right to protection from violence and any form of degrading treatment and expressly provide that a guardian can be only natural person.

In the institute of care for the elderly, the existing institute of "parental care after the age of majority" is abandoned, because from the point of view of the contemporary understanding of the protection of human rights of adults with mental disorders, it is completely unacceptable to treat adults with mental disorders as children or to give parents of adults with mental disabilities and parental care duties as well as juvenile children. Positive aspects of parental care of adult children with mental disorders can be equally well-maintained by the institute of custody.

The Family Act 2015 (ObZ) clarifies the principles of guardianship of adult deprived of legal capacity and explicitly stipulates that in dealing with persons under custody must take into account their personality and attitudes.

One of the most significant changes is that of abolishing the possibility of complete deprivation of business ability. In the Republic of Croatia today, about 18 000 people are deprived of their business abilities/legal capacity, of which more than 90% of cases are said, still⁸ about the complete deprivation of business ability. Obz / 2015 excludes the possibility that the same person (body) proposes the procedure of deprivation of ability to work and be appointed to a special guardian in the deprivation procedure for possible conflicts of interest and suspicions of the quality protection of the rights of the protected persons in the proceedings. Therefore, a new public law body, the so-called " Special custody/guardianship center".

Guardians from special custody center are the guardians (legal representatives) for the child and the adult person in the judicial procedure of depriving legal capacity, are specially trained persons with a bailiff's degree, employed in the Center for Special Guardianship (Aras Kramar, Ljubić: 2017) . Of course, a person in a deprivation of ability to work can also appoint a proxy and a guardian based on a new institute of anticipated orders.

The water and the possibility for the administrator is notified, and more than one person, thereby also regulating the content and extent of their functions. He works for the duty of the CBO / 2015 to allow the deputy guardian to be appointed, thus preventing "arrest" in carrying out custody duties in cases of immediate disability. This would enable rapid and continuous protection of the rights of the ward, especially in emergency situations.

⁸ The Family Law of 2015 provides for a five-year deadline for reviewing all custody procedures and amending decisions on the complete abolition of business capability.

The Family Act 2015 introduces the obligation to respect the earlier expressed attitudes and wishes of the spouses and allows each person to appoint a person whom he would like to have for a guard at the time of his / her legal/business ability. In this way, the institute of advance directives (anticipated orders in Croatian Family Act 2015) introduces the Croatian legal system.

Also, the new Family Law stipulates:

- a) which personal status decisions are made solely by a protégé,
- b) in which cases a prior approval of the Social Welfare Center is required,
- c) what important health decisions are made by the court, and
- d) To precisely regulate the management and representation of property rights of the resident

With the aforementioned, a new judicial, non-contentious procedure will be introduced in which the county council's court councils would have made extremely important decisions concerning the health and life of the spouses, with the possibility of appeal to the Supreme Court. This is a very important, but at the same time and difficult decisions with far-reaching consequences of such decisions of life support, which, before the matter incomplete provisions of the earlier domestic legislation brought guardians, with unspecified powers of social welfare centers, and often family members of such the decisions were not authorized either.

Obz 2015 prescribes the right to appeal to an adult resident, regardless of the degree and content of the deprivation of ability to work, which is in accordance with the requirements of international documents on the right to appeal decisions on deprivation of ability to work and appointment of a guardian.

The aforementioned solutions to the new Family Act are certainly a step forward in the existing legislation (Aras, Milas Klarić: 2015). However, such solutions are in disagreement with the requirements of the Convention on the Rights of Persons with Disabilities, particularly in the context of abandoning a substitution decision system to support decision-making with support. Also, respect for the will of a person with

disabilities, her attitudes, wishes, etc., will need to be more closely regulated by expanding the limits of application of anticipated order/advance directive.

Also, decisions on persons with disabilities should be removed from the social welfare system and established special courts or at least their departments who will decide on the particular requirements / rights and powers of adults with disabilities. A step forward has been made with the above-mentioned ruling on a court case concerning health issues.

Family Act 2015 regulates “procedure before the court” in the part of act contained general provisions for all the family and statutory procedures, which is entitled “The participation of persons deprived of legal capacity in the process.”

Thus, in statutory matters, decisions on parental care, personal relationships and measures for the protection of the rights and well-being of a child, the court will, by means of a decision, allow the party deprived of his / her abilities in that part to exercise its rights and interests if he is able to understand the meaning and legal consequences of these actions. Prior to the adoption of the decision, the court is required to seek the opinion and the proposal of the center for the whole care. If their court did not admit their procedural ability, they would be represented by their legal guardians.

In addition to the provisions on the recognition of the procedural abilities of persons deprived of their legal capacity, the court's duty to hear persons deprived of their legal capacity in proceedings in which they decide on different aspects of their parental care is also emphasized, as well as in the procedure for the deprivation of their legal capacity, business-capable.

In all the procedures for deciding on the personal rights of the child as well as in procedures for the protection of the personal rights and the welfare of the child, the court will personally hear the parents. The court will not personally hear the parents if they decide on matters for which the parent is limited in the exercise of parental care or is deprived of the right to parental care unless a procedure is conducted to restore a restricted or deprived right or to replace the consent of a parent to adopt a child by a court decision. However, the parent will not be heard if this is required by the special circumstances of the case.

The court will hear a person undergoing a procedure for the deprivation of their ability to act. If this person is in a psychiatric institution, a social welfare institution or because

of the deprivation of liberty within the prison system, he / she will normally be heard at that institution, from the nose within that system. If the court finds that the hearing of a person is unlikely due to its health condition, it is obliged to compile a note in the file and state the reasons for the inability to hear a.

In the field where they are deprived of their business capacity would still be procedurally incapable, unless they were primarily in the status (family status) of a procedure that would not be recognized as procedural. They will be represented in the process by their consilient representative; therefore, remains in the substitution decision system for persons deprived of their business ability. In this context, we should point out that OBZ 2015 (see Milas Klarić: 2010) include, inter alia, the ability of a person to form a notarial record by depriving a person or persons of a guardian as well as their deputies before the deprivation of ability to work, which the center is obliged to appoint to custodians if the other presumptions for appointment guardian prescribed by the ObZ 2015. Also, if the person under the procedure of deprivation of legal capacity has compiled a notarial record appointing a guardian, the social welfare center will appoint that person with a special attorney in the process of deprivation of his / her legal capacity if that person fulfills the other presumptions for appointing a guardian prescribed by the Act.

3. Anticipated commands (advance directives, AD)

In comparative legal systems, the so-called „advance *directives*.⁹ This is a binding decision made in the future¹⁰ Inability. We will use the term of anticipated commands, or AD. (Milas Klarić: 2010.) Primarily, this type of decision arises in medical law, in the event of a permanent disability in deciding and giving a statement of will such as permanent vegetative state, condition of a person etc. But time, the application of that institute is spreading other areas such as decisions on different personal situations, family law institutes (parental, nursing, adoption) as well as property decisions.

Anticipated commands (AD) are most commonly divided into two types (Milas Klarić: 2010):

⁹ Literature and comparative legislation also include the terms: *prior directives*, *advance refusals* and *advance decisions to refuse treatment*, *advance statements* and *advance agreements* (more often for non-binding decisions, but not necessarily), *psychiatric advance directives (PAD)*, *mental health advance directives (MHAD)* and *psychiatric wills* (refer to psychiatric institution's decision or psychiatric procedures), *living wills*, *Patientenverfügung* (*verbindliche Patientenverfügungen*, *Betreuungsverfügung* or *Sachwalterverfügung*).

¹⁰ Often used as synonym name *prior directive*.

One of them is by itself the expression of the will of the adult on (no) action in specific, accurately stated situations. Often such anticipated commands are called *living wills*¹¹ or *do not order* (do not feed, do not include life-saving appliances, etc.).¹² It is a matter of having an adult at a time when it is (business) capable of making decisions, in advance, in the event of future incapacity, deciding on their rights and interests, most often about health issues (diagnosis, treatment, medical procedures). But, as we have already pointed out, the content is spreading to the other, beyond the medical field.

Another type of anticipated orders is those in which a person recalls a person who, in the event of a future incapacity, makes decisions that are (mainly) related to health issues. But it may also be about decisions of a different content, such as those relating to property or other personal belongings of an adult. Such types of anticipated commands are commonly referred to as *proxy directives*. Also, *durable powers* are often used of *attorney*,¹³ *enduring powers of attorney* etc. We will use the name of the *anticipated power of attorney*.

In practice, anticipated commands are often a combination of both types. As a rule, it is difficult to assume all the possible situations, their consequences and so on. Therefore, persons deciding to compile anticipated orders generally define part of the content and declaration of will in the case of incapacity, and also appoint a person who as their proxy will make decisions for a part of content that has remained “uncovered” by the content of the “*living will*” decision.

In 2009, the Council of Europe adopted Recommendation CM / Rec (2009) 11 on the standing powers of attorneys and advance directives for future incapacity (Recommendation of the Committee of Ministers to the member states on principles concerning continuing powers of attorney and advance directives for incapacity), adopted on December 9th 2009 (<https://rm.coe.int/168070965f>). The document confirms the fact that there is a growing number of elderly people and those who need some sort of help in decision making, so this recommendation, having in mind, sets out the principles of expressing will in the event of future incapacity to decide. The basic principle is the principle of self-determination.

¹¹ It is about the rewards that have the legal effects for a person's life. An adult in such a document determines which procedures should be carried out, and not in the case of a permanent vegetative state or other situations in which decisions on health, treatment, etc. should be made.

¹² *Do not resuscitate orders* (DNR) or *do not hospitalize orders* (DNH). The latter concern the decision to refuse hospitalization.

¹³ Or a durable power of attorney for health care.

The first part of the Recommendation applies to the scope of application and contains two principles (promotion of self-definition and definition); The second part deals with anticipated *powers of attorney* and the third refers to advance *directives*.

The first principle encourages self-determination, and the same is achieved by standardizing and applying anticipated *directives* and the continued *powers of attorney*. The above mentioned documents should take precedence over other solutions to the protection of adults (patients).¹⁴

An ongoing power of *attorney is* defined as a mandate given by a capable adult with the effects that will occur after an adult becomes incapacitated. This gives the decision-making power to an *attorney*.

An advanced *directive is* drawn up by an adult with a view to determining binding instructions (instructions),¹⁵ or expressing wishes that relate to different circumstances¹⁶ which may occur in the event of inability.

The third principle deals with issues of possible content in terms of whether they are related solely to health or other personal matters as well as those related to financial decisions. There is also a question of possible exclusion of certain content.¹⁷

Principle 4 refers to the appointment of an *attorney*. In principle, it can be any person¹⁸ to which person who makes the anticipated power of attorney has confidence. It also allows the appointment of multiple representatives and may be authorized to act together, separately, with special powers, subsidiary, etc.

¹⁴ We propose to think of different forms of guardianship, but also of other "alternative forms of substitute decision-making.

¹⁵ Therefore, in the literature, such commands are also called instructive ADs.

¹⁶ Eg. illness, necessity of medical interventions, etc.

¹⁷ These things that may be excluded or somehow limited are, presumably, psychiatric anticipated orders or statements that relate to strict personal conditions (termination of marriage, extramarital community, adoption, etc.).

¹⁸ Such a determination is consistent with the maximum respect of the will autonomy. Many legislations that have provisions on anticipated power of attorneys contain certain restrictions regarding the choice of a lawyer (lawyer). First of all, this is a matter of limiting the minimum age or decision-making ability, but also some other, such as no conflict of interest, that a person should not be an employee of an institution where an adult is located or treated.

The form of anticipated power of attorney is determined by the *fifth principle*, and the Recommendation decides for the written form. We consider this to be a good solution because it reduces space to ambiguities and allows for registration.

Also, he explicitly opts for effects after the room that has compiled the anticipated power of attorney becomes incompetent.¹⁹

The sixth principle allows a recall²⁰ anticipated power of attorney by an adult.

Performance of the anticipated power of attorney is specified in *principle 7*. National legislation leaves the question of the moment when the effects of anticipated power of attorneys appear as well as the way of determining an adult's inability to make decisions, which may include a medical finding (expert witness).

The eighth principle refers to registration or notification of the composition, modification, revocation, or entry into force of the anticipated power of attorney. The Recommendation does not provide more detailed guidance, and comparative legislative solutions are quite diverse.

Principle 9 refers to the preservation of the business capacity of an adult who compiles an anticipated power of attorney. Namely, the fact of existence and appearance of the effects of such an instrument should not determine the (general, business) inability.

The ten principle speaks about the role and powers of the appointed person. First of all, she is authorized to act according to the provisions of the anticipated power of attorney and in accordance with the interests of the adult (the power of attorney). In doing so, the appointed person should, as far as possible, inform you and notify the draftsman and ask for and listen to his opinion. It also reflects on the expressed wishes and feelings, which, as well as the present, should be given full attention and respect.

Principle 11 speaks about avoid conflicts of interest. We believe that this will be best achieved by a high quality selection of representatives, and by some legal constraints in his choice.

¹⁹ N whose terms of business (in) abilities in classical, formal sense but the functional not (ability) to make decisions about what's anticipated full powers transferred to the power distributor.

²⁰ While the person is still capable of compiling such a document.

The *twelfth principle* proposes the possibility of appointing a third party responsible for controlling the work of a representative. One of the proposals also refers to the possibility of appointing a (competent) body to carry out such controls, whereby this can certainly (and does seem to us) be a body with public authority.

The thirteenth principle refers to the abolition of powers from the anticipated power of attorney, without giving concrete solutions. It is quite justified to consider the possibility of applying other, necessary measures of protection of a person in the event of termination of the power from the anticipated power of attorney. Such is the result (or should) of the obligation of protection of persons who do not have any anticipated power of attorney.

The third part edits anticipated commands, whether binding or non-binding (instructive commands).

In terms of content, they can refer (according to *Principle 14*) to health issues, personal matters, property issues and decisions as well as to appoint a guardian in case of such need.

The Fifteenth Principle speaks of the effects of anticipated orders, or the extent of the binding nature of such documents. The above implies that most of the legislation will decide for certain restrictions. It is also recommended to regulate situations of substantially changed circumstances.

The pretense principle applies to form of anticipated commands, whereby written form and some type of registration are recommended following the efforts for binding effects. (https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c0b39).

4. Anticipated orders (AD) in Croatian family law

The reform of Croatian family law, more specifically the institute of adult guardianship, as well as provisions in other institutes (marriage, parental care, adoption) and the procedural part regulating the legal position of adult persons under guardianship, are introduced Ads into the Croatian legal system.

Article 223 of the CC / 2015 stipulates:

(1) Protection of a disabled person, if possible, shall be provided by other means and measures provided for by special regulations before a decision on deprivation of ability to work and guardianship is made.

(2) In the conduct of guardianship, it is necessary to strive as far as possible to limit the rights of the protector.

(3) Personality and the present or earlier pronounced attitudes of the person as well as the protection of his dignity and well-being shall be considered in dealing with a spouse.

(4) It is necessary to encourage autonomous decision-making by the protégé and support the decision making process as well as participation in community life. (pot IMK)

The aforementioned principles encourage the self-determination of a person with disabilities, trying to avoid limiting the business from the job if possible. When this is not possible, the opinions expressed earlier and the feelings of the protégé (paragraph 3) have to be taken into account. It is a principle that is the basis for introducing anticipated commands.

Article 236 of the Family Act. The representation of a person during a business capacity restriction procedure is determined. A person shall be appointed a special representative, except in cases where that person has appointed a proxy (st.2.) or if that person has previously compiled an anticipated order (para 6):

„Exceptionally... if a person in relation to whom a procedure for the deprivation of their ability to act in the form of a notary public designates a person for whom he wishes to represent him in the proceedings for the deprivation of his / her ability to act (an anticipated order), the social welfare center shall appoint that person guardian if he or she fulfills the other presumptions for appointing a guardian prescribed by this Law.“

Also, Art. 247 (5) establishes the possibility of appointing several custodians²¹, or Deputy Custodian,²² all in the form of anticipated commands.

²¹ Eg. a person can determine that one person will represent him when it comes to eg property, and the other when to make decisions about health or the like.

²² In the event that a person who was first named by an anticipated order is prevented or some other circumstances arise, for which he or she can no longer perform the duties entrusted to him.

“If a person is deprived of his or her business capacity prior to deprivation of his / her legal capacity as a notary public, he or she has designated a person or persons for whom he or she would like to be appointed to a guardian or guardian as well as persons for whom he would be appointed to their deputies), the Social Welfare Center will appoint such person or person to the guardian or guardians and to the deputy or deputy of the guardian if the other presumptions for appointing the guardian are prescribed by this Law .”

Great news and an important step forward in protecting the personal rights of the spouse, when it comes to extremely sensitive decisions concerning medical procedures (sterilization, abortion, maintenance of life), is governed by Article 260 of the Family Act.

“(1) A court may, in a non-contentious proceeding on a proposal of a spouse who is deprived of his or her legal capacity or custody, issue a decision on:

Sterilization of the resident

2. donating the tissues and organs of the protégé and

3. measures to maintain the lives of the spouses.

(2) A court decision shall not be required under paragraph 1 of this Article if the protected person has decided on the procedures and measures referred to in paragraph 1 of this Article (anticipated order) at the time when he was capable of doing business in the form of a notary public. “

These extremely sensitive decision, on which up to now, in the traditional system of guardianship for the person (usually fully deprived of legal capacity) decided only one person (administrator) now decided by the court, and this in specially regulated procedure. And in these decisions it is possible to combine an anticipated command (paragraph 2). The court procedure is governed by the provisions in articles 504 to 508. in Family Act. The decision is therefore to be made by the court within a very short period of 15 days²³, and a proposal for the adoption of a decision on the health of a protected person can be filed by a protector or guardian. In the proceedings on the basis

²³ Art. 504th

of the motion under paragraph²⁴ to hear the spouse, guardian and, if necessary, other persons close to the ward, and only if the court finds that the hearing of the spouse is not possible with regard to his / her health, he / she has to compile a note in the file and state the reasons for the inability to hear 4).

It is a procedure in which the county court is tried in the first instance by a panel of three judges, and the appeals against the decision on the health of the spouses are decided by the Supreme Court of the Republic of Croatia in a panel of five judges. (Article 506).

Also, due to the nature of the decisions in question, the prescribed deadlines are very short so that the decision on the health of the protégé of the parties can be appealed within three days of the delivery or delivery of the resolution. In the procedures for deciding on medical interventions regulated by Article 260 of Family Act. the court of second instance has to make and dispatch the decision within eight days from the date of receipt of the appeal. Also, the court may determine that the legal effects of a decision on the health of a spouse appear before their expiration if necessary to protect their own. No legal remedies or other legal remedies are allowed against a final decision accepting the proposal for the adoption of a decision on the health of a protected person. (Articles 505-508).

Anticipated orders, apart from those made by a person to make a decision about himself (procedure for limiting his / her ability to work, appointing a guardian, a decision on medical procedures under Article 260 of the Law), can also be compiled by a person when he or she wishes to designate a person (legal representative) the case that she / he will be prevented from exercising parental care.

Thus, the social welfare center is obliged to respect the expressed wish of the parent on the choice of a guardian who the parent has compiled in the form of a notarial document (anticipated order) if the presumptions for appointing a guardian to a child prescribed by this law are fulfilled and this is not in contravention of the child's well-being. (Article 225, paragraph 3, ObZ / 2015).

²⁴ Therefore, the court is obliged to hear the aforementioned persons.

5. Concluding remarks

Although the adoption of the Family Act in 2015 represents a significant step forward in the reform and protection of the human rights of persons with disabilities and strengthening their legal position as a party in the court and administrative proceedings, we believe that reform this is not and must not be completed. Namely, in accordance with the Convention on the Rights of Persons with Disabilities, the traditional adult custody/guardianship institute which is predominantly based on substitute decision-making, must be fully transformed into decision-making with support. This implies the preparation of the whole "infrastructure", both the legislative framework and the necessary assumptions in practice. Also, the legal protection of adults with disabilities should be removed from primary, family law legislation because it is with its content and not, and additionally, it would be necessary to adopt new regulations whose content would be the complete arrangement of advance directions.

Indeed, the question of the rights of people with disabilities is the issue of human rights, civil rights of the individual, and not, as it has so far been the issue of solely social or health care. Principles of autonomy of will and self-determination become the fundamental criterion for the protection of the rights and dignity of persons with disabilities, regulating the issue of legal relevance of their will, and of interaction with other subjects in legal relations.

Literature

- Aras Kramar, Slađana; Ljubić, Boris, About the Center for Special Guardianship: Results, Doubts and Perspectives - Part I // Croatian Legal Review, 6 (2017), 7-8; 22-33.
- Aras Kramar, Slađana; Ljubić, Boris, About the Center for Special Guardianship: Results, Doubts and Perspectives - II. part // Croatian Legal Review, 17 (2017), 7-8; 16-25.
- Aras, Slađana; Milas Klarić, Ivana, Application of the Convention on the Rights of Persons with Disabilities in Croatia and Bosnia and Herzegovina: Reality or Utopia? // Proceedings of II. International Conferences Bosnia and Herzegovina and Euro-Atlantic Integration. Current Challenges and Perspectives. Bihać: Faculty of Law of the University of Bihać, Center for Social Research of the International Burc University, 2014 333-360.
- Arthur, Slađana, Milas Klarić, Ivana, Two Steps Forward and One Backwards in the Autonomy of the New Croatian Family Law, (Swennen, F.) Contractualisation of Family Law - Global Perspectives, Springer International Publishing, Switzerland, 2015, p. 129-147.
- Milas, I., Family Status of Disabled Persons, Faculty of Law, Zagreb, 2005.
- Milas Klarić I., Legal Status of Guardians as a Guarantee of Human Rights Protection, Faculty of Law, Zagreb, 2010.

Rešetar, Branka, Impact of the European Court of Human Rights on the Reform of the Family Legal Protection of Persons with Disabilities in the Republic of Croatia " Proceedings of the Fourth International Conference on Family Law Day, University of Džemala Bijedić" in Mostar, Faculty of Law, Mostar, 2016, p. 133-148.

Regulations:

Observe the Law of the People, Official Gazette, no. 103/2015.

Recommendation CM / Rec (2009) 11 on the standing powers of attorneys and anticipated orders for the future incapacity of the Council of Ministers of 9.12.2009. (Recommendation of the Committee of Ministers to member states on the principles of continuing powers of attorney and advance directives for incapacity.

Convention on the Rights of Persons with Disabilities, Official Gazette - International Treaties, no. 6/2007, 3/2008, 5/2008.

Official Websites:

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c0b39 , Review 2.10.2018.

<https://rm.coe.int/168070965f>), Review 2.10.2018.

[https://hudoc.echr.coe.int/eng#{%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\]}](https://hudoc.echr.coe.int/eng#{%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}) , Review 2.10.2018.

Cheng Yan*

THE DEVELOPMENT OF DEFENSE RIGHT IN CHINESE CRIMINAL PROCEDURE

The legislation of criminal defense in China has been through a slow and tough process. In 1979, Chinese Criminal Procedure Law was enacted and the right to defense was included. However, at that time the regulation about defense was pretty vague, which resulted in its infeasibility. In 1996, the amendment of Chinese Criminal Procedure Law was enacted and the defense regulations were perfected to a large extent. The access to lawyer during investigation phase was realized and the legal aid system was also improved. The defense right had its greatest development in 2012, when the latest amendment of Criminal Procedure Law was enacted. The defense rights of attorneys during investigation phase were expanded. Their rights to meet with the client, to have the experts on their side, and to cross-examine the witness were realized to some extent.

Keywords: *Defense Right; Criminal Procedure; Lawyer; Amendment*

The right to defense is one of the most important human rights, and it indicates litigation civilization of the society. Chinese government attaches great importance to the improvement of defense right, especially in criminal area. Chinese Constitution stipulates that the defendants have the right to attorney.

1. The Development of Chinese Criminal Defense

1.1 The Founding Time

In 1979, China's first Criminal Procedure Law was enacted, which also brought criminal defense system to this land. The main gist of that enactment consists of the following parts:

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1.1.1 General Patterns

Criminal defense system comprises of three patterns: self-defense; hired-lawyer defense; assigned-lawyer defense.

1.1.2 Qualification of Lawyers

People without attorney qualification can defend the accused on court as well. Because at that time China was in reform and open up, the booming economy resulted in the rising crime rate. The lawyer was in great shortage. So that, at that time people with the recommendation of state organs or people's organizations can also act as a lawyer on court.

1.1.3 Legal Aid

If the defendants were too indigent to have the lawyer, the court would assign one for them. This constitutes the beginning of Chinese legal aid system. It applies to two situations. First, when the prosecutor attends the court and the accused is indigent. Second, when the accused is deaf, dumb or under the age of 18.

1.1.4 Rights of Lawyers

The person who defends the accused has the following rights: first, to check the investigation files; second, to meet the accused. But if the defending person has no lawyer qualification, he or she must get the court permission before exercise the rights above.

1979 Criminal Procedural Law constitutes a great progress towards human rights, however, it still has several deficiencies: first, the accused can not have lawyer until trial, which is too late. Secondly, the legal aid coverage is too narrow. Third, the litigation rights for the lawyer are limited.

1.2 The Developing Phase

In 1996, People's Congress of China amended Criminal Procedural Law and the defending right was improved to a large extent:

1.2.1 When to Have a Lawyer

The time to have a lawyer is moved up. The defendant can have a lawyer right after the investigation phase when the prosecutor takes over the case. During the investigation

phase, the defendant can consult with a lawyer but the lawyer has no right to check the files as they do after investigation.

1.2.2 The Coverage of Legal Aid

The coverage of legal aid was expanded. The defendant who is blind and facing death penalty is added to mandatory legal aid system. What's more, a new channel was created: indigent people can apply for legal aid. A new governmental agency called Legal Aid Center was created after the amendment, which is responsible for processing the legal aid application and assigning the attorney.

1.2.3 More Rights for Lawyers

The attorney was granted more rights - the right to investigate. Before the 1996 amendment, the defense lawyer can not exercise investigation. They can only check the investigation files of the police to get the case information.

1.2.4 Rules for Lawyers

The attorney needs to follow stringent rules, such as they are not allowed to fabricate or hide evidences; to threaten or induce the witnesses to distort testimony.

Even though, 1996 Amendment granted more rights to the attorney. However, the attorney can hardly exercise them. In practice, three problems came into existing: difficulty to check the investigation files; difficulty to meet the defendant; difficulty to investigate the case¹. And to some extent, those problems still exist now.

1.3 The Further Perfection

In 2012, the latest amendment of Chinese Criminal Procedure Code was released and the most significant improvement thereof is about the right to defense.

1.3.1 More Rights Are Granted to Attorneys During Investigation

The suspected is not allowed to have an attorney until 1996, when Chinese congress decided to amend Criminal Procedure Law for the first time. Even though after the first amendment lawyers can exert their influence in criminal procedure, their rights are limited by law. Because legislators treated lawyers as the hindrance of investigation and placed more weight on truth finding rather than human rights protection. For example,

¹ (Zhang, 2017: 25).

at that time the lawyer could not check the investigation files. As time goes by, the idea of human rights protection becomes more and more prevalent. In 2012, the second amendment was passed in Chinese Congress, lawyers are granted much more rights by the new law. Now the lawyers can meet the suspect in jail, can check the investigation files and can make an accusation for the suspect's merits. All those defense rights of attorney constitute a great leap toward criminal procedural civilization.

1.3.2 The Perfection of Legal Aid System

In Chinese judicial practice, the criminal defense rate is extremely low and only 30% of people who are facing criminal charges have attorneys.² The reasons behind it are complex and the most important one is about money. A majority of the suspects are comparatively indigent and they can't afford for a lawyer. Especially the cost to hire a lawyer has increased to a very high level in China - tens of thousands of yuan equals almost half of people's annual income. In this case, the government should take the responsibility to provide legal aid to the indigent.

The 2012 amendment of Chinese Criminal Procedure Law perfects the legal aid system in China in order to provide attorneys to more indigent people. Firstly, the scope of compulsory legal aid is expanded. The suspected who are facing life imprisonment and who may have mental problems will be provided compulsory legal aid. Consequently, the government has no excuses to reject the application. In the second place, the suspects can apply for legal aid before trial. Before 2012, the suspects can only apply for legal during trial, which means they have no right to legal aid in investigation phase. However, the suspects face greater risk during investigation and they are more vulnerable facing the police. The attorneys are much more needed during investigation to protect the suspects from potential harms and to stop the police from collecting evidence in an unlawful way. The 2012 amendment breaks the time limitation of applying for legal aid. Now according to the latest law, the suspect can apply for legal aid at any time during criminal procedure. The last but not least, special agency called legal aid agency is created and the responsibility of which is to review the application and assign the counsel. Before 2012 those jobs were taken by the court which was too busy with cases trial to handle legal aid. The creation of the special agency makes the legal aid review more efficient and applicants can get their attorney as soon as possible.

² (Wei, 2017:101).

1.3.3 The Solution of Meeting Issues

Before 2012, the law stipulated that the lawyers were not allowed to meet with their clients until they had the permission of the police. However, everybody knows that if the lawyer met the suspects, it would be much more difficult to acquire the confession. As a consequence, rarely did the police permit the meeting application and in a large number of cases the suspect had no chance to meet with their counsels until trial. The biggest problem is that so many confessions were acquired without the presence of lawyer. So that the tricks, threaten and even violence are unavoidable.

1.3.4 Guarantee of the Attendance of Witness

Before 2012 amendment, the rate of witness attendance in criminal trial was extremely low - less than 10%.³The 2012 amendment has particular stipulations to deal with this problem. First, it articulates the circumstance that witnesses need to attend the court. If either the defendant or the prosecutor disagrees with certain evidence and the judge thinks it's necessary, witnesses need to attend the court. Secondly, if witnesses refused to attend, the court would bring them to court with force or punish them with judicial detention. In the third place, more protection measures and economic compensation are stipulated to witnesses.

2. Problems in Practice

2.1 A large number of defendants still go through the whole procedure without lawyer.

According to the data of Chinese Ministry of Justice, the number of Chinese lawyers has exceeded 300 thousand and this number is growing at 9.5 percent each year. There are 25 thousand law firms now and the number has grown 7.5 percent each year of the past decade. However, the percentage of the defendants having lawyer is still low.

In 2011, Chinese scholars did empirical research about lawyer defense rate all over the country, the result is as followed: M city in Hei Longjiang province 20.2%; P district in Shanghai 27%; C city in Zhe Jiang province 9%; M city in Si Chuan province 15%; F city in Guang Dong province 10%; Z city in He Nan province 26.5%; X city in Shan Xi

³ (Zuo, 2015:151).

province 25%; C city in Hu Nan province 29%; N city in Guang Xi province 21%. The average rate of the whole country is about 22.5%.⁴

5 years has passed, since the enactment of 2012 amendment. However, the lawyer defense rate does not improve. In 2016, scholars did another empirical research in Sichuan province and the result shows that the overall lawyer defense rate was 20.17%, which is no better than 5 years ago. The specific details are as followed: in simplified trial 12.3% (solo judge), 24.69% (collegiate panel); in ordinary trial 37.62%; first trial in intermediate court 88.75 (intermediate court in China exclusively handles cases that relating to terrorism, national security, death penalty and life-long imprisonment).

More than 70% cases remain non-lawyer trial and the defendant can hardly exercise their rights. Because they don't know what rights exactly they have and how to exercise them. The reasons resulting in this problem are complicated but one of them is critically important, that's the indigence of the defendant. With the development of Chinese economy, lawyer defense as a kind of commodity becomes increasingly expensive. The cost of hiring a lawyer ranges from tens of thousands to hundreds of thousands. For so many defendants, they can not afford such a big expenditure. As a consequence, the rich who can afford for a lawyer have a better change to be acquitted or be sentenced to lighter penalties. That is unfair and the government needs to take its responsibility and solve this problem. The further perfection of Chinese legal aid system needs to focus on two points:

Firstly, expand the scope of the mandatory legal aid. According to the 2012 amendment, mandatory legal aid consists of only 4 types of cases: the defendant is blind, deaf or dumb; the defendant is under the age of 18; the defendant has mental problem; the defendant is facing death penalty or life-long imprisonment. Those cases are special and only account for a small proportion of total cases. For the large majority of cases, the indigent defendants need to submit their applications for legal aid and wait for the discretion of local legal aid agency. However, due to the insufficiency of funds and manpower, a large number of applications are turned down regardless of the case nature. To improve this situation of low lawyer defense, the scope of mandatory legal aid need to be enlarged. Many scholars in China suggest that the mandatory legal aid should cover cases with defendants facing more than 10-year imprisonment.

⁴ (Gu, 2012: 56).

Secondly, to diversify the legal aid patterns. In China, legal aid is offered in a single way — local legal aid agency assigns lawyers to the indigent. China is a developing country with large size and diverse regions. 34 proveniences are different from each other in population, economy, culture, nation and religious belief. Such a diverse country needs a diversified legal aid system. In the future Chinese government may build a diversified legal aid system with public defender, assigned lawyer, contract lawyer and many other legal aid patterns.

2.2 The Defense Quality of Legal Aid Needs Improvement.

In practice, legal aid agency assigns lawyers to the indigent and reimburses the lawyers with very little money ranging from hundreds to thousands of yuan. By contrast, the market price to hire a lawyer ranges from tens of thousands to millions. As a consequence, most of lawyers are not willing to accept the assignment of legal aid or if inevitable, just finish it in a perfunctory way. The lawyers want to save their limited time to real cases which can bring them much more money. To solve this problem, the government should do its job and invest more money on legal aid system.⁵

2.3 In Criminal Cases the Lawyers Have Difficulties in Exercising Their Rights.

Before 2012 amendment, lawyer’s rights are restricted in three ways: checking the investigation files; meeting the suspect and investigating the case. The 2012 amendment alleviate the problems above to a certain extent. However, new issues come out afterwards.

First, there are still hindrances in meeting the defendants. The article 36th of 2012 Criminal Procedural Law stipulates that in bribery cases involving 500 thousand yuan (about 77 thousand U.S dollars) lawyers are not allowed to meet their clients until they get the permission of the prosecution. As a consequence, the prosecution usually turns down the meeting application with the excuse of being hindrance to investigation. Moreover, the 73rd article of 2012 amendment creates a new kind of criminal coercive measure called Assigned Residence under Surveillance. Within this measure the investigators hold the suspects in custody in a particular place created by the prosecution and usually the lawyers are not informed where those places are. Consequently, the lawyers can hardly meet with the suspects. As you all know, the present government of China is trying its best to crack down on corruption. A large number of government officials have been accused of corruption crimes. In corruption

⁵ (Chen 2014: 33).

cases, it is so difficult for the lawyers to meet with their clients that they suggest to repeal 73rd article.

Second, cross-examination is difficult to implement. Even though the 2012 amendment creates special rules to enhance the presence of witness, it does not function well. Culture is a major contributor. In Chinese culture people treat litigation as an evil thing and they don't want to go to the court, not to mention identify criminals on court. Apart from culture the court shows its unwillingness to subpoena the witnesses because of the caseload pressure. The court wants to finish one case as soon as possible but cross-examination of witness will slow down trial. The judge has too much discretion on subpoena the witnesses and that's what the law should limit

2.4 About Supervision Commission

In November 7th 2017, the 12th Standing Committee of the National People's Congress released the draft of Chinese Supervision Law and asked the public for advices. According to Supervision Law, the new-established specialized agency — National Supervision Commission will take People's Procuratorate's place and investigate corruption and bribery, dereliction of duty, or other serious illegal or criminal abuses of government officials of Chinese Communist Party organs, people's congresses, administrative organs, CPPCC organs, Supervision Organs, adjudication organs, procuratorate organs, democratic parties, Federation of Industry and Commerce organs, and persons managed with reference to the "People's Republic of China Law on Public Officials". The investigator of Supervision Commission is empowered to carry out investigation measures such as interrogation, questioning, retaining custody, searches, collections, sealing, seizures, or inspections. The law will probably help to crack down on corruption. But according to this law, lawyers are prohibited during the whole investigation process of National Supervision Commission. This regulation has incurred criticism from almost all of scholars from Constitution, Criminal Procedure and Administrative Law area. Let's see if the draft will be revised or otherwise it will represent the retrogression of Chinese legal system.

Overall in recent decades, Chinese criminal defense system is becoming more and more advanced. Human rights protection has become the direction of its further development. Even though we still have some issues to tackle, our future is bright.

References

- Chen, Y. (2014) Domestic Problems and Abroad Experience of Legal Aid in Criminal Case. *Journal of Comparative Law*, 25(1), p. 33-45.
- Gu, Y. (2012) The Development Improvement and Implement of Chinese Criminal Defense System. *Journal of Judicial Science*, 35(6), p. 56-65.
- Wei, X. (2017) The Effective Defense Under the Background of Trial Centralism. *Contemporary Law Review*, 29(3), p. 101-110.
- Zhang, Z. (2017) The Lawyer Defense in Investigation Phrase. *Contemporary Law Review*, 32(6), p. 25-34.
- Zuo, W. (2015) The Empirical Research of the Exclusion Rule of Wrongfully Obtained Evidence. *Judicial Science*, 34(3), p. 151-162.

Silvia Signorato*

DATA RETENTION, A BALANCE BETWEEN JUDICIAL REQUIREMENTS AND THE RISK OF ILLEGALITY

Whenever a telephone or a computer device connected to the network is used, the telecommunication service providers keep some data, e.g. the origin of the communication, its destination and its size. The prior storage activity of telephone traffic data and electronic communications traffic data is defined as "data retention" and can play a fundamental role for investigative purposes. This article aims at recognizing the benchmarks for regulation of data retention that respects the proportionality principle. As part of this analysis, an approach that also takes into account the right to the defense of the accused is proposed. Furthermore, the article disputes the possibility of ab origine define the data retention period on the basis of the type of crime. This is because the internet service provider cannot know a priori what kind of crime will be combined with any given data, until access to that data is requested by the competent national authorities.

Keywords: *Data Retention, Criminal Investigations, Privacy*

1. Introduction

If a mobile phone or a computer is connected to the network, it generates data called *traffic data*. In particular, the term traffic data “means any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in chain of communication, indicating the communication’s origin, destination, route, time, data, size, duration, or type of underlying service”¹. Such data may be of fundamental importance in investigations aimed at *a posteriori* reconstructing the activities carried out by suspects. “Those data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data

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¹ See art. 1, d), Convention on Cybercrime of the Council of Europe, signed on the 23 November 2001.

has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them”². For this reason, the laws of the various States require Internet Service Providers (ISPs), i.e. the providers of publicly available electronic communications services or of public communications networks, to keep traffic data for certain periods of time. The discipline that regulates the conservation of such data is called *data retention*³

2. A difficult case of balance between different rights.

In developing data retention regulation, legislators must face different conflicting demands. On the one hand, there is the investigative need to preserve as much data as possible for as long as possible. On the other hand, however, a general and prolonged conservation of data evokes Panopticon-like scenarios⁴, i.e. scenarios of global surveillance, where everything is controlled, and where there is a serious violation of fundamental rights. Specifically, the Right to have one’s private and family life respected and the Right to the protection of personal data; these rights are intertwined with other rights and legitimate interests (European Union Agency for Fundamental Rights and Council of Europe, 2018: 52-80), such as Freedom of thought, conscience and religion, Freedom of expression⁵, Freedom of assembly and association, Professional Secrecy, etc.

For this reason, there is a need for data retention to be conducted in such a way as to guarantee the protection of fundamental rights to the highest degree. This objective is first achieved by excluding possibility of preserving the communication contents of the

² See Court of Justice (Grand Chamber), 8 April 2014, Digital Rights Ireland and Others, Joined Case C-293/12 and C-594/12, § 27: “With individuals increasingly subjected to varying methods of surveillance, people are beginning to talk about developing a digital ethics, and the EDPS intends to be a leading force in this area” (European Data Protection Supervisor, 2017: 3).

³ “Data retention is distinct from data preservation (also know as ‘quick freeze’) under which operators served with a court order are obliged to retain data relating only to specific individuals suspects of criminal activity as from the data of the preservation order. Data preservation is one of the investigative tools envisaged and used by participating states” under the art. 16 Convention on Cybercrime of Council of Europe (European Commission, 2011: 5).

⁴ The Panopticon is a type of institutional building and a system of control designed in 1791 by Jeremy Bentham.

⁵ See Court of Justice (Grand Chamber), 8 April 2014, Digital Rights Ireland and Others, Joined Case C-293/12 and C-594/12, § 28: “it is not inconceivable that the retention of the data in question might have an effect on the use, by subscribers or registered users, of the means of communication covered by that directive” (Directive 2006/24/CE) “and, consequently, on their exercise of the freedom of expression guaranteed by Article 11 of the Charter”.

data⁶. For investigative purposes, such communication data can therefore be detected only if an interception of conversations or communications is carried out; therefore, the detection of communication contents is never the result of data retention.

Secondly, a continuous balancing of the involved rights, in compliance with the principle of proportionality (Hulsroj, 2013), is necessary. However, this balance appears to be particularly difficult, as the case of Directive 2006/24/EC (also known as Data Retention Directive) has shown. In that case, European legislators stumbled across problems of inadequate balancing between the above cited opposing requirements. That directive handed down by the European Parliament and the Council regulated the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC. However, the Court of Justice, 8 April 2014, *Digital Rights Ireland and Others*, declared Directive 2006/24/EC invalid because it led to wide-ranging and particularly serious interference with the fundamental right to respect for private life as well as to the protection of personal data. The Court of Justice ruled that such an interference exceeded what is strictly necessary and that the directive exceeded the limits imposed by compliance with the principle of proportionality⁷. Thus, following that judgement, the Court of Justice has moved towards greater protection of the right to respect for private life and the protection of personal data.

The terrorist attacks in Europe, however, led to a thrust in the opposite direction. Those attacks caused serious and profound violations of fundamental rights, including the right to life. This determined the need for States to provide new powers to intelligence and law enforcement agencies, including greater availability of data retention data (European Union Agency for Fundamental Rights and Council of Europe, 2017: 156-158)⁸. Moreover, Article 6 Charter of fundamental rights of the European Union expressly provides the right to security of person. In this scenario, a new reflection on the relationship between protection of privacy and protection of security has opened up.

⁶ Some authors point out how, when facing the new forms of communication, it sometimes becomes very difficult to distinguish between data related to and data not related to the content of a communication (Bachmaier Winter, 2009: 12).

⁷ See § 65: “Directive 2006/24 does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary”.

⁸ As is well known, in order to counter terrorism, in many States some emergency regulations were issued (Vervaele, 2005: 201 ff.; Paşca I.C., 2016: 166 ff.).

The focus is on the binomial privacy / security which, too often, is interpreted as “privacy versus security” rather than as “privacy and security”. These rights should in fact be interpreted as “enabling rights rather than ends in themselves” (United Nations, 2016:10).

3. Roadmap for a balanced data retention regulation: test of proportionality and abstract landmarks

It is important to recognize which requirements a data retention regulation should satisfy in order to allow a good balance between different rights. However, in this matter, the line that divides justice and illegality is subtle. The identification of the point of balance between the different requirements must be based on the principle of proportionality. According to jurisprudence and doctrine, in order to verify respect of the principle of proportionality, it is necessary to carry out the so-called test of proportionality. It is based on the following three factors⁹:

- a) *Geeignetheit*. It expresses the *suitability* of an act to achieve the purpose set by a law or inferable from the principles of liberty, democracy and respect for human rights and fundamental freedoms.
- b) *Enforderlichkeit*. It expresses the *need* for an act to achieve its purpose.
- c) *Angemessenheit* o *Verhältnismäßigkeit im engeren Sinne*. It expresses the concept that the sacrifice required by the prescribed discipline is *justified* and is the mildest possible in relation to the persecution of the crime.

These factors are not objective but are, instead, the result of an evaluation. For this reason, they inevitably depend on the subjective and cultural variables of the various European legislators. Nevertheless, they are essential for the purpose of verifying whether or not the principle of proportionality has been violated. Furthermore, these factors can be used as abstract landmarks.

In any case, it is possible to establish some concrete landmarks. They can be drawn *a contrario* from the reasons for which the Court of Justice issued its judgement, 8 April 2014, Digital Rights Ireland and Others, declaring Directive 2006/24/EC invalid on account of the violation of the principle of proportionality.

⁹ These factors are usually derived from German terminology because a particular reflection on the subject is due to German legal doctrine.

4. Concrete indicators that can be derived from jurisprudence

With regard to the concrete requirements that the data retention regulation should satisfy, it is possible to deduce some indicators from jurisprudence and, in particular, from the judgment of the Court of Justice, 8 April 2014, *Digital Rights Ireland and Others*. They are as follows:

- a) *Clear, precise and predetermined rules*. Data retention regulation should lay down clear and precise rules. People should be able to know in advance which types of data will be retained and for how long these will be retained.
- b) *Security of stored data*. It is imperative that the data be stored in such a way as to ensure adequate safeguards against the risk of abuse and against any unlawful access and use of that data. This requirement must be satisfied by taking into account the recent European privacy legislation¹⁰ outlined by three important European Union acts. Firstly, Regulation 2016/679¹¹ of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation or GDPR). Secondly, Directive 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. Finally, Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. These European acts clarify that adequate safeguards should not only concern the processing of personal data storage (so-called privacy by default). Instead, they must also concern the prodromal development phase of the processing tools (so-called privacy by design) (Hustinx, 2010: 253-258; Kipker, 2015: 410; Klitou, 2014).

¹⁰ Some authors recognize that the protection of privacy is “a question of human dignity” (European Commission, 2016).

¹¹ Regulation is a binding legislative act. Directive is a legislative act that sets out a goal that all EU countries must achieve (For an analysis see Kostoris, 2018: 25).

- c) *Need for a new approach to the question of the retaining period* (Note: the retaining period refers to the duration of data retention). In doctrine and in jurisprudence, it is usually stated that the retaining periods should be determined according to the types of crime involved. In particular, data relating to serious crimes should be retained for longer periods, while data referring to minor offenses should be retained for shorter periods of time. However, this common approach seems to be based on an incorrect assumption. When an ISP enters data into a specific archive for data retention purposes, it is not known whether those data could be required by the competent national authorities. Furthermore, it is not known for what kind of crime those data could be required. As a result, it is practically impossible to define *a priori* the retention period according to the type of crime, which would rather seem to be required by the Court of Justice¹². Therefore, it would seem advisable that the retention period should be the same for all data. The limit date of the retention period could operate only at the time of the request by the competent national authorities to obtain access to the data, in the sense that the ISP would be authorized to transmit only data that fell within the retention period provided for by the law. For example, if for a given type of crime a law provided for a 24-month retention period from the date when the data were generated or transmitted, these data could not be transmitted to the competent national authorities if the access request was received 24 months and one day after that date.
- d) *Retention of data of all people, regardless of whether they are suspect or not.* Considerations similar to those outlined above regarding the retention period can also be proposed with regard to persons whose data should be retained. In fact, when the data are archived for data retention purposes, it is completely impossible to choose whether or not to save the data based on whether a subject is suspect or not because, simply, this fact is not known to the ISP. Consequently, a data retention regulation should provide for the retention of data of all possible subjects.

¹² See Court of Justice, 8 April 2014, *Digital Rights Ireland and Others*, Joined Case C-293/12 and C-594/12, § 59: “Moreover, whilst seeking to contribute to the fight against serious crime, Directive 2006/24 does not require any relationship between the data whose retention is provided for and a threat to public security and, in particular, it is not restricted to a retention in relation (i) to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime, or (ii) to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious offences”.

- e) *Objective criterion by which to determine the limits of access by the competent national authorities.* A data retention regulation should delimit the access of the competent national authorities to the data “and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference¹³”.

Data retention plays a fundamental role in the investigative action. The discipline of data retention, however, inevitably infringes upon some fundamental rights, including the right to privacy and the right to the protection of personal data. It is, therefore, necessary to balance investigative needs and the protection of fundamental rights. This balancing action is based mainly on the principle of proportionality.

One of the most critical aspects of this balancing act is the timing of data retention, i.e. the determination. Of the retention period. It has been shown in this article that, in general, when the data are sent to a specific archive for storage, it is not possible to know whether they will be required for investigative purposes and, if so, for which type of crime they will be required. For this reason, an approach to the determination of a suitable retention period is proposed here. It is focused on the access of the competent national authority to the data and not on the data retention itself.

It should be recalled that Article 6 Directive 2006/24/EC provided for a retention period. Such an article stated that “Member States shall ensure that the categories of data specified in Article 5¹⁴ are retained for periods of not less than six months and not more than two years from the date of the communication”.

Regarding retention time, at a European level there is a double scenario. On the one hand, there are States that have reduced the retention period as much as possible in order to protect privacy and the right to protection of personal data. On the other hand, there are States which, in order to combat terrorism more effectively, have instead extended the retention period.

¹³ See Court of Justice, 8 April 2014, *Digital Rights Ireland and Others*, Joined Case C-293/12 and C-594/12, § 61.

¹⁴ I.e., data necessary to trace and identify the source of a communication, data necessary to identify the destination of a communication, data necessary to identify the date, time and duration of a communication, data necessary to identify the type of communication, data necessary to identify users' communication equipment or what purports to be their equipment, data necessary to identify the location of mobile communication equipment.

However, it seems that an important element is missing in the debate on data retention. It seems, in fact, that the right to defense always remains in the shade. In particular, the fact that data stored by Internet Service Providers could be essential in proving the innocence of the accused is too often neglected.

For this reason, a balanced debate on the subject of data retention should not take into account only the balance between investigative needs and the protection of privacy and the right to protection of personal data. It should also focus on the needs of the defense of the individual. This approach will show that an overly limited retention period can also be detrimental to the right of defense (In this case, the right to defense is understood in its sense of the right to have available the necessary evidence for defending oneself in a trial).

It is appropriate to conclude this article by providing concrete suggestions regarding an appropriate retention period. Currently, the most widely accepted legal doctrine is oriented towards very short retention periods. However, it would seem that in order to reconcile the right of defense, the right to privacy, and the needs of investigators, a retention period of at least 36 months should be provided for. It is important to explicitly point out that the single scheme for data retention (i.e. a scheme independent of the type of crime and the subject that generated, processed or transmitted the data) refers to strictly technical aspects and not the criminal procedures ones. If, for example, the retention period is 36 months, this means that the data are stored in the appropriate ISP archive for 36 months, with their general deletion if the deadline is reached without specific requests of the competent national authorities. However, in accordance with the indicator 4.c, the data may actually be used by the authorities for judicial purposes only if they are requested within the deadlines established for the specific type of crime (for example, 36 months). This way of *a posteriori* working remedies the problem of the *a priori* lack of knowledge of possible crimes at the time of data archiving and complies with the current doctrine and jurisprudence, which indicate that the retaining periods should be differentiated according to the type of crime.

Bibliography

- Bachmaier Winter, L. (2009), Criminal Investigation and right of privacy: the case-law of the European Court of Human Rights and its limits. *Lex ET Scientia*, Juridical Series (II), p. 12.
- Pașca, I.C. (2016), The danger of Islamic Terrorism in Romania, *Journal of Eastern-European Criminal Law* (I), p. 166 ff.

- European Commission (2011), *Report from the Commission to the Council and the European Parliament, Evaluation report on the Data Retention Directive (Directive 2006/24/EC)*, p. 5.
- European Commission, Juncker, J.-C. (2016), *State of the Union address 2016*, Speech/16/3043, 14 September 2016.
- European Data Protection Supervisor (2017), *Annual Report 2017, Executive Summary*, Luxembourg: Publications Office of the European Union, 2018, p. 3.
- European Union Agency for Fundamental Rights and Council of Europe (2017), *Fundamental Rights Report 2017 - FRA Opinions*, Luxembourg: Publications Office of the European Union, pp. 156-158.
- European Union Agency for Fundamental Rights and Council of Europe (2018), *Handbook on European data protection law*, Luxembourg: Publications Office of the European Union, pp. 52-80.
- Hulsroj, P. (2013), *The Principle of Proportionality*, Berlin: Springer.
- Hustinx, P. (2010), Privacy by design: delivering the promises, *Identity in the Information Society* 3 (2), p. 253-255.
- Kipker, D.-K. (2015), Privacy by Default und Privacy by Design, *Datenschutz Datensich*, 39 (6), p. 410.
- Klitou, D. (2014), *Privacy-Invasive Technologies and Privacy by Design. Safeguarding Privacy, liberty and Security in the 21st Century*, Berlin: Springer
- United Nations, Human Right Council, Cannataci, J. (2016), *Report of Special Rapporteur on the Right to privacy*, A7HRC/31/64, 8 March 2016, p. 10, para. 24.
- Kostoris, R.E. (2018), European Law and Criminal Justice. Kostoris, R.E. (Ed.), *Handbook of European Criminal Procedure*, Berlin. Springer, p. 25 ff.
- Vervaele, J.A.E. (2005), The anti-terrorist legislation in the US: inter arma silent leges? *European Journal of Crime, Criminal law and Criminal Justice* 13 (2), 2005, p. 201 ff.

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INTERNATIONAL CRIMINAL COURT’S CRIME OF AGGRESSION. A DIFFERENT CRIME FROM ALL THE OTHERS

Ever since its adoption in 1998 was the Statute of the International Criminal Court unique in its kind. Not only was it establishing the first permanent criminal Court on an international level and tried to encompass as many crimes as possible within its field, but, it was the first, after the International Military Tribunal of Nuremberg and the International Military Tribunal of Tokyo, to include the Crime of Aggression as crimes over which it had jurisdiction.

The current article will follow the underwent path of defining the crime till its adoption and later by the Court’s possibility to exercise jurisdiction over it. Further on, we shall try to answer to the question of whether in real life the ICC will be able to exercise jurisdiction and prosecute people for its commission, as well as try to define the perpetrator’s necessary actus reus and mens rea at times of the commission of the crimes.

Keywords: *International Criminal Court, crime of aggression, jurisdiction, actus reus and mens rea.*

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1. Introduction

Even though adopted in 1998 and entered into force after it received the entire number of the needed ratifications in 2002, the Statute of the International Criminal Court¹ did not contain an article detailing and foremost giving a definition of the crime of aggression, despite the fact that, in comparison with the other Statutes of the *ad-hoc* international criminal courts and tribunals, an article called *Crime of aggression* could be found within the text. Even so, no definition could be agreed upon so, the adoption of the Statute went through without containing the much needed definition nor when and how the court could actually exercise jurisdiction over such a crime, postponing all these for another 12 years until the Kampala Review Conference in 2010.

The only Statutes that contained a similar provision within their text were the International Military Tribunal of Nuremberg² and the International Military Tribunal of Tokyo³, both established after the World War II, and was known as the crime “Crimes against Peace”⁴. Based on these and the jurisprudence of the two *ad-hoc* military tribunals, the United Nation’s General Assembly adopted in 1974 on 14th of December the *Definition of Aggression*⁵. Grounded on this document the United Nations was “*Convinced* that the adoption of a definition of aggression ought to have effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would of, and the rendering

¹ Statute of the International Criminal Court, Art. 5, UN Doc A/Conf.183/9 (1998) (hereinafter Rome Statute or Statute).

² http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2_Charter%20of%20IMT%201945.pdf.

³ http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf.

⁴ The text reads as follows: Article 6 of International Military Tribunal Nuremberg and article 5 of the IMT Tokyo state that The Tribunal (established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interest of the European Axis Countries who whether as/ Far East war criminals) who as individuals or as members of organizations are charged with offences which include crimes against Peace. The following acts, or any of them, are crimes within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) “*Crimes against Peace*: namely planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.

⁵ United Nation general Assembly, Resolution 3314 no. A/RES/3314 (XXIX) adopted on 14th of December 1974 [http://undocs.org/A/RES/3314\(XXIX\)](http://undocs.org/A/RES/3314(XXIX)).

of assistance to the victim”⁶, somehow hoping that by entering a prohibition, States will stop violating the borders of other countries for varied reasons.

Twenty-four years later, the international society realized that this United Nation General Assembly’s Resolution was not enough to prevent the mixture within other countries’ territory while, unlawfully and violently cross the border and enter their territory. As such, the international society concluded that such a crime should fall, next to the other heinous crimes like Genocide, Crimes Against Humanity and War Crimes, under the jurisdiction of then to be the first *permanent* international criminal court. Unfortunately, the first result was not as hoped and the Statute of this so needed Court did not entail a clear cut definition of what Crime(s) of Aggression would signify and as such neither its possibility to exercise jurisdiction. At the Review Conference held in Kampala, Uganda, a unanimously agreed upon definition was adopted resolving in the same way the problem of jurisdiction, agreeing “to activate the Court’s jurisdiction over the crime of aggression as early as possible”⁷ this latter happening only after another 7 years, based on at least 30 State’s ratification of the given definition, 01 January 2017. But, it took another 11 months and 14 days, on the 14th of December 2017, after 10 days of negotiations, to conclude when, how and in which circumstances the Court will be able to try cases on such a matter, deciding on the 17th of July 2018, when the Court celebrated its first 20 years.

2. Definition of Crime of Aggression

For the purpose of this article and for a better understanding, we consider it important to give the relevant articles of the Rome Statute, the UN General Assembly’s Resolution 3314 and the one given by the two Military Tribunals from Tokyo and Nuremberg⁸ on the *Crime of Aggression*⁹.

On the definition of crime of aggression in conformity with the Rome Statute and the UN Charter, we would like to draw the attention that, while the Rome Statute tried to distance itself from the other Statutes and Treaties or other international acts defining the crimes that fall under its jurisdiction, best example being Genocide, it just added

⁶ United Nation general Assembly, Resolution 3314, Annex definition of Aggression, Preamble.

⁷ International Criminal Court, Assembly of State Parties, Resolution RC/Res.6! Adopted at the 13th plenary meeting, on 11 June 2010, by consensus RC/Res.6 The crime of aggression https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf

⁸ See *above* Footnote 7.

⁹ <http://hrlibrary.umn.edu/instreet/GAres3314.html>.

some parts next to the definition given by the United Nation General Assembly in its Resolution 3314 on the given Crime of Aggression. As such, in 2010 after the Review Conference held in Kampala, Uganda, the Assembly of the State Parties of the International Criminal Court and based on the enormous work of the Special Working Group that has been established to work on the definition of the crime of aggression, the following definition was agreed upon by all States.

The Rome Statute describes the Crime of Aggression in Article 8*bis* as follows:

1. For the purpose of this Statute, “crime of aggression” means the *planning, preparation, initiation or execution*, (emphasis added) by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”

In conformity with the above mentioned articles, the crime of aggression can be committed under any of the forms of commission, alone or together with others, directly or indirectly through *planning, preparation, initiation or execution*, personal individual responsibility being possible to arise from any of the forms inclusive instigation to the commission of any of the crimes listed in article 8*bis*.

Paragraph 2 of the same article explains what is to be understood, for the purpose of paragraph 1, under “act of aggression”. As such, such an act “means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, *regardless of a declaration of war (emphasis added)*, shall, in accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory

beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”

Even though, the article lists 7 acts we believe that this is actually a non-exhaustive list and it could be as well interpreted in the light of what an aggression against one state can mean nowadays, as in conformity with the social and political evolution of the society, what an aggression meant in 1974 might have changed. [on a discussion on the definition see Oscar Solara, *The Definition of the Crime of Aggression: Lessons Not Learned*, 42 Case W. Res. J. Int'l L. 801 (2010), Learned, 42 Case W. Res. J. Int'l L. 801 (2010) Available at: [h6p://scholarlycommons.law.case.edu/jil/vol42/iss3/13](http://scholarlycommons.law.case.edu/jil/vol42/iss3/13)]

Concerning the *Elements of crimes*, meaning the *actus reus and the mens rea* through which this crime (crimes) can be committed, what could be observed is that, in comparison with the ones for the other crimes that fall under the jurisdiction of the Court, the former are not very detailed, leaving the impression that, the crimes listed by this article are not as important as the others or that they have been left as vague as possible so that, either, their interpretation would be very broad or that it leaves no space for interpretation.

As such, Article 8bis of the Elements of the crime, as they were included after Kampala establish that, first, the perpetrator had to have planned, prepared, initiated *and/or* executed an act of aggression while he, she or they, as there could be more the one person, was/were holding such a position in order to effectively exercise control over or to direct the political or military action of the State which committed the act of aggression. By its definition what can be sustained is that this sort of crime, no matter how it was committed is actually a “leadership crime”¹⁰, as only a person holding and exercising the real control over the State could be responsible for the commission of such a crime. “It has been argued that this excludes non-governmental actors such as organized armed groups involved in armed conflicts and private economic actors”. [http://www.internationalcrimesdatabase.org/Crimes/CrimeOfAggression#_ftn6, see as well, Mauro Politi, *The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead*, *Journal of International Criminal Justice* 10(1):267-288, DOI:

¹⁰ <http://www.internationalcrimesdatabase.org/Crimes/CrimeOfAggression>

10.1093/jicj/mqs001 (2012) p. 285-286.] We believe that, taking in account the current situations, international organized armed groups, such as ISIS, could be considered as being a possible perpetrator.

What is interesting to observe is that, the elements, laid out in point 3 do not, like in the case of the other crimes envisaged by the Rome Statute, require that the act of aggression is committed by one or more persons but that “the use of armed force (...) against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations” to be committed by another State¹¹, while paragraph which focuses on the perpetrator of the crime, establishes that he/she or they should have been aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations. In this case it is not clear if the Elements mean the State or the person/s acting in position to effectively exercise control over the State. Taking in account that the International criminal Court has actual jurisdiction over individuals and not states we suppose it was referring to individuals acting in that position, as expressed in the in 2010 Kampala’s amendments *Article 25, paragraph 3, of the Statute 3bis will read as follows* “In respect of the crime of aggression, the provisions of this article shall apply *only (emphasis added)* to persons in a position effectively to exercise control over or to direct the political or military action of a State” and as such, another person shall not be held liable for the commission of such a crime, ergo, it cannot be considered that he or she committed in any way the crime nor that it had the required *mens rea* for the commission of such a crime, but could be held responsible for the commission of another crime that falls under the Court’s jurisdiction. Furthermore, the same article states that, “the act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations” and “the perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations”.¹²

1. Actus reus and mens rea

As, *mens rea* in all other cases is intent under its two forms and knowledge, as such it had to be imagined that for this particular crime, of such an importance and scale, irrespective of the way of commission, the required mental element while acting within

¹¹ <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>

¹² <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>

the commission of the crime would be intent, be it direct or indirect and with knowledge.¹³ On the other hand, as there is no special provision envisaged by the Statute, a requirement of a special intent, like in the case of Genocide, or Persecution and Extermination as Crimes against Humanity, article 30 applies fully in this instance.

As such the author of the crime, the person holding the position of leadership, should have wanted to attack in any way envisaged by this Statute and against the principles laid down in the United Nation Charter, should have envisaged the consequences of his or her actions or the ones he or she planned and should have known that the envisaged outcome would have been and aggression against the other state.

As to the perpetrator there are some differences between the Crime of Aggression and the other listed in the Statute of the International Criminal Court. is that, while for the commission of others, with a few exceptions, there is no requirement for any status of the perpetrator, being possible to be committed by a soldier, a superior or a person that was in command, this crime can be committed under any of the enumerated forms only by a person in a position through which it could effectively exercise control over or to direct the political or military action of a State, against another State.

We ascertain these facts because, there is no provision within the Rome Statute that would require otherwise, but that the person should have committed the material element as envisaged by article 8*bis* of the Rome Statute and as elaborated by article 8*bis* of the Elements of the crimes and the prosecution has to prove that the person meant to engage in such a conduct wanting to cause the consequences of his acts or that the acts he or she planned, prepared or initiated would have come to the result of an aggression against another state. On the initiation part, some questions could be raised. What if the person initiated the acts but then gave up to the plan but some consequences still happened? Could such an act exclude individual responsibility? We believe that, as

¹³ Article 30 - *Mental element*

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - a) In relation to conduct, that person means to engage in the conduct;
 - b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

in the case of Genocide, attempt should be punishable under the Rome Statute, and so should be *aiding and abetting* or *indirect perpetration*.

On the other hand, in this case, it was believed that *Article 32 – Mistake of fact or mistake of law*¹⁴ could be applicable in case of humanitarian actions or self - defence. We are of the opinion that it depends on the threshold of where self-defence ends and where aggression actually starts, as an act could start as self-defence but could end with the aggression in any manner of the attacking State as well. The same could be envisaged in case of humanitarian actions that could end up falling under the provisions of the Rome Statute.

2. The jurisdiction's issues

The amendments concerning the definition and the elements of the crimes must have been agreed upon, ratified and/or accepted by at least 30 State Parties of the Rome Statute. Upon ratification or acceptance 1 year must have passed until the Court could finally exercise the well needed jurisdiction. Another condition for exercising jurisdiction was that on 1th of January 2017 for that the Court to be able to exercise jurisdiction, a consensus or the vote of a majority of at least 2/3 would be needed.¹⁵

For the criteria to exercise jurisdiction concerning this crime, articles *15bis* “Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)” and Article *15ter* “Exercise of jurisdiction over the crime of aggression on the United Nation’s Security Council referral” were adopted. In comparison with the other cases and crimes that fall under the Court’s jurisdiction, in the case of Crime of Aggression the ICC “may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), *subject to the provisions of this article*. 2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.¹⁶ As such, the Court has jurisdiction of such crimes not before 2018 as the Court can exercise

¹⁴ Article 32 - Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

¹⁵http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/ciccfactsheet_crimeofaggression_oct2017.pdf.

¹⁶ Rome Statute, Article *15bis* paragraph 1 and 2.

jurisdiction only after July 17th 2018 and for 3rd parties only one year after their ratification or amendment.

Nevertheless paragraph 3 of the same article emphasize that, “the Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.”(2/3 majority – *emphasis added*). In addition to all the above, the drafters found it necessary and for good reason nonetheless to highlight that “The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, *unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar (emphasis added)*. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.”

As such, the Court shall have jurisdiction over such a crime for the next three years after the withdrawal, similar with the case of withdrawals from the entire Statute, which is 1 years after the written notification of withdrawal from the Rome Statute was deposited at the United Nations Secretary-General as the depositary of the Statute. A withdrawal of a State has no impact on on-going proceedings, or any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective; retaining jurisdiction over the crimes committed during the time the State was part of the Statute and as such can actually exercise jurisdiction over these crimes even after the passing of one year, after which the withdrawal becomes effective. The withdrawal shall not have an effect on the status of any judge already serving at the Court.¹⁷

Because of the magnitude of the crime and the current World situation, paragraph 5 had to be introduced within article 15*bis*, excepting in this way non-party states from prosecution “In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.”

The next 4 paragraphs of the same article try to establish the relationship between the Prosecution, the United Nation Security Council and the Pre-Trial Division. As such: paragraph 6 – 10 state that “[w]here the Prosecutor concludes that there is a

¹⁷ <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371>

reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents. 7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression. 8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16. 9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute. 10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.”

Further on article 15^{ter} establishes the possibility for the ICC to Exercise its jurisdiction over the crime of aggression on the United Nation’s Security Council referral in accordance with article 13, paragraph (b), subject to the provisions of this article. As such: “2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties. 3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute. 4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute. 5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.”

In respect of article 15^{bis} and ^{ter}, the following questions rise. What happens if, a state party to the Rome Statute that has ratified or accepted the amendments refers a case to the Court but the perpetrator is neither a State Party nor a third party accepting/ratifying the Statute and there is a state referral or a *proprio motu* one? The investigation should not be of any issues, but the bringing of the perpetrator before the Court might be a problem, as if, the perpetrator does not hand-over its state officials willingly, the Darfur-Sudan case scenario (where the president of the country is being sought to be brought before the Court, because, even if Darfur-Sudan is not State Party the case was referred to the Court through a United Nation Security Council Resolution)[for a better

understanding of the situation and withdrawals from the ICC, see, R. Colojoară, Does the International Criminal Court Have a Future or Is It Just an Illusion, in JE-Eur. Crim. L., 2016]. Another scenario is the opposite the perpetrator is a state Party but the aggressed is a non-state party, and the court is referring the case *proprio motu*? In this latter event we envisage the following scenario, the Court can start investigating and even if the State enters a withdrawal the Court is in its right to prosecute the case in conformity with article 15*bis*. Is the scenario of a case referral by the UN Security Council even possible in this case, bearing in mind that State like Russia or the USA have the *veto* power?

Additionally, will the acceptance or ratification of the articles on the Crime of Aggression, that change in a way the structure of the Statute, bring to new opt-outs and will this opt-out be just for this articles or for the entire Statute, as it could be observed lately some African countries have already decided to redraw from the Courts jurisdiction. Another very good example is the decision of Russia¹⁸ after the Court opened an investigation in the situation in Georgia and Ukraine, as even though Russia only signed but did not ratify the Statute, it withdrew completely from the Statute and so did the USA as well for visible reasons (we shall not forget that after being one of the biggest supporters of the ICC the USA threatened to attack its premises in case one American soldier is being brought before the Court¹⁹). The drafters tried somehow to solve this issue by including in article 15*bis* but that does not mean there were not and will not be any debates on this matter, as long as there is the possibility of the United Nation Security Council's referral of a case to the International Criminal Court.

On the *non bis in idem Principle*, to Article 20 , paragraph 3, of the Statute the following text was added “No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8*bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice”, keeping in this way the sense of the Principle of Complementarity that is ruling the Court.

¹⁸ The case of Ukraine is already before the Court <https://www.icc-cpi.int/ukraine>

¹⁹ <https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law> and most recent <https://www.thetimes.co.uk/article/us-threatens-to-sanction-war-crimes-court-judges-fggnqzgh>

In any case, so that the Court is not being confronted with problems like other international tribunals and courts that were built after or during the Conflict, and the defence raised the lack of jurisdiction defence, it was decided that first and foremost the Court shall have jurisdiction over this crime only after acceptance or ratification and only one year after its entry into force, second, the Court will not be able to rule over the commission of such a crime except when there is evidence that the countries involved were unable or unwilling to try such a case or any other country was in the same position (same is applicable for the other crimes as well, just that in those cases the Court has jurisdiction only over crimes, acts and omissions, committed after 2002). We say *any other country* as, due to the criminal law *universality principle*, any other country could have jurisdiction to try those responsible for acts that fall under the Permanent's Court jurisdiction, or at least this should be the broad interpretation. But can another state prosecute such individuals for the commission of such crimes? Let's not forget that, one of the reasons for certain countries withdrawal from the Court's Statute and implicitly from under its jurisdiction was the fact that cases against certain country's leaders have been opened, like in the situation of Darfur Sudan and its acting president Bashir [*The Prosecutor v. Omar Hassan Ahmad Al Bashir*²⁰], and in this case the acting president is being accused of having committed crimes against humanity and war crimes, his extradition, while being on the territory of certain State Parties to the ICC, having created in the end great debates on state officials immunity²¹ in conformity with the Vienna Convention and article 27 of the ICC Statute, the *Irrelevance of official capacity*^{22, 23}.

3. *Victims and perpetrator*

Another question that can arise from the given definition and Statute's text is who the final victim is. Is it the population of the aggressed state or the state itself? As a rule, standing before the permanent criminal court as a victim would be able just a person and not an entity as the Court is not built to protect and neither, as said before, to accuse entities, be it an international organization or a state. As such, to be more precise, it was hard until now for the Court to bring justice to the victims as individuals and to bring

²⁰ <https://www.icc-cpi.int/darfur/albashir>.

²¹ http://legal.un.org/ilc/guide/4_2.shtml and http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf.

²² https://www.icc-cpi.int/nr/rdonlyres/ea9aef77-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

²³ For a better understanding of why state immunities do not, legally apply to the ICC, see for example: https://www.icc-cpi.int/CourtRecords/CR2018_02423.PDF.

them before the court, now, how hard will it be to bring justice to the victims of a crime of aggression.

Based on article 85(a) of the ICC Rules of Procedure and Evidence the status of victim can be held by a *natural person* “who has suffered a harm resulting from a crime within the jurisdiction of the Court”²⁴ as well as any “organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes”²⁵ excluding in this way States even though it should have, for certain been taken in consideration as well as the actual status of victims and who they are in case such crime is being committed. As such, even though forgotten and undermined, the Drafters should have taken in consideration that, for the first time, victims can take part in the proceedings of and be part of trial, their status should have been established in a manner that could not bring to many unnecessary interpretations. Of course, when analysing the crime itself, not only the individuals or other organizations are the victims of such a horrendous crime but the State itself, as the crime is being, first and foremost directed against the State, and secondly against its population. For the protection of the population other crimes can be invoked the as well, while for this crime the State and its integrity is its primer subject. Unfortunately, not having it well established under no internationally recognized act, the status of a victim in case of a trial on (a) crime(s) of aggression before the ICC is still uncertain. As such there is a well recognizable conflict between the definition of the crime and its elements and article 85 of procedure and Evidence belonging to the same Statute.

Another recognizable conflict is on the status of the perpetrator itself. While on one hand article 8bis says that whoever *planning, preparation, initiation or execution* and is in a position to effectively exercise control over the political or military actions of the State but in paragraph 2, as it was taken from the United Nation’s Resolution, the perpetrator seems to be the State, as an entity itself, and as such could not be brought before the Court.

²⁴ Rule 85(a) of the ICC Rules of Procedure and Evidence states, “‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.” ICC Rules of Procedure and Evidence, Rule 85(a), <https://www.iccpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf>.

²⁵ ICC Rules of Procedure and Evidence, Rule 85(b), <https://www.icc-cpi.int/iccdocs/PIDS/legaltexts/RulesProcedureEvidenceEng.pdf>. In this sense see as well Marissa R. Brodney, *Accounting for Victim Constituencies and the Crime of Aggression: New Questions Facing the International Criminal Court*, Harvard International Law Journal / Vol. 58 Online Journal, 2017, p. 39.

“However, the fact that ambiguities remain should not in itself be regarded as a matter of concern. That texts need to be interpreted is the stuff of law. Also, it should not be expected that all of these questions can and will be resolved before a decision is taken on activation of the Court’s jurisdiction.” [Dapo Alande, *The ICC Assembly of States Parties Prepares to Activate the ICC’s Jurisdiction over the Crime of Aggression: But Who Will be Covered by that Jurisdiction?*, <https://www.ejiltalk.org/the-icc-assembly-of-states-parties-prepares-to-activate-the-iccs-jurisdiction-over-the-crime-of-aggression-but-who-will-be-covered-by-that-jurisdiction/>]

4. Conclusions

Going for the Crime of Aggression would imply not only finding a crime committed against a state but as well a State as a victim while the current statute of the International Criminal Court allows, for the moment, for only individuals to be tried and sentenced for the commission of crimes that fall under its jurisdiction as well as for only individuals or organizations within the borders of a state, to take up the position of victims. Furthermore, the court has, it’s true the possibility to investigate into the occurrence of the crimes under its jurisdiction over a certain territory and establish their occurrence or not, case known as prosecution in the case of X state, or situation in X state, but it cannot try a case against a state as, that is only the International Court of Justice that has such a jurisdiction and the establishment the existence of an aggression over a State or not.

What should be emphasized in any case is that, even though the State Party does not amend or ratify the articles concerning this crime, but is still a state party to the Rome Statute a case concerning the situation in it and against superiors or persons (proven to be) in control can still be brought before the Permanent International Criminal Court if his or her acts fulfil the by the international criminal law required criteria for the other crimes that fall under its jurisdiction.

Even though it is a great achievement for international criminal law that, after 40 years since the United Nation General Assembly’s resolution and almost 60 years since the trials at the International Military Tribunals of Nuremberg and Tokyo, there is one court that is actually habilitated to try persons for actively engaging their State in an aggression against another state, there is still no real perspective for the moment at least, for such a case to be tried before it.

In any case, the fact that there was an agreement on the definition of the Crime of Aggression and the decision on start of jurisdiction is laudable, even though the chances for trials in such cases in the near future are very slim, and that is not due to the legal determination but because of political premises.

We are of the opinion that there was a need for such an article within the statute of a Criminal Court because, state officials have committed acts that could fall under the provisions of such an article, but because of the inexistence of a Court that could exercise jurisdiction over such cases, the Pandora Box on this subject was not opened, with the exception of the cases before the International Court of Justice which, on the matter of aggression the latter has never found that a state has actually committed an act of aggression, and condemning by the United Nations of certain acts, but all of these does not have the same impact as a judgement before an international criminal court.

References

Literature:

- Dapo Alande, The ICC Assembly of States Parties Prepares to Activate the ICC's Jurisdiction over the Crime of Aggression: But Who Will be Covered by that Jurisdiction?, <https://www.ejiltalk.org/the-icc-assembly-of-states-parties-prepares-to-activate-the-iccs-jurisdiction-over-the-crime-of-aggression-but-who-will-be-covered-by-that-jurisdiction/>
- Marissa R. Brodney, Accounting for Victim Constituencies and the Crime of Aggression: New Questions Facing the International Criminal Court, *Harvard International Law Journal* / Vol. 58 Online Journal, 2017
- Mauro Politi, The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead, *Journal of International Criminal Justice* 10(1):267-288, DOI: 10.1093/jicj/mqs001 (2012) p. 285-286
- Oscar Solara, The Definition of the Crime of Aggression: Lessons Not Learned, 42 *Case W. Res. J. Int'l L.* 801 (2010), Learned, 42 *Case W. Res. J. Int'l L.* 801 (2010) Available at: <http://scholarlycommons.law.case.edu/jil/vol42/iss3/13>
- Raluca Colojoară, Does the International Criminal Court Have a Future or Is It Just an Illusion, in *JE-Eur. Crim. L.*, 2016

Statutes and legal acts

- Elements of Crimes <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>

International Criminal Court, Assembly of State Parties, Resolution RC/Res.6! Adopted at the 13th plenary meeting, on 11 June 2010, by consensus RC/Res.6 The crime of aggression
https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf

Statute of the International Criminal Court, Art. 5, UN Doc A/Conf.183/9 (1998)

Statute of the International Military Tribunal for the far East

http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf

Statute of the International Military tribunal of Nurenberg

http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf

United Nation general Assembly, Resolution 3314 no. A/RES/3314 (XXIX) adopted on 14th of December 1974 [http://undocs.org/A/RES/3314\(XXIX\)](http://undocs.org/A/RES/3314(XXIX))

Case-law

ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case number ICC-02/05-01/09
<https://www.icc-cpi.int/darfur/albashir>

International Criminal Court, Preliminary examination Ukraine <https://www.icc-cpi.int/ukraine>

Web-sites

<http://hrlibrary.umn.edu/instrtree/GAres3314.html>

http://legal.un.org/ilc/guide/4_2.shtml

http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf

http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/ciccfactsheet_crimeofaggression_oct2017.pdf

http://www.internationalcrimesdatabase.org/Crimes/CrimeOfAggression#_ftn6

<http://www.internationalcrimesdatabase.org/Crimes/CrimeOfAggression>

<https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law>

<https://www.thetimes.co.uk/article/us-threatens-to-sanction-war-crimes-court-judges-fggnqzgh>

https://www.icc-cpi.int/CourtRecords/CR2018_02423.PDF

<https://www.iccpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf>

https://www.icc-cpi.int/nr/rdonlyres/ea9aef77-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

<https://www.icc-cpi.int/Pages/item.aspx?name=pr1371>

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THE SCOPE OF FORENSIC SCIENCE IN THE LEGAL SYSTEM OF SERBIA AND THE PROTECTION OF HUMAN RIGHTS

Cooperation between forensic science and the legal system in the world as well as in Serbia is constantly changing, improving, uncovering new opportunities. In this paper, we briefly present a short history, a study of some areas and the scope of forensic science in the world. Also, we focus on the scope of the application of forensic science through various types of expertise in the Serbian legal system. In that part, the focus is on the area of criminal law, the problems that we have so far noticed in the work of the police and judicial authorities regarding the application of certain forensic science from the aspect of human rights protection. In addition, we also point to possible new human rights concerns, bearing in mind the provisions of certain new yet insufficiently known regulations relating to certain aspects of forensics.

Keywords: *forensic science, the legal system, expertise, human rights.*

1. Introduction

Crime has existed as long as time itself, as well as crime trace evidence, primarily blood. Crime trace evidence is usually found in almost all criminal offenses committed with elements of violence, as well as residue on victims of crime and at the crime scene, but this evidence can also often be transferred onto the perpetrator himself. In addition to these traces, other biological traces of the crime remain on the victim and at the crime scene.

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In the recent years, crime TV shows have been very popular on numerous television channels in Serbia that glorify the use of various forensic methods in solving various crimes. Based on these shows, the average viewer can think that by the use of the forensic methods presented, it is relatively easy to detect the perpetrators of all, even the most heinous of crimes. The TV shows include knowledge from forensic science intermingled with medicine and criminalistics. Forensic DNA methodology is often mentioned. However, in no way can it be said that this reflects the reality either in Serbia or in most countries around the world!

The development of science and technology in the fight against crime has been accompanied by a constant tendency for new discoveries and a more effective struggle, as the perpetrators of crime always seek to leave as few traces as possible when committing crimes: their aim, after all, is not to leave traces but to commit “the perfect crime.”

The cooperation between forensic sciences and the legal system is in constant changing. Some experts debate that forensic science is in transition and that constant improvement of this relationship is needed to achieve full functionality and show the complete power of these two systems. Currently, new insights, advancement of technologies and customer services in conjunction with extreme costs and developing effectiveness is the main cause that the sector of forensic science is expanding. This has, as a result, the change in the role of forensic laboratories and forensic experts. With the current need worldwide, most forensic laboratories can process more and a great variety of proofs and follow the golden rule “less is more”, where the experts are able to extract more useful information from the less sample obtained. The advancement of forensic science and technologies allows specialists to gather information from digital sources like mobile phones, computers, and laptops, as well as from car computers, by tracking a GPS software. On the other hand, the improvements in the field of DNA science made possible to give more precise information about the donor. Furthermore, this procedure is nowadays less time-consuming. One additional advantage is that these procedures come with lower costs compared to traditional investigative techniques (O’Brien et al., 2015; Tjin-A-Tsoi, 2013).

Because of all this, the current aspect of forensic science is changing. In the past criminal proceedings, the role of forensic science was merely supportive, providing additional information and clarification to traditional techniques. However, today forensic science is considered one of the key factors in a larger machinery of the investigation, due to the speed and reliability of data, possible scenarios, and suspects.

Furthermore, the whole profession is changing the stance from the perspective where one expert played a predominant role and the expertise was crucial for solving the case, to one where skilled workers are part of a complex mechanism of empirical knowledge combined with constantly developing technology (Redmayne et al., 2011; Tjin-A-Tsoi, 2013).

Members of the academic society and legal practitioners are progressively embracing a more critical attitude towards the forensic sciences, the way they are introduced at trial and the role they play in convictions or acquittals once admitted. Moreover, practitioners from a range of forensic science specialties have begun a reflective appraisal, wherein the deficiency and validity of a number of previously accepted techniques are being questioned (O'Brien et al., 2015). There are several problems and shortfalls that are inherent in the current relation between forensic sciences and legal sciences and some of them include the efficiency of the justice system and the way it is administered, the admissibility of expert evidence, reliability tests, structural problems such as the influence of the evidence tendered by experts on the jurors, the adversarial nature of the judicial system, the bias of legal representatives and flawed assumptions in forensic science (Abregu, 2001; Morrison, 2012; Perlin et al., 2009; Saks and Koehler, 2008; Wheate, 2010).

It is important to note that any piece of the evidence that is processed and analyzed by some forensic technique remains latent until an expert interprets its meaning and explain the significance of finding and presents it to the legal system (O'Brien et al., 2015). The art of presenting the findings and evidence on the court is equally important because the expert is linking and associating two branches, the science and the law. The process through which the evidence is presented to the legal system and how it is interpreted is of utmost importance to get a full potential of both systems.

In this critical review we would like to address the problems between legal sciences and forensic sciences, what are the major stepping stones in this process, in what way and how can forensic sciences help the legal system on the one hand, and what are the expectations of the legal system on the other. We believe this is in the best interest of protecting human rights and the fundamental freedoms of all persons who are in different ways linked with any kind of court proceedings, and above all with criminal proceedings.

2. The history and development of forensic science in the world

From the earliest times, the role of forensic scientist has been observation and interpretation of physical evidence. The word “forensic” derives from the Latin word since the Ancient Greeks and Romans were the first ones who practiced it. During that period in history the whole social and political system was open and had strong connections with public places called “forums”, and there we can find the origin of the word we use today. The origins of forensic science go as far as Archimedes and Ancient Chinese and we cannot determine a specific time in the past when the forensic science was born. Since the crime in some form existed from the beginning of the human race, we could freely say that forensic science existed from the same period of time. With the advancement of the human society, the crime itself evolved and became more and more sophisticated. The advancement of technology and science changed the concept of crime as well as the methods adopted by criminals. That quick development allowed criminals to exploit science for his criminal acts and investigators were no longer able to rely on old-fashioned art and techniques to detect crime (Bell, 2008: 29-37; Katz and Halamek, 2016).

Besides Archimedes, we come to know of another early forensic science application by Soleiman, an Arabic merchant of the 7th century. He used fingerprints as a proof of validity between debtors and lenders. In the 700s, the Chinese also used the fingerprint concept. In the 1000s, Quintilian, a prosecutor in the Roman courts, used a similar method to solve murders. The first document that mentions the use of Forensics in legal matters is the book *Xi Yuan Ji Lu* (translated as “Collected Cases of Injustice Rectified”) written in 1248 by Chinese author Song Ci. In the 18th century, many scholars did some groundbreaking work in Forensics. England also solved several murder cases using forensic science. For instance, in the year 1784 in Lancaster, John Toms was convicted of murder, when a torn bit of a newspaper in a gun was found matching a leftover paper in his pocket. In the 19th century, scholars like Thomas Bewick, an English naturalist, a Spanish professor of medicinal/forensic chemistry Mathiew Orfila, John Evangelist Purkinji, professor of anatomy at the University of Breslau, to name a few, made history in forensic science (Tilstone et al., 2006: 25).

The discovery by Karl Landsteiner, who distinguished the main blood groups, helped develop the first modern genetic tool used to identify individuals, which can now be done in a short time; in fact, in a matter of minutes. Based on the discovery of the three blood groups, A, B, and O of human blood, it is possible to rule out a person from a list of suspects, but this can still not be taken as evidence for presence at the crime scene (or

as evidence of identity). Bearing in mind that within the European population there are about 43% of people with blood group A, 34% with blood group O, 16% with blood group B, and 7% with blood group AB, it is clear that very often there is no possibility of ruling out at least several suspects, if they all, including the victim, have the same blood type, which in practice is not a rare case (Aleksić, 1982:85).

The methods of testing blood groups (A, B, AB, and O) and factors (MN, Rh, DAFI-KEL and P factors) which could reliably rule out paternity and maternity (although by their application paternity could not be reliably determined) were, until the emergence of DNA expertise, the essentially dominant methods for determining or affirming parenthood, with the addition of legal assumptions about the shortest and longest pregnancy, and expertise on the maturity of the newborn (Obradović, 2001:86).

Their proof of evidence in criminal proceedings today is practically negligible. With the advent of DNA synthesis, these methods have lost much of their power of evidence in paternity procedures as well.

The history of modern dactyloscopy or finger identification is linked with the name of Ivan Vučetić, director of the Center for Dactyloscopy in Buenos Aires, Argentina, who developed his own dactyloscopic classification system and in 1891 created the first method of fingerprint classification. His classification system, due to its practicality, has been adopted by many countries in the world and is still applied. Since the adoption of dactyloscopy in judicial and police practice, fingerprinting has rapidly developed and occupies a very important place, as the safest method with the least probability of error can be thus ruled out (Aleksić, 1982: 158-160.) The dactyloscopic evidence is the most efficient when it can be proven that the fingerprint was created just and only during the committing of the criminal offense. This means that the following facts should be established for such proof: that the fingerprint is factual, evident, unfiltered; that it was left in situ and that the incriminated imprint could only be left behind by the perpetrator of the crime, based on the analysis of a specific triad: conditions, place and time when the trace was left (Vodinelić, 1998, 115-116).

Therefore, the incontestable power of dactyloscopic expertise is the procedure which serves to determine whether two fingerprints originate from the same person, which is in modern laboratories carried out via a computer. Nowadays, this is done through the automatic identification system for papillary line prints (AFIS) and this system is an integral part of the exchange of data within the framework of international police cooperation.

As a matter of fact, dactyloscopic expertise has an advantage over DNA testing only when it comes to identical twins. Namely, only in this case, based on DNA analysis and on the basis of the established biological trace, it is not possible to determine which of the twins has left the trace, but on the basis of the left fingerprint of one of the identical twins it is possible to precisely identify the one who left the fingerprint at a crime scene.

With the discovery of Alec J. Jeffreys in 1985 that certain segments of the DNA structure in individual genomes are very diverse, and that two people differ by the combination of these genes in a similar way as people differ in the combination of papillary lines, there are numerous new opportunities in the fight against crime, as well as in a number of other fields, such as paternity disputes, identification of missing persons, etc.

DNA testing is just one of the latest and perhaps the most up-to-date method of criminal identification that has found its full application in police and judicial practice. An object or a certain person present at the crime scene can be identified on the basis of traces. Putting into practice the method of identifying a person based on their DNA is the greatest contribution of the 20th-century forensic doctrine to the development of contemporary ways of detecting and proving criminal offenses, according to some authors (Simonović, 2004: 474).

The use of DNA expertise in criminal proceedings is important for the procedures that have been in place since the beginning of the application of this type of expertise, as well as for old, incomplete procedures in which DNA expertise was not possible as it was unknown. The number of criminal proceedings in which DNA expertise had with certainty contributed to clarifying the facts and establishing the guilt or innocence of the persons suspected of having committed the crime will never be known for certain. The data confirming this, in itself, is that in 2002, hundreds of thousands of DNA analyzes were carried out in the USA in criminal investigations, and two thirds in sexual offenses (Dunjić, 2008: 293). It will also never be known how many times a wrong verdict was brought in criminal proceedings, as at that moment DNA expertise could not have been applied since it was unknown. Thus, in the period from 1992 to 1997, due to the results of DNA expertise in almost 50 cases, it was proven that there was an incorrect assessment of individuals. There have been cases up to that period whereupon prisoners spent more than 15 years in prison, after which they were found to be innocent on the basis of DNA expertise (Zonderman, 1999: 114).

Any science that is used for the purposes of the law and is suitable for the court is a forensic science. Moreover, forensic sciences deal with the application of the scientific knowledge to legal problems and they are vital for understanding the truth in any legal proceeding (James et al., 2009: 10). These sciences include forensic anthropology, forensic odontology, forensic chemistry, forensic biology, forensic medicine, forensic materials science, forensic engineering, computational forensics, cyber forensics and all of them are widely used to resolve civil disputes, to enforce criminal laws and to protect public health (Byers, 2015; Casey, 2011; Khan et al., 2012; Pavlović et al., 2017; Payne-James et al., 2003; Saferstein, 2014). Each of these areas and subareas have a different approach to the solving the criminal case. In forensic botany, for instance, plant and pollen samples collected at the crime scene are sufficient to reaching certain conclusions (Miller Coyle, 2004:15), while some other branches like forensic chemistry need to use more profane and sophisticated instrumental analytical methods in order to detect the smallest particles of chemical compounds (Jackson and Verbeck, 2016: 56). Of course, the most frequently encountered examples of forensic science application are fingerprint and DNA analyses, both aiming at the identification of crime victims or criminals and both highly precise and not prone to alterations (Butler, 2009: 81; Lee and Gaensslen, 2001: 52).

One equally interesting and valuable discipline is forensic entomology and in recent years has become the gold standard for estimating the time since death. The general definition of this discipline is the study of insects and other arthropods associated with criminal events. As one of the oldest disciplines, its origins are found in 13th century China, where the first case was described (McKnight, 1981: 69-95). Unfortunately, this discipline remained in the relative shadow until the second half of the nineteenth century, when again it reached certain significance (Dadour and Morris, 2014). At the present moment, forensic entomology can give us information regarding time since death, toxins, drugs and gunshot residues (GSR), food contamination, child neglect and veterinary and wildlife forensics (Benecke and Lessing, 2001; Crosby et al., 1986; Roeterdink et al., 2004; Watson and Carlton, 2005). However, the main problem arises when the crime scene exists and when examiners are not an entomologist, so the sampling process could be biased. Mostly collected non-backboned animals associated with a legal investigation may be snails, millipedes, spiders and mites, flatworms and this list is expanded when a corpse is in the water. Currently, a general problem with entomology is that very few species of animals have been studied scientifically and have any reliable use (Dadour and Morris,2014). A death investigation is not the only area in which forensic entomology is applied. Moreover, it is also applied for the

purpose of clarifying the circumstances where the bodies were found, investigating cases of neglect and abuse of humans and animals, investigating crimes against the environment and in other cases where, on the basis of entomological knowledge and methods, facts relevant to the outcome of the criminal investigation and pronouncing the verdict can be established (Fuyimura, Kolar-Gregorić, Šuperina, 2009).

One case law where forensic entomology was the decisive method that led to the solution of a criminal case is *the case of child neglect*.

Benecke and Lessig in their work described an interesting case dealing with child neglect. A body of a child was found in an apartment of a 20-year old woman. The mother, heavy heroin user, and a prostitute could not remember when was the last time that she saw her child since she had been living for the past two weeks at her uncle's place and the child's father was arrested five months prior. Before the unfortunate event the neighbors contacted the social service and reported a case of mistreatment, but the social workers concluded that “the child's well-being is not in danger”. During the legal proceedings, both the mother and two social workers were charged for duty of care violation and the legal system raised two questions: how long the child had been neglected and when did the child die. Based on the maggots collected from the child's body, three different species of flies were identified. Since each of the species have a different time frame when it inhabits the corpse and based on the stadium of the development of maggots, it was possible to calculate the approximate PMI, which was between 7 and 14 days. Based on the finding the mother was sentenced to 5 years in prison and because of the lack of evidence, the charge against two social workers was dismissed. However, the entomological evidence recovered from the apartment strongly suggested that the neglect was set much earlier than the actual death. Since the forensic entomologist was not present at the crime scene, the proper sampling was not done (Benecke and Lessig, 2001).

So far, in the Republic of Serbia, there have been no experts in this field of forensic science.

Except for this case, we can tell more about a lot of cases where it was used some new possibilities of forensic science, such as *Libyan HIV-1 and HCV outbreak*. In this case, the scientist used the technique of molecular phylogenetic to analyze new virus sequences for the outbreak. This was a very good example of how international cooperation combined with modern techniques and forensic skills can help in solving serious charges (Oliveira et al., 2006; Rosenthal, 2006).

We also consider it necessary to mention forensic dentistry, which is often used as a branch of dentistry and forensics in combination with other forensic methods for age assessment. A forensic dentist may be called to the court as an expert in cases where a positive identification of a deceased person is necessary or in cases where it is necessary to estimate the age of the person. In European countries, a forensic dentist is a permanent member of the Emergency Response Team (DVI) and the international regulations proposed by Interpol represent a step forward in promoting co-operation between countries and establishing unity at the level of EU member states (Interpol 2014). In addition to the role the expert plays in identifying victims of mass casualties, a forensic dentist can use dental parameters to estimate the age of both living and deceased people. In most cases, orthopantomographic images of teeth and jaws are used to estimate age (Obradović, Pavlović, 2017).

3. The scope of using forensic science within the Serbian legal system

We consider it important to recount a short history of some of the most important forensic methods applied in Serbia.

In case of the Republic of Serbia, the first known case was an autopsy was performed was in 1839. That first case was led by Doctor Karol Pacek, the personal physician of Miloš Obrenović, the Prince of Serbia and was done on the body of the prince itself since he died of tuberculosis. Following this, another interesting case from the Serbian history is the investigation of the murder and autopsies of King Aleksandar Obrenović and his wife, Queen Draga Mašin. Those autopsies were performed by doctor Eduard Michel and doctor W. Demosthen and that was the first case in Serbia where the autopsy report was dictated directly to the court stenographer.

The dactyloscopy system based on the fingerprinting classification of the mentioned Ivan Vučetić was also applied in the Kingdom of Serbia, and in Belgrade, the fingerprinting system has been in use since 1911 (Aleksić, 1982: 158-160).

In the last decade of the 20th century, current criminal procedural legislation in Serbia failed to mention DNA specification in its provisions, nor was this type of expertise known to the wider legal public. There were a small number of people from the professional legal experts who were acquainted with this type of expertise (Obradović 2000: 99-150; Miljković 2000: 151-171).

The provisions on DNA expertise were obliquely referred to in the Criminal Procedure Code from 2001 (hereinafter: CPC 2001).¹ The applicable Criminal Procedure Code (hereinafter: the CPC)² stipulates significantly more provisions in which biological expertise is directly or indirectly referred to, and these provisions are brought into conjunction with the conduct of a person or thing. In addition, it contains specific provisions on certain types of expertise, such as bodily injuries, corpses and psychiatric expertise. The CPC also contains provisions on sampling during the autopsy of the corpse for giving findings and opinions and the treatment of expert, biometric and biological origins, i.e. forensic - genetic analysis.

The application of DNA expertise in criminal proceedings in Serbia today brings individuals and cases in relation to an ever wider range of criminal offenses covered by the Criminal Code (hereinafter: CC).³ (In practice, in the last few years, DNA expertise has found its full application in the procedures for identifying individuals as perpetrators of certain criminal offenses, or in the procedures for bringing certain cases in relation to certain individuals accused of committing criminal offenses). Some Serbian analysts in their first papers in this field at the beginning of the 21st century pointed to the **necessity of creating a databank**, among other things (Obradović, 2001: 93-94; Obradović, 2004:144-146).

The most important novelty related to DNA testing is the Law on the National DNA Database (hereinafter: DNA database law)⁴ adopted in March 2018. This is the first law in Serbia that relates directly to DNA matters relevant for dealing with court proceedings.

Until then, DNA expertise was mentioned only within the provisions of the mentioned DNA regulations and DNA expertise was referred to in the previous and valid Law on

¹Criminal Procedure Code, Off. Gazette of the SRY, no.70/01 dated Feb. 28, 2001, Off. Gazette of the Republic of Serbia, nos. 58/04, 85/05, 115/05, 49/07, 20/09, 72/09, 76/2010 – Article 126, Para. 4: The expert witness is obliged to take notice of the found biological material (blood, saliva, sperm, urine, etc.) and to describe and preserve it for biological expertise if it is determined, that is, in the provision of Article 129, Para. 3, which refers to expertise on physical injuries and which explicitly states that, “During the expert examination, the expert is obliged to act within Article 126, Para. 4 of this Code.”

²Criminal Procedure Code, Off. Gazette of the Republic of Serbia, no. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/16.

³Criminal Code, Off. Gazette of the Republic of Serbia, nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/16.

⁴Law on the National DNA Database, Off. Gazette of the RS, no. 24/2018.

Police,⁵ i.e. the Law on Special Measures for the Prevention of Crimes Against Sexual Freedom involving Juveniles⁶ in the part referring to special records which, besides other data, contained the DNA profile of the convicted persons. The need for this law came from the international obligations of Serbia regarding the harmonization with the legislation of the European Union (EU), foreseen in Chapter 24 of EU negotiations (police cooperation, fight against organized crime, human trafficking, terrorism and drugs, and cooperation in civil and criminal matters).

4. The problems of the police and the judiciary regarding the application of specified forensic science in Serbia

The Code stipulates that the court assesses the expert's opinion (finding and opinion) as any other evidence, individually and in conjunction with other proof of evidence. During the search for the most serious crimes, e.g. murder, robbery, and rape, the police increasingly use forensic experts, most often employed within the Ministry of Interior of the Republic of Serbia, as a rule. According to their findings and opinion, public prosecutors, who, pursuant to the provisions of the Code, conduct criminal investigations against individual persons suspected of committing certain crimes, and upon the completion of the investigation, they base their accusations very often without sufficient critical analysis of such findings, which produces a longer length of time or the increase in the costs of the criminal proceedings. In such situations, the judge's decision was in many cases objectively determined by expert testimony, but this in no way means that the judge is subordinate to the findings and opinions of the expert (Vasiljević, 1981: 346). The opinion of the expert has a great factual effect on the decision-making of the court, which is also the opinion of other theoreticians (Jekić, 1994: 315).

Others allege the following: “A judge cannot be swayed by the opinion of an expert witness. The problem is that the judge has no profound professional knowledge that would enable him to critically and completely verify the expertise. As a result, in practice, it happens that the judge uncritically accepts the findings and opinions of the expert and that the factual expert is the one that decisively influences the making of a court decision” (Simonović, 2004: 336). Essentially, in our opinion, the findings and

⁵ Law on Police (Off. Gazette of the RS, nos. 101/2005, 63/2009, 92/2011, 64/2015) that is (Off. Gazette of the RS no. 6/2016).

⁶ Law on Special Measures for the Prevention of Crimes Against Sexual Freedom involving Juveniles (Off. Gazette of the RS, no. 32/2013 started to be applied on October 1, 2013 for courts of general jurisdiction, no. 55/2014) – Article 13.

opinions of the experts are in practice of a great significance and very often they are not subject to a critical assessment of the court to which other evidence has been submitted, and through practical cases, it is determined that it is the expert witnesses that often make decisions. This particularly refers to the findings and opinions of the institutions which by their name represent an objective authority for judges, and most often there are no questions for expert witnesses and the findings are uncritically adopted, as they are primarily based on a subjective opinion. There is no need for an explicit explanation as to what this means from the aspect of human rights protection.

4.1. Possible new issues in view of human rights protection

New problems with human rights protection occur in relation to some provisions of the DNA Database Law.⁷ Namely, the DNA Database Law stipulates that the database is managed by the ministry which is authorized for internal affairs by way of the official forensic service.

The jurisdiction for the establishment of this type of database has been resolved in various ways in different legislations both in Europe and in the world (under the jurisdiction of the Ministry of Police, Health, Science, Justice, and Special Agencies). There are several laboratories in our country that have been involved for several decades in forensic-genetic analyzes in court procedures. Some of the laboratories are within the university (Faculty of Biology and Medical Faculty, University of Belgrade), some are within clinical centers (in Novi Sad and Niš) or in private laboratories registered with the Ministry of Health (in Belgrade), some are organized within special agencies (BIA), and others are within the Ministry of Internal Affairs (in Belgrade).

Some experts believe that this solution will create a monopoly of forensic-genetic analysis of the laboratory which is closely involved in all phases of the pre-investigation procedure, that is, the investigation, and would, therefore, have a special interest in the best possible results and especially in revealing the perpetrators of crimes, which can lead to certain abuse. This opinion is based on the need that a section of the Databank containing biometric samples is to be removed from potential sources of abuse, or from the current places where future expertise is conducted. Therefore, there is a concern that this law will impact the fact that the competently and widely applied forensic-genetic practice in our country will be reduced to one laboratory – the forensic science service of the Ministry of Internal Affairs of the Republic of Serbia.

⁷ Article 4 of the DNA Database Law.

The DNA Database Law contains, among other things, a provision regarding the updating and deletion, storage periods and data protection measures of the database. These provisions are regulated by the Law on the Registration and Data Processing in the Area of Internal Affairs (hereinafter: The Law on Registration), which was adopted and published in the same Official Gazette as the previously mentioned law. Therefore, we believe that there is seemingly a consistent solution in this regard, which is reflected in the provisions of the Law on Registration which relates to dactyloscopy, photographing (forensic registration) and taking other samples, forensic expertise, and analysis, as well as managing the National DNA Databank.⁸

However, in the Law on Registration we failed to notice the provisions related to the removal of biological material taken from suspects against whom no criminal proceedings were initiated or persons against whom the criminal proceedings for certain legal reasons were terminated after the completion of the investigation, so there was no indication of an indictment or another appropriate charge. All of this can cause Serbia to be subject not only to lawsuits before the European Court of Human Rights but also to paying high fines especially when it comes to juveniles, which were the cases found before foreign courts.⁹

5. Conclusion

Bearing the mind the complexity of everything aforementioned, it is not easy to make a simple conclusion. The technology is constantly evolving, and new techniques and machines are being developed to keep up the pace with the current trends. That development influences forensic science itself, and because of the inseparable relation with the law system, it indirectly influences the whole legal system and expectations the system has from the scientists.

Forensic science, if used accordingly, can give us valuable information about different types of crimes and perpetrators. Since there are different judicial systems around the world, each of them has its good and downsides, and it is a duty of experts from each of those countries to discover those flaws and work on eliminating them. Only then we could witness the complete power of these two sciences that are so closely related, but again, so different and complex.

⁸ Article 45 of the Law on the Registration and Data Processing in the Area of Internal Affairs.

⁹ Grand Chamber, Case of S. and Marper v. The United Kingdom, app 30562/04 and 30566/04, 4th December 2008. www.echr.coe.int

In the fight against various forms of crime, the Republic of Serbia, according to its capabilities, follows the development and achievements of forensic science around the world. In some areas, however, there are problems as there have been no experts in a different field of forensic science.

Therefore, the human rights of individuals in conflict with the law can be jeopardized because the state has no opportunity to follow the latest developments in the field of forensic science.

6. Literature

- Abregu, M. (2001) Barricades or obstacles: The challenges of access to justice. *Compr. Leg. Judic. Dev. Towar. an Agenda a Just Equitable Soc. 21st Century* (3-11), Washington D.C: The World Bank.
- Aleksić, Ž. (1982) *Kriminalistika*. Beograd: Savremena administracija.
- Bell, S. (2008) *Crime and Circumstance: Investigating the History of Forensic Science*. Westport: Praeger.
- Benecke, M., Lessing, R. (2001) Child neglect and forensic entomology. *Forensic Sci. Int.* 120, pp. 155–159.
- Butler, J.M. (2009) *Fundamentals of Forensic DNA Typing*. San Diego: Academic Press.
- Byers, S.N. (2015) *Introduction to forensic anthropology, 11th ed.* New York: Routledge.
- Casey, E. (2011) *Digital Evidence and Computer Crime, 3rd ed.* London: Academic Press.
- Crosby, T.K., Watt, J.C., Kistemaker, A.C., Nelson, P.E. (1986) Entomological Identification of the Origin of Imported Cannabis. *J. Forensic Sci. Soc.* 26, pp. 35–44.
- Dadour, I.R., Morris, B. (2014) Forensic Entomology: A Synopsis, Guide, and Update. In: Ruttly, G.N. (Ed.), *Essentials of Autopsy Practice*. London: Springer, pp. 105–131.
- Dunjić, J.D. i saradnici (2008) *Ekspertizna medicina*. Beograd: Evropski centar za mir i razvoj Univerziteta za mir Ujedinjenih nacija i Pravosuđni centar.
- Fujimura, M., Kolar-Gregorić, T., Šuperina, M. (2009) Primjena forenzične entomologije u istraživanju kaznenih djela, *Policajska sigurnost (Zagreb)*, 18(4), str. 441–471.
- Interpol (2014) INTERPOL Disaster Victim Identification Guide 2014, <https://www.interpol.int/INTERPOL-expertise/Forensics/DVI-Pages/DVI-guide>, last accessed 12.09.2018.
- Jackson, G., Verbeck, G. (2016) *Forensic Chemistry: Instrumentation and Applications*. Chichester: Wiley-Blackwell.
- James, S.H., Nordby, J.J., Bell, S. (2009) *Forensic science: An introduction to scientific and investigative techniques, 4th ed.* Boca Raton: CRC Press.
- Jekić, Z. (1994) *Krivično-procesno pravo*. Beograd: Astropres.
- Katz, E., Halamek, J. (2016) Forensic Science – Chemistry, Physics, Biology, and Engineering – Introduction. In: Katz, E., Halamek, J. (Eds.), *Forensic Science: A Multidisciplinary Approach*. Weinheim: Wiley-VCH, pp. 1–4.

- Khan, J.I., Kennedy, T.J., Christian, D.R. (2012) *Basic Principles of Forensic Chemistry*. New York: Humana Press.
- Lee, H.C., Gaensslen, R.E. (2001) *Advances in Fingerprint Technology, 2nd ed.* Boca Raton: CRC Press.
- McKnight, B.E. (1981) *The Washing Away of Wrongs*. Detroit: University of Michigan.
- Miller Coyle, H. (2004) *Forensic Botany: Principles and Applications to Criminal Casework*. Boca Raton: CRC Press.
- Miljković J., (2000) Veštačenje DNK otisaka u krivičnim postupcima kod krivičnog dela silovanja iz čl.103. Krivičnog Zakona Republike Srbije, *Bilten sudske prakse Vrhovnog suda Srbije, (Beograd)*, 2, str.151-171.
- Morrison, G.S. (2012) The Likelihood-Ratio Framework and Forensic Evidence in Court: A Response to *R v T*. *Int. J. Evid. Proof* 16, pp. 1–29.
- Obradović D. (2000) Veštačenje DNK u krivičnom postupku, *Bilten sudske prakse Vrhovnog suda Srbije,(Beograd)*, 2, str. 99-150.
- Obradović D. (2001) Veštačenje DNK u krivičnom postupku, *Bilten sudske prakse Vrhovnog suda Srbije, (Beograd)*, 1, str. 83-134.
- Obradović, D. (2004) Biološko veštačenje – značaj, primena i perspektiva u sudskim postupcima kod nas, *Bilten sudske prakse Vrhovnog suda Srbije, (Beograd)*, 3, 138-156.
- Simonović, B. (2004) *Kriminalistika*. Kragujevac: Pravni fakultet u Kragujevcu i Institut za pravne i državne nauke, Kragujevac.
- O'Brien, É., Nic Daeid, N., Black, S. (2015) Science in the court: pitfalls, challenges, and solutions. *Philos. Trans. R. Soc. B Biol. Sci.* 370 (1674), 20150062.
- Oliveira, T. de, Pybus, O.G., Rambaut, A., Salemi, M., Cassol, S., Ciccozzi, M., Rezza, G., Gattinara Castelli, G., D'Arrigo, R., Amicosante, M., Perrin, L., Colizzi, V., Perno, C.F., (2006) HIV-1 and HCV sequences from Libyan outbreak. *Nature* 444, pp. 836–837.
- Pavlović, S., Palmela Pereira, C., Vargas de Sousa Santos, R.F. (2017) Age estimation in Portuguese population: The application of the London atlas of tooth development and eruption. *Forensic Sci. Int.* 272.
- Payne-James, J., Busuttill, A., Smock, W. (2003) *Forensic Medicine: Clinical and Pathological Aspects*. San Francisco: Greenwich Medical Media.
- Perlin, M.L., Birgden, A., Gledhill, K. (2009) “The witness who saw, /he left little doubt”: A comparative consideration of expert testimony in mental disability law cases in common and civil law systems. *J. Investig. Psychol. Offender Profiling* 6, pp. 59–88.
- Redmayne, M., Roberts, P., Aitken, C., Jackson, G. (2011) Forensic science evidence in question. *Crim. Law Rev*, pp. 347–356.
- Roeterdink, E.M., Dadour, I.R., Watling, R.J. (2004) Extraction of gunshot residues from the larvae of the forensically important blowfly *Calliphora dubia* (Macquart) (Diptera: Calliphoridae). *Int. J. Legal Med.* 118, pp. 63–70.
- Rosenthal, E. (2006) HIV Injustice in Libya - Scapegoating Foreign Medical Professionals. *N. Engl. J. Med.* 355, pp. 2505–2508.

- Saferstein, R. (2014) *Criminalistics: An Introduction to Forensic Science, 11th ed.* Upper Saddle River, N.J: Pearson.
- Saks, M.J., Koehler, J.J. (2008) The Individualization Fallacy in Forensic Science Evidence. *Vanderbilt Law Rev.* 61, pp. 199–219.
- Tilstone, W.J., Savage, K.A., Clark, L.A. (2006) *Forensic Science: An Encyclopedia of History, Methods, and Techniques.* Santa Barbara: ABC-CLIO.
- Tjin-A-Tsoi, T. (2013) Trends, Challenges and Strategy in the Forensic Science Sector. *Netherlands Forensic Inst. Publ.* pp. 1–28.
- Vasiljević, T. (1981) *Sistem krivično-procesnog prava SFRJ.* Beograd: Savremena administracija.
- Vodinelić, V. (1998) *Šta je daktiloskopski dokaz i starost otisaka prstiju kao njegov relevantni element,* Priručnik, 2.
- Watson, E.J., Carlton, C.E. (2005) Insect succession and decomposition of wildlife carcasses during fall and winter in Louisiana. *J. Med. Entomol.* 42, pp. 193–203.
- Wheate, R. (2010) The importance of DNA evidence to juries in criminal trials. *Int. J. Evid. Proof* 14, pp. 129–145.
- Zonderman, J. (1999) *Beyond the Crime Lab,* New York.

Regulations

- Criminal Code, Off. Gazette of the Republic of Serbia, nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/16 (*in Serbian: Krivični zakonik, Službeni glasnik RS, br. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/16.*)
- Law on the Registration and Data Processing in the Area of Internal Affairs, Off. Gazette of the RS, no. 24/2018. (*in Serbian: Zakon o evidenciji i obradi podataka u oblasti unutrašnjih poslova, Službeni glasnik RS, br. 24/2018.*)
- Criminal Procedure Code, Off. Gazette of the FRY no. 70/01, Off. Gazette of the Republic of Serbia, nos. 58/04, 85/05, 115/05, 49/07, 20/09, 72/09, 76/2010. (*in Serbian: Zakonik o krivičnom postupku, Službeni list SRJ, br. 70/01, Službeni glasnik RS, br. 58/04, 85/05, 115/05, 49/07, 20/09, 72/09, 76/2010.*)
- Criminal Procedure Code, Off. Gazette of the Republic of Serbia, nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 (*in Serbian: Zakonik o krivičnom postupku, Službeni glasnik RS, br. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014.*)
- Law on the National DNA Database, Off. Gazette of the RS, no. 24/2018. (*in Serbian: Zakon o nacionalnom DNK registru, Službeni glasnik RS, br. 24/2018.*)
- Law on Police, Off. Gazette of the RS, nos. 101/2005, 63/2009, 92/2011, 64/2015 (*in Serbian: Zakon o policiji, Sl. glasnik RS, br. 101/2005, 63/2009, 92/2011, 64/2015.*)
- Law on Police, Off. Gazette of the RS no. 6/2016 (*in Serbian: Zakon o policiji, Sl. glasnik RS, br. 6/2016.*)

Law on Special Measures for the Prevention of Crimes Against Sexual Freedom involving Juveniles, Off. Gazette of the RS, no. 32/2013 started to be applied on October 1, 2013 for courts of general jurisdiction, no. 55/2014 (*in Serbian: Zakon o posebnim merama za sprečavanje vršenja krivičnih dela protiv polnih sloboda prema maloletnim licima*, Sl. glasnik RS, br. 32/2013).

Case law:

Grand Chamber, Case of S. and Marper v. The United Kingdom, app 30562/04 and 30566/04, 4th December 2008. www.echr.coe.int

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**LIQUIDITY OF INTIMACY IN CYBERSPACE:
A CRITICAL APPROACH TO THE IMPRACTICAL
CHARACTER OF REVENGE PORN IN CRIMINAL LAW**

"Revenge porn" is the concept that aims to account for the act of disseminating sexually explicit material (naked pictures, or the representation of any type of sexual act) through cyberspace without the consent (sometimes even without the knowledge) of some of the parties involved, with revenge as the motivation. However, it is a problematic concept insofar as neither of the two signifiers that compose it, (i.e. 'revenge' and 'porn'), encompass the complexity of what they purport to describe. In any case, even without consensus on the accuracy of the concept, there are sectors that seek to activate criminal law as a tool for punishment on those who perpetrate revenge porn, since the mainstream assumes that this will solve the problem in question. However, the above would result in simplifying a highly complex sociological problem, which not only requires discussions on gender but also a critical look at the realities that characterize contemporaneity; one that has very close links with technology, and that assumes it as an instrument to visualize all the dynamics among actors, thus leaving the dividing margins between those practices that are socially permitted in the public sphere and those that are socially thrown into the space of private, blurred. Hence, through this work I intend to: add nuance to the complexity of the phenomenon of revenge porn mainly as a sociological problem, deconstruct the legal rational that seeks to criminalize the practice, and explore alternatives that have been taken to address the phenomenon of revenge porn outside of criminal law. The latter with the intention of answering the research question: Is criminalization the solution to the problem of revenge porn?

Keywords: *autopoiesis, chaos, cyberspace, criminalization, complexity, consent, criminal law, gender, privacy, liquid modernity, pornography, privacy, systems theory, victimhood, revenge, revenge porn.*

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I. Introduction: Revenge porn as a phenomenon that goes beyond the limits of simplicity

“Refusing to criminalize revenge porn does not make us accomplices of the male domination regime, but it does install us in the possibility of imagining a social that does not rest in the weakness in which it gives us the power to punish.” - Madeline Román (2015)

The main objective of this paper, which is part of the unpublished Master thesis “*Liquidez de lo íntimo y ciberespacio: un abordaje crítico al carácter impráctico del derecho penal en materia de pornovenganza*” (defended on September 2018 at the International Institute for the Sociology of Law in Oñati), is to try to respond the following research question: Is criminalization the solution to the problem of revenge porn? The Paradigm of Complexity (Edgar Morin: 1990) that allows the understanding that two or more factors (even if they seem to contradict each other) can coexist within the same phenomenon and the Second Generation Systems Theory (Luhmann, 1996) will serve as the basis of the theoretical framework. It is hypothesized that criminalization is not an effective tool to tackle the problem in question, as it is understood that alternatives to penalization may produce more effective approaches to the conflicts arising from this form of violence, making space for significant changes.

Although the phenomenon of revenge porn in the cyberspace is relatively new and there is no consensus regarding the definition of the term, multiple sectors - academics, lawyers, civil organizations, among others- have been activated with the intention of eradicating it through legal means as they understand it, among many other things, as a serious violation of the rights to privacy, intimacy, and the dignity of victims, in most cases, women. Revenge porn is a practice that consists of spreading sexually explicit material through cyberspace including any platform of socio-electronic media, without the consent of any of the parties involved. However, there is a plurality of possible motivations to commit the act, but the concept itself implies revenge as the exclusive intention, leaving aside commercial and other interests, such as entertainment, and sexual gratification. It is therefore an unprecedented moment in history, marked by the accessibility of technology that enables the dissemination of all types of content through images, including intimate details traditionally relegated to the most private sphere of sexual relationships. Given this, we should account for the contemporary impulse that activates the desire to see and to be seen, a kind of fetishization with images and the recognition received from others. Thus, the victim-perpetrator dichotomy, from which

the legal system operates, leaves aside many factors that are central to address the phenomenon in its wide complexity.

Therefore it is necessary to problematize "victim" as concept, as it implies a binary logic. On the one hand an active and entirely violent subject is placed, who is identified with the concept of 'victimizer'. In contrast, the 'victim' is located and is assumed as a completely passive subject. This is problematic, in the first place, insofar as it loses perspective of the fluency of identities, the binding aspect between victim and victimizer, and the fact that the same subject can transit between the limits of one identity and another, at the same time, without major difficulties. In the second place, and in the words of Marlene Duprey (2014), the productivity of victimhood as a device of contemporary domination, produced by the mass media through its exposure of a kind of omnipresent threat, should be taken into account. Media produce the imaginary of "the perfect victim" using populations perceived as more vulnerable to fill their audience shares. Hence, Duprey suggests that it is precisely the representation of suffering that is overrated and the most exploited element of victimhood as a device of domination.

Another element of important consideration is the fact that 90% of the affected by revenge porn are women (Henry, N. Powell, A. 2016). It is necessary to analyze what this means within a practically universal male-dominated system that is sustained, among many things, by imaginaries of the obscenity of women's eroticism, and the reproduction of some others about the expectation of sacredness over female bodies. From this perspective, the phenomenon of revenge porn can be understood as a matter related to women and gender studies, as it can be approximated as a new modality to highlight the naturalized inequality of gender in most societies.

Revenge porn can be thought of as an example of the exercise of power through technology, since it serves as a tool, that is, as an extension of the violence against women. It is, then, a highly complex sociological problem that merits deep approaches from the new contours of the public and the private in times of liquid vigilance that is, a contemporaneity that produces the fetish of the image, the pleasure of seeing and knowing oneself seen, since social networks lend themselves so that vigilance is established in individuals, as Zygmunt Bauman and David Lyon (2013) already explained. The centrality of their contributions lies in the development of the contemporary turn from fear of being observed, to the fear of being ignored. As they said: "Social media has ended the nightmare of being watched (panoptic perspective) to want to be watched and not want to be alone again (post-panoptical perspective), since

modernity is not understood without that connection to the network, without interactivity and fluid communication. Now the fear of being ignored, forgotten or excluded abounds, sacrificing personal privacy to be news, thus becoming a confessional society. We are talking about a voluntary servitude, since we cooperate with the current surveillance "(Bauman, Z. Lyon D. 2013).

Thus is also urgent to reflect on the fluid and contextual nature of consent as a concept since, in most cases, what ends up being used to perpetrate revenge porn, was produced and even shared consenting to the gaze of the other, "voluntarily". However, the latter has to be questioned as the will is constantly mediated by external factors to the subject, e.g: the contemporary pulse Bauman and Lyon exposed, the power imbalance between men and women in romantic relationships, or the combination of both and many other. In any case the liquidity of consent lies in the fact that it is not perpetual in nature. There is an expectation that at the time a person decides to disassociate themselves from the one to which they shared the material in question, the possibility that the latter may make use of it is canceled. Based on the contextual nature on consent, it is assumed that the other, in this case the receiving party, understands and accepts that what was given is in an intimate context and must remain precisely within that closed context.

Faced with these complexities, the claim appears in certain sectors for criminal law to take action on the matter, even though criminal law must be the last resort activated by the State when it assumes the project of addressing social problems. They demand punishment for the one who commits revenge porn, in what seems to be the infinite ritual of the legislation of social dynamics; an immediate and simplistic answer that makes the individual responsible for macho practices not only generalized, but naturalized, in that conflictive "whole" that is the social, and that legitimizes the traditional mechanisms used for controlling it. Those who favor typifying the action, bet on the symbolic effect of law which presupposes the understanding that its effects on society are not limited to the effective nature of the implementation or execution of the legal norms that it produces. Otherwise, and according to Cristopher Corvalán Rivera (2014): "The regulatory force of the law does not start exclusively from the effective implementation of its normative contents; the symbols that it evokes, from the moment of its publication, also have a binding force, both in the operators and in the prevailing ones. Thus, law can affect society even before and independently of the implementation of its rules, an issue that is explained by the ideas it raises, beliefs, representations or images associated with legal discourse, the prestige of the one who is imbued, feelings even which is capable of awakening in the recipients and legal operators. When speaking of the symbolic function, it is being said that the law has the aptitude to

mobilize citizens towards the benefit of an idea or image; "... it does not always work through the imposition of the facultative force of its contents on the conduct of citizens, it also does so through the legitimizing forces of its forms and contents on the representations of citizens (García Villegas, 1993: 3)".

II. Differentiation and chaos: Limitations of the legal system before an increasingly complex social

Starting from the second generation of the Systems Theory (Luhmann, 1996), it is possible to understand law as a subsystem within the social system as a whole, the same way sociology is understood, without losing sight of the fact that the central analysis categories of the Luhmannian lens is the difference between system and environment, as well as the self-referential and autopoietic character of complex systems. However, it is necessary to emphasize the centrality of the interrelated nature of systems and subsystems. According to Luhmann: "no part is something in itself" (1996, p.83), everything exists as a product of the differences that become activated demands within the social system as a whole. This does not mean that the systems merge together, since in the context of the modern contemporaneity, there is a tendency to an increasing differentiation. Therefore we could point out that the subsystems within the social as a whole are just different from each other due to the specialized functions they carry out.

The same phenomenon can be identified and defined as a problem by some subsystem, and remain as an irrelevant matter for another. In any case, each of them decides what communication is important to them, since each system produces information from its own operations. The self-referential character of the systems implies the double mastery of the self, inasmuch as a self-referential object is itself, at the same time as it constitutes a unit of reference for itself. It implies a double role of identity and difference. In Luhmann's words: "the self-reference of the concept of difference constitutes the unity of difference" Luhmann, N. (1998). For Luhmann, communication is the central category of analysis, as he understands it as the operation that defines the social, it is the form through which the social is reproduced, for which it becomes the only genuinely social device.

Ernesto Grün (1999/2000) uses the Theory of Chaos to challenge the scope of such a normative system. As he explains, "chaos" is not synonymous with disorder, but rather the appearance of situations of very high complexity, and whose result is freedom: "when deterministic systems, i.e. systems completely determined by laws can show a chaotic behavior is then this chaos the space of freedom in the middle of the laws

“(1999/2000: 33). Similar to Luhmann, Grün understands law in the postmodern context as a highly complex system, as a mechanism of social control and indirectly as a control of the organic systems. Grün questions the effectiveness of the law insofar as: “the more complex a system is, the more its conscious conduction becomes impossible. But this also means that the more complex a system is, the more possible it is a failed decision “(1999/2000: 31). Therefore, he argues that: “the sense of complex systems is not the result of orderly projects. Planned order is a trap of reason “(1999/2000: 32). Given this, Grün suggests that:

“Instead of the planning reason, a new opening has to appear for legal self-organization processes. By doing this, we can say that we are on the path of the utopia of the planning reason towards the science of 'muddle through'. We must understand that the more complex a system is, the less it can be governed with orders. And we must learn to manage it through chaos.” (1999/2000: 32)

Similarly, Madeline Román (2005) points out that the present is a contemporaneity in which the social becomes more and more complex, turning the world into an increasingly uncertain space, collaterally limiting the ability of the legal system to assume the generalized control that has it has self-assigned. This is paradoxical, as long the more the legal system loses this capacity\the more fields it puts under its custody (Román, 2005: 29). In this way, Román denounces the ritualism of legislation, underlining the ephemeral nature of the validity of laws, challenging the possibility of legislating a historical moment characterized by the technology that enables the subversion of them (2005: 65):

“The constant legislation turns out to be adverse to the imperative of consistency itself (in the application and in the sense) of the laws because it implies that the laws are constantly being changed (Luhmann 2004: 222). The changes in legislation thus express the growing impossibility of existing laws to accommodate the new demands usually derived from the field of politics and a growing increase in the information that is handled. In turn, the intensification of conflicts between rights also expresses the exacerbation of demands derived from the field of politics”(2005: 31).

Taking into account the importance of context in relation to the effectiveness of law as a tool of social control, it is necessary to put in focus that present society is a globalized one, with the implication that:

“Power becomes increasingly liquid, more global, more extraterritorial, while many of the political and legal institutions remain territorial institutions. This provokes tensions and undecidability with respect to the levels of jurisdiction in the elucidation of conflicts”(Román, 2005: 38-39)

Returning to Grün, it is possible to think that this globalized contemporaneity represents a chaos for traditional order model and that from chaos emanates the freedom to think about alternative possibilities of the social. Román already said that: "the decline of the sovereignty of the States that accompanies the present moment also supposes an erosion of the power to punish of the State and its monopolized use of force and violence" (2005: 40). It seems that we approach the freedom to question the assumption that justice is intrinsic to law. Otherwise it is possible to understand what Román said: "the impossibility of equating justice and law is given, since the recognition of the founding violence of law as an expression of a whole network of power "(2005: 73). The moment to handle the differences within the social system as a whole, and without the need to activate the legal system is getting even closer.

III. Neither revenge, nor porn: revenge porn out of sync with its meaning

The practice that occupies this text has been named revenge porn because it is assumed that the material in question is disseminated by former “legal vilovers “of the victims, who, having not been able to overcome the trauma of the rupture of the relationship. They disseminate the images as a way to avenge the suffered pain. It is noteworthy what this reveals about the intimate relationships that take place within the male-dominated system, where women's sexuality becomes a double-edged sword against them. It is also important to highlight the logics of property that, established and dominated by capital realities, are extrapolated to all social spaces, including affective bonds.

However, it has been shown that not all cases of pornography respond to the same motivation, so the word "revenge" is misguided, because it cancels another conglomerate of possibilities (Román, 2018). At the same time, there is an assumption that it is a deserved consequence to a damage previously suffered. Therefore, as Henry and Powell (2016) say, it is urgent to be clear that it is not always the intention to take revenge on the ex-partner. Sometimes it is to inflict damage on the reputation of the woman by: mockery, extortion, sexual gratification, coercion, social status, or economic profit, among other reasons. Thus, the term 'revenge' occludes the fact that there are entire industries supported by the morbidity that results in economic gains from humiliation through sexuality, activating the pleasure of seeing the policies of

correctness being transgressed, exposing the sexual drive that is assumed inherent to women as human beings.

Further, the pornographic character behind the images in question must also be problematized. Pornography is defined as sexually explicit content produced with the intention of being publicly disseminated. Its rational is to produce sexual arousal in those who consume it. It also touches on the commercial aspect; the intent of causing sexual excitement in another, which translates into economic gains. Given that the legal victims of revenge porn denounce the violation of what they understand as their privacy, it is possible that the material in question was not filmed with the intention of becoming public. In this way, it is quite clear that neither of its two signifiers, that is, neither the pornographic nor the vengeful, encompass the complexity of the phenomenon they are trying to describe.

From my perspective, revenge porn is not a new practice. What is happening in the digital age is just a new virtual modality of the historical practice of disseminating information related to women's sexuality without their consent; another alternative to achieve the sexual degradation of these, now through cyberspace. It would be necessary to remember the times in which, having more rudimentary technologies, boards of public expression were used to provoke shame in the sexed nature of women. It would be necessary to ask, from a Luhmannian logic: what do the different subsystems have to say about the phenomenon in question, what do they assume as relevant about it, and what alternatives they suggest to tackle it. Taking the System Theory (Luhmann, 1996) as a stand point, it is possible to understand that revenge porn is a social problem, which has activated relevant communications to various systems, including the sociological and the legal, as specialized bodies of knowledge. It has been identified as a problem to be addressed both from the legal academy and from the sociological one, but given the differentiation between these fields, the way of approaching the subject in question, and the information that is produced about it is considerably different.

In any case, it is urgent to understand that revenge porn is much more than the means that make it possible, since it responds to a male-dominated system that monopolizes all social spaces, and that is much older than the era of hyper-connectivity. The Luhmannian-feminist sociological subsystem could point to a whole conglomerate of factors, to which revenge porn is another manifestation of gender violence, which has positive repercussions for capital, and which recognizes the deplorable nature of the practice. Therefore it can bet on the autopoietic character of the social, that is, on the capacity of the social system as a whole to produce responses to the phenomenon by

itself. Otherwise, the legal subsystem, striving to narrow notions about the duty of human interactions, is represents as a violation of the rights it invented, and it aims to hunt any form of deviation, although the deviation has paradoxically become the norm.

IV. Criminalize revenge: Paradoxes of a legal system as violentas what it seeks to control

The phenomenon of revenge porn as a cybernetic modality was identified as a problem within the social system as a whole, by the women affected by it. In response to this, several reflective bodies were activated in an attempt to produce intelligibility in this regard, in order to find a solution. As inefficient as legal systems can be (even more so when "doing justice" in relation to matters that concern women), it is privileged, the first line of defense used to assume postures. Women, knowing that they had been violated without their authorization of the publication of their image, urged legislators to take action on the matter. The latter has tried to respond against revenge porn through the protection of right to: privacy, intimacy, to the image, to the honor, and to the dignity of the victims. Revenge porn appears as a blatant attack against the aforementioned supposedly inalienable rights, although it is of general knowledge that, in practice, at least for women within the male-dominated system, they are overlooked with unquestionable regularity.

However, in an attempt to signify itself as something different from what it seeks to regulate, the legal system has engaged in protecting the diffusion of private, paying tribute to the article twelve of the Universal Declaration of Human Rights (1948) which states that: “No one shall be object of arbitrary interference in his private life, family, home or correspondence, or attacks on his honor or reputation ...”. As if the State did not arbitrarily interfere in matters concerning the life and bodies of women; as if its position on issues such as sex work and abortion were not sufficiently clear examples of the paradoxical nature of its project. Anyways, there are those who insist that greater rigor on the part of the legal system can produce considerable changes:

“The introduction of specific criminal legislation is important to recognize the damages associated with the non-consensual distribution of intimate images." In the absence of legal frameworks to address this serious and emerging problem, the victims, the perpetrators and the community at large will continue to blame women and, in the process, aggravate existing psychological and social damage.”(Henry, Powell, 2016, p.403)

Faced with a system that, has classified revenge porn as a crime in some jurisdictions (ignoring the singularities already discussed), it is incapable of apprehending and therefore resolving the complexity of the phenomenon. Revenge porn as a concept that demands attention to the particularities surrounding the motivation of the perpetrator. However, the State, in its eagerness to represent itself as diligent, passes them superficially to the point that it no longer condemns what the concept confers centrality. Even so, when the legal system proposes to eradicate this practice, it does so after the exercise of evaluating the potential damages, considering the suicide of the victims as the most serious of them. Despite the fact that every life is important (a single suicide is alarming), the cases in which people have deprived themselves of life in response to revenge porn are not statistically significant.

The debate about the possibility of typifying revenge porn revolves around the clash between the right to privacy, and the right to freedom of expression. We are then faced with a legal system that experiences the confrontation of two of its main rights: on the one hand, the right to private life is universalized, and on the other the First Amendment to the Constitution of the United States privileges freedom of expression, allowing the publication of most of the information that has been legally obtained and that is related to a matter of public interest. In such a way revenge porn becomes a constitutionally protected discourse, despite its offensive nature (Larkin, 2014). The irony revolves around the fact that, although sexuality has historically been thrown into the private space, the interference of the State and the general public in everything concerning women has also been historical. In other words, the sexuality of women has always been a matter of public interest, despite being part of what is socially understood as private. The 'invisible' character of women in regards to the law must be emphasized, given that in countries where there is revenge porn legislation, it has not been considered to be a matter specifically of women, and the vulnerability they are socially forced to assume.

Another of the focal points of the legal rational rests on the understanding that: "intimate photographs are shared under circumstances that give rise to an implicit agreement of confidentiality between the parties, and the freedom of expression clause does not protect the recipient against their unfulfilled promise not to share a photograph with other people "(Larkin, 2014). Therefore, Larkin proposes among several possibilities to activate the Law of Grievances and the Law of Contracts, in order to impose extra-contractual and criminal liability to anyone who violates a confidentiality agreement. This strategy will not result in an attack against protected freedom of speech and expression, but could otherwise encourage people to keep their word: "Allowing a victim of pornographic revenge to recover damages for publication that

breaches an implicit promise of confidentiality is true to the principles of the civil liability law "(Larkin, 2014).

Larkin's approach constitutes a great ingenuity. First, one should question whether there is really an expectation of confidentiality and therefore of discretion in a contemporaneity thrown into hyper-connection, what Bauman and Lyon understand as a post-panopticon period (2013). Further, social learning theories have already shown that this -- knowledge and norms of behavior -- are produced vicariously, and even when the subject is not assumed as a passive entity, the example is understood as a central factor. The law in the books does not necessarily force its compliance but it is the culture that establishes the standards of behavior within the social. Gomez said that "the strength of the legal norm can hardly transform the receptivity of sensitivities" (1997) Otherwise, and given the counterproductive tendency to increase the laws, how is transgression explained?

Larkin's proposals force the questioning of their scope. If the deplorable aspect of revenge porn is the damage to the reputation of the victim, what compensation could repair it? Is it possible to think that the opinion of judicial actors has a direct effect on collective morals? No material should be disseminated without the consent of the parties involved (protecting the notion of private property), and the imaginary of promiscuity that is built on women (even if all the conservative categories are applicable to them: monogamous, heterosexual, etc.) remains intact.

Given this, and assuming that breaking with ideologies that urge to repress the bodies is an advanced act, I wonder where the intrinsically embarrassing character of sexuality lies, and until when the modesty-promiscuity dichotomy will be kept. It is precisely this binary understanding of sexual behavior which allows sexuality to serve as a resource to violate women as a political minority. Therefore, answering these questions with "nowhere" and "until today", respectively, would mean advancing the anti-revenge porn agenda, as long as female sexuality is no longer be a threat to women. Revenge porn has negative effects on women precisely because of historic vulnerability. There is nothing naturally embarrassing about women's sexuality. These questions open reflection on who is the "other" that violates, whether it is simply the one that commits revenge porn, the historically produced imaginaries about our identities, or the community that reproduces them. It can also be a complex combination of these three possibilities.

V. Law is not to justice, as criminalization is not to the solution

In contrast to the punitive logic, it is critical to consider the recognition of the flaws of the law, and the question of the scope of the problems it seeks to deal with from its frame of action. This perspective highlights the central problem of criminalization, understanding it as the individualization of a problem that arises within the social system as a whole. Henry and Powell themselves recognized that: "the law is intrinsically based on an individualized and depoliticized model of justice that does not address the deeply rooted and underlying structural and individual causes of gender-based violence." (Henry, Powell, 2016: 411). Therefore it is important to focus on what this reveals about how the State uses the legal system to advance its particular political agenda, drafting and approving laws with the characteristic rapidity of fast-food restaurants. It is also important to notice what it tells us about a legal system that does not recognize the liquidity of contemporaneity itself, embracing highly decontextualized precepts instead.

In the words of Tamar Pitch, criminalization simplifies social problems, judging social actors as homogeneous, while at the same time dichotomizing the phenomena into binomials of "victim-victimizer (2005). In this way, Pitch's repudiation of criminalization rests on the fact that "criminal responsibility is personal", therefore criminalizing a problem means blaming on clearly identifiable individuals, with the consequence that only these will become responsible for the problem, leaving the social, political, and cultural context in which the problem occurs, outside the analysis. In this sense, criminalization operates in a paradoxical way, universalizing the problems, but relegating the solution to the individual sphere (Pitch, 1995). This is central to the discussion of gender problems, as it is an attempt by the State to distance itself from what it condemns, while preserving a supposed "harmonious whole". A central question becomes: how much does the individual who violates women transgress? How deviant is he who annuls the will of her? How much is it that one who breaks a promise, or who betrays the trust of the other? Is it not clear that this has to stop being assumed as a transgression as it has become the norm itself? How can trust or a broke promise be measured by criminalization of an act?

Something that would challenge the current norm, saturated with violence against women as a political minority, would be to validate their voices, respect them, and unblock their steps towards the autonomy of their lives. The legal system on the other hand, tries to solve the problem from the simplicity of the logic of punishment without questioning the context that gives way to the unwanted behavior in question:

“The demand for criminalization implies the acceptance of the law and the rules of the conflict as they are given, recognizes and legitimizes the authority of the criminal justice system, uses official political channels, delegates the definition and legitimization of its own collective identity to political institutions traditional. In short, it secularizes the relations between movements and institutions in the context of reciprocal recognition.”

Events that are morally or ethically questionable, or condemnable, do not necessarily have to be criminalized. It is urgent to question the pragmatism of law in these cases, since condemning a practice from the legal framework will not necessarily mean the cessation of it. Relevant examples include the criminalization of drugs or prostitution (Román, 2015).

According to Román, the paradox behind the attempt to criminalize revenge porn is anchored in the fact that contemporaneity is characterized by, borrowing Bauman's phenomenon of 'liquid vigilance', the fetishism of the image, the desire to see and be seen (Román, 2018). In such a way the idea of a solid victim, intrinsic to the women whose images were disseminated without their consent, can no longer be defended. Thus, none of the actors in the so-called revenge porn is completely passive in relation to their misfortune, since it is neither absolutely victimizer. In Román's view, the distance between public and private space cannot be eroded any further. Therefore, the judgment of the practice supposes a level of morbidity greater than the one that it seeks to condemn. Román understands the debate in question as unfounded, untangled from the debates around porn, revenge, and the body. Pitch categorized this as "traditional symbolic crusades", an understanding of defenses oriented in the past, taking the form of protection of traditional values perceived as a threat by the advancement of the new (Pitch, 1995).

Faced with this scenario, one would have to face the nonsense of a system that insists on defending the non-existent privacy, and had to (if aim to revive it in order to consult it at some other time, and perhaps in response to another situation) contextualize it in the complexity of a fluid and hyper-connected present. However, before taking a step towards this matter, it is worthwhile to reflect on whether a system that operates from dichotomies such as 'innocent or guilty' or 'victim or victimizer' is capable of adjusting to the complexity demanded by the relationships of these times. This phenomenon mainly affects women, who are exposed to suffering: humiliation, loss of employment, attempts against their personal relationships, power violence within the home, and cause

serious harm to their self-esteem, among others (Henry, N. Powell, A. 2016). Those who commit revenge porn take advantage of an entire patriarchal system in their favor, in order to achieve "slut-shaming", that is to stigmatize their victims for their sexual behavior. The complicity between the perpetrator and the community should be noted: since it naturalizes his speech, it also validates his positioning, and reproduces the harms towards women. However, given the inability of the legal system to deal with these complexities and in the face of the evidence that punishment does not nullify the violence it intends to eradicate, this work does not bet on the legal system to be the platform that can give birth to the social change that is needed. The problem of criminalizing the individual that commits revenge porn lies in the fact that it does not act against the underlying problems that occur within the affectivities so for now, the most effective thing to do is take a political stance against the act, and bet that society as a living organism will be able to produce extra-penal responses to the practice (Román, 2018). In fact that is already happening as women have been organizing themselves around cyberspace, and so has the capital system.

It is worth highlighting the efforts of women who have joined collectives to produce counter-speeches such as the #Metoo campaign, challenging the logic that has historically oppressed them. The discussion held by Catherine MacKinnon about the invisibilization of women against pornographic law. MacKinnon, 1997, p. 58 should be seriously taken into account on this matter, as some years later Katherine Mckinnon herself recognized that the #Metoo movement managed to do for the women's struggle what the law has been unable to achieve. That is to get the attention of those who are part of the bodies of power, without questioning the culpability of women or the veracity of their stories. Seeing it from this perspective, perhaps it is then that the law has to be politicized.

Other efforts in the battle against the so-called revenge porn are those that have taken place from the private sector. Such is the case of the implementation of strict policies on platforms such as Facebook (also for both of its platforms, Instagram and Messenger), Pornhub, Google, Yahoo, Reddit, Twitter, among others. These have enabled the possibility that those affected by revenge porn denounce the content that without their consent has been published, so that it is removed from the respective media. Likewise Facebook initiated a pilot project of preventive nature in Australia and it possibly will be implemented in the USA, UK and Canada also. It invites its users (those who understand themselves as potential victims of revenge porn) to send their nudes to the company by the messenger app, so that they can code them, in order to prevent the image (or an alteration of it) from being uploaded to the network again. This technology

has already implemented in the area of child pornography, and the Facebook team promises that it will be very helpful for the advance against revenge porn. At a first sight the latter seems to be a relief. However this begs the question of the links being built. How can we intimate with the existence of an implicit threat of public revenge? It is important to ask questions that, far from pretending to blame the victim, give tools to face the dynamics this contemporaneity expose -us- to.

VI. Preliminary conclusions and pending questions

It would be irresponsible to draw conclusions about revenge porn as it is a phenomenon that is only just beginning to be problematized. In fact, the intention of this paper, rather than to bring concrete answers, has been to generate questions that allow discussions around revenge porn to penetrate greater levels of theoretical depth, making it possible to approach the widest spectrum of complexity that characterizes it. However, a preliminary conclusion has been established in that revenge porn is a social problem that mainly refers to the problem of gender inequality. Despite the conceptual limitations that lie in the term itself, revenge porn has been identified as a problem both by the aggrieved women, as well as by those who are part of the sociological system, and the legal one respectively.

As evidence of the naturalization of the legal system, and the imaginary that establishes it as the only mechanism for the mediation of social conflictivity, many sectors have been activated in favor of the criminalization of the act as a crime because they understand that this will have at least, symbolic effects on the behavior of citizens that are attached to the social contract. Paradoxically, the State and those who legitimize law as an institution, engage in the ritual of punishing the individual who commits revenge porn, as an individual who transgresses the supposed social norm. The paradox is that, given the generalized violence against women, the subject identified as a transgressor could not be differentiated from the rest of the community that systematically legitimates and reproduces the logic from which it operates. So, if the intention behind the criminalization of revenge porn is to eradicate this social problem, it results in my view, a simplistic approach that occludes substantially important factors whenever it tries to provide an immediate response to the problem. In any case, it would be necessary to question if the one who commits revenge porn would rethink their intention because of the existence of a legal norm, imposed by an illegitimate legal system, as violent as they themselves. Hence, to criminalize revenge porn, far from seeking to eradicate the generalized violence behind it, is an attempt by the State to make itself perceived as effective so that its power can be legitimized. In this sense,

criminalization resolves revenge porn legal cases, but not revenge porn as a social problem.

Those who bet on criminal law as a transformative entity in the matter of revenge porn, lose perspective that their urgency shows a discourse and legal scaffolding decoupled from this liquid contemporaneity; They lose perspective that the involvement in pointing out the presence of the private in the public sphere as an anomaly, is meaningless when the limits of the one with respect to the other are increasingly blurred. The hyper-complex contemporaneity forces the exposition of the bodies as merchandise, and this becomes a fundamental requisite for sustaining diverse bonds. That is why a community that reifies women as mere bodies is activated, at the same time it condemns them for assuming an active role in this dynamic. However, knowing that what is condemned is the publication of the content without the consent of any of the exposed parties, it would be necessary to question how much of the activity in the virtual era is really consented. It would then be necessary to reflect on the liquidity of consent itself, and to return to Grün's statements about the resistance of complex systems to submit to the simplicity of norms and planned order.

The illegitimacy of the law in the face of social problems is increasingly evident, and ironically, revenge porn serves as an example of it. To assume that revenge porn is in fact carried out with the motivation to avenge a pain suffered, or right a wrong, it would be necessary to reflect on the clue that this throws on us of citizens who no longer trust the effectiveness of law as a domesticating entity of conflicts and instead, bet on the evident effectiveness of cyberspace. It is evident then that the judicial system and the expansion of its processes cannot compete with the speed of the virtual space, and with the immediacy of its results. Those who perpetuate revenge porn, if they indeed seek to compensate for a suffered injury, resists doing so through the court as an institution of official order, and evades the bureaucracy of its procedures, by way of the virtual sphere. Recognizing the inability of law to solve the problem that afflicts the person who commits revenge porn, he takes the reins of the process and serves himself of the speed provided by cyberspace, a space where there is always on the other side a community willing to streamline the process of collecting justice, or perpetrating revenge, depending on the lens that look. Cyberspace represents a chaos, from which arises the possibility of producing an alternative form of the social. A platform that, although serves as a space to produce damage with incalculable rapidity, is also capable of solving them by its own means. Take as an example the relief that the #Metoo movement has generated for survivors of sexual violence, who use cyberspace to claim

the fight against sexual violence, moving out of victimhood, and advancing the feminist agenda through a means that could not be achieved through the legal system.

Cyberspace, in its self-referential and autopoietic quality, has been able to produce responses to the problem of revenge porn: internet portals have made significant changes in their policies regarding this, and netizens have organized themselves in the production of virtual counter-attack groups. This has achieved the removal of the non-consensual content, and produced counter-discourses that promise to break the practicality of revenge porn, since they fight to break the imaginaries on the sacredness and obscenity of the female body and the sexuality of women. This female agency through cyberspace has had great effects given that on the one hand, the male-dominated system stigmatizes both free sexuality, as well as eroticism and female desire. The exposure of that sexuality and eroticism without the consent of those pictured has both emotional and social implications, since it damages their reputation. Faced with the danger of their images being exposed without their consent, women may fear exercising their sexual freedom in this way (participating in sexting, filming themselves, etc.). These practices may be pleasurable and erotic for women, but many deprive themselves of exploring those desires for fear of being exposed and stigmatized.

Otherwise, although revenge porn reproduces the oppression of women in the cybernetic space, movements like #MeToo manage to overcome the difficulties women have to obtain recognition of the damages they suffer, and are not effective within the framework of due legal process. Criminalizing revenge porn could reinforce the idea that cyberspace is a place of danger for women, instead of reinforcing the notion that all women have equal access to that space as men do. The logic of criminal regulation of the damage produced in cyber publications will most likely give the idea of criminalizing women who expose their abusers in networks and "have no evidence" or do not submit to the justice system because they would appear as "Bad victims" who have sought their victimization.

The fact that the legal system recognizes its inability to resolve all social conflicts, opens space to the autopoiesis of the social system as a whole, making room for more significant transformations to occur. Although this work does not celebrate the impunity of those who perpetrate revenge porn, it does try to account for the plurality of factors that are played in the phenomenon, so that action is taken, preventing revenge porn from ending up being a result. Hence, I privilege the autopoietic character of the social as an instrument to tackle the dynamics that are gestating in this time, betting on the awareness of respect for the other, which does not stop being another-owner of itself-,

when it starts an affective bond. There must also be an effort to educate the public about the conscious use of virtual spaces, and the risk that is assumed when sharing one's image in a liquid contemporaneity where, unfortunately, no expectation of confidentiality can be maintained, at least not in the virtual space.

The male-dominated system finds in revenge porn one more possibility of violating women, because there is a whole community that supports it. In fact, victimhood as a device of contemporary domination also legitimizes revenge porn as a practical tool. That is why I turn in recognition of the feminist collectives that, although they have recognized the damage generated by revenge porn, they urge the empowerment of women as a solution. Raising awareness of the liquidity of this context, and of the possible risks to which one is exposed by virtue of virtual sharing, elevates women to the status of active actor. It is precisely from the recognition of that active role, where the chaos of the masculine domination system is born. In her critical discussion of victimhood, Marlene Duprey (2014) said that it would be necessary to return to the relevance of the destabilizing question that Freud asked his patient Dora: "What do you have to do with this that you are complaining about?" From the answer to this question, and from the recognition of the complicity to which the fetishism of seeing and being forced forces us, we could witness the chaos that breaks the system of masculine domination. From this chaos, it is possible to imagine a society in which women can defend their eroticism, so that the effect of revenge porn is directed to problematize the breakdown of the confidence of the affected, and not to the shame of the exhibition of an eroticism to which most social beings are invited.

The objective of this text is not to give a false impression of closure on this problem that, given the liquidity of this hyper-connected contemporaneity in the fetishism of the image, and in coexistence with a male domination regime, is increasingly relevant. That said, and given the impossibility of covering in depth all the factors that are played in revenge porn as a phenomenon, it is important to conclude by opening the way to new questions. Although I privilege the autopoietic character of the social, and I recognize that law in itself is an autopoietic response that generates communications about the differences that it recognizes as relevant. My criticism revolves around the hegemony that it pretends to exert over the conflictive whole that is the social.

The significant effects of the agency of women through cyberspace have already been evidenced, and so has the diligence of Internet portals in terms of the problem. Nevertheless, the scope that might have alternatives such as the Right to be Forgotten, and other areas of civil law still has to be explored. It is also important to recognize the

theoretical vacuum that exists on how revenge porn affects transgender women, so that it is possible to make them visible. Meanwhile, I confide centrality to the capacity of society itself to generate its own answers, at the same time as I privilege addressing the issue from its wide complexity advances the passage from victimhood to social emancipation.

References

- Gómez, M. (1997). La mirada pornográfica. Derecho y pornografía. ISBN: 958-665-003-0
- Grün, E. (1999/2000). Derecho y caos: Sobre la actual y futura evolución del derecho. Revista Telemática de Filosofía del Derecho. (3) pp 31-36
- Henry, N. Powell, A. (2016). Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law. Vol 25 (4)
- Luhmann, N. (1996). Introducción a la teoría de sistemas. Lecciones publicadas por Javier Torres Nafarrate. México: Universidad Iberoamericana.
- Luhmann, N. (1998) Sistemas sociales. Lineamientos para una teoría general, Barcelona, Antrhupos-Universidad Iberoamericana-Centro Editorial Javeriano Pontificia Universidad Javeriana.
- Lyon, D. Zygmunt, B. (2013). Liquid Surveillance: A Conversation. ISBN-13: 978-0-7456-6282-4
- McKinnon, C. (1997). La pornografía no es un asunto moral. Derecho y pornografía. ISBN: 958-665-003-0
- Morin, E. (1990). El paradigma de la complejidad. Introducción al pensamiento complejo. ISBN: 978-84-7432-518-8
- Pitch, T. (1995). Limited Responsibilities: Social Movements and Criminal Justice. SBN 0415086531
- Román, M. (2005). Complejidad y sistema legal. En Estallidos: polisemia y polimorfia del derecho y la violencia. San Juan: Publicaciones Puertorriqueñas.

Sources

- Corvalán Rivera, C (2014). La función simbólica, la eficacia simbólica y el uso simbólico del Derecho. Delimitación conceptual y metodológica. Available at: https://e-archivo.uc3m.es/bitstream/handle/10016/19891/TFM_MEADH_Cristopher_Corvalan_2014.pdf.
- Duprey, M. (2014). El cuerpo sufriente: Sobre el resentimiento y el problema de la víctima. Revista de Ciencias Sociales, [S.l.], p. 70-91, ene. 2014. ISSN 0034-7817. Available at: <https://revistas.upr.edu/index.php/rcs/article/view/5853>.

- Larkin, J.P. (2014). 'Revenge Porn,' State Law, and Free. Research Gate. Available at: ['Revenge Porn' State Law and Free Speech](https://www.researchgate.net/publication/272246825).
- McKinnon, C. (2018). #Metoo Has Done What the Law Could Not. The New York Times. Available at: <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.
- Román, M. (2015). Lo porno y la venganza en tiempos de vigilancia líquida. Foro Pornovenganza: un análisis criminológico, penal y de género, Facultad de Derecho de la Universidad Interamericana. Available at: <http://www.80grados.net/lo-porno-y-la-venganza-en-tiempos-de-vigilancia-liquida/>.
- Román, M. (2018). Pornovenganza, sociedades de control técnico y autopoiesis extrapenal. In Rev. Revista Jurídica de la Universidad de Puerto Rico. Available at: <http://revistajuridica.uprrp.edu/inrev/index.php/2018/02/05/pornovenganza-sociedades-de-control-tecnico-y-autopoiesis-extrapenal/>.

Veljko Delibašić*

CRIMINAL LAW ASPECT OF DOMESTIC VIOLENCE

The paper focuses on topic of the criminal offence of domestic violence under Article 194 of the Criminal Code, taking a stance regarding this issue and as to whether the family members are to be given additional criminal legal protection by prescribing this criminal offence. This analysis aims to find valid arguments for the existence of this criminal offence given that all the actions under this criminal offence can be subsumed under another criminal offence which protects all citizens, regardless of who the perpetrator is, a member of the family or another person. In addition to this, the paper warns that violence in the presence of children constitutes violence against children of sorts and calls for stricter sanctioning of such behavior. The paper also points out to the basic characteristics of the Act on the Prevention of Domestic Violence. Special attention has been given to the views taken in respect of this question by the European Court of Human Rights. The paper also points out to the obligations which Serbia has taken upon itself by ratifying the Istanbul Convention, as well as to the need to fulfill some more, so far unfulfilled obligations, all in order to ensure maximum of human rights protection for all citizens, and primarily the victims of domestic violence.

Key words: *violence, family, human rights, European Court, Istanbul Convention.*

1. Introduction

Domestic violence occurs all over the world, in all states and cultures, among people of all races, ethnic groups, religious confessions, political or sexual preferences, social and cultural levels. Protection against domestic violence constitutes a significant element of security culture because the violence which occurs within the family rapidly spreads to relationships outside the family. So the children who suffer or witness domestic violence, learning this pattern of behavior, become violent towards their peers in

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nurseries, schools, colleges and other environments and thereby represent a threat to wider society and certainly even to those who have done nothing to prevent or stop domestic violence. Thus their children become the victims of domestic violence as the last consequence. It is therefore necessary to oppose this phenomenon with all means at our disposal, primarily social, educational, economic, propaganda, misdemeanor, and finally criminal law, with special caution as regards criminal law.

Domestic violence can be described as behavior that is manifested through continued use of force, threats or abuse of trust in relations between family members. Until 1960s it was believed that domestic violence was very rare and unusual behavior. Many studies that have been published since then have shown, however, that domestic violence takes very different forms, that its proportions are much larger than it could ever be presumed, and that it stretches across all social and ethnic groups. Unfortunately, the actual proportions of domestic violence are difficult to estimate for many reasons, but it is more likely that its scope is greater and more serious than any statistical data can show. Research shows that violence fails to be reported in a large percentage of cases in our country. The causes of non-reporting include the fear of the condemnation of the environment in which the victim lives, the fear of the perpetrator and the mistrust in the legal system (Draškić, 2008: 342-343).

Numerous provisions pertaining to domestic violence adopted in international documents and in professional literature under domestic violence include primarily violence against women. Regardless of the fact that violence against women prevails in the total number of offences of this kind, domestic violence is a broader concept which encompasses violence among family members and implies, in the strictest sense, violence against children and spouses, and more broadly, against parents and all other family members. Some definitions of domestic violence include violence between partners not only in heterosexual marriages, but also in same-sex communities. Violence may occur during a relationship, in the course of breaking up or even when the relationship ends (Marković, 2016: 158).

What is controversial or could be controversial when it comes to domestic violence, is the way in which the state responds in providing protection for the victim, that is whether the protection by criminal law is necessary with its mechanism of repression which indisputably affects the whole family or is it more effective to activate other mechanisms of victim protection through family law protection or some other forms of protection. Previous experience indicate that state mechanism are more focused on sanctioning than on preventing and protecting the victim (Milenković, 2017: 242) which

has not yielded satisfactory results, so that greater engagement in the prevention of domestic violence would be desirable.

2. Criminal offence of domestic violence under Article 194 of the Criminal Code

Domestic violence is indisputably an extremely harmful social phenomenon. This criminal offence directly affects a family member who is the victim of another family member, but it attacks the family as such, and destroys certain established family values which are of great social significance. Particularly dangerous are those forms of domestic violence which target children and minors in general and these call for a particularly careful approach in the criminal procedure and, above all, first of all, taking care that such a victim does not suffer additional harmful consequences (Škulić, 2012a: 71).

Domestic violence is a serious problem in modern societies, so there is an increasing number of those legislations that envisage this criminal offence, although the incriminated behavior can generally be covered by the existing incriminations (e.g. compromising security, coercion, abuse of a minor, and in the event of a severe consequence, serious bodily injury, manslaughter, etc.). However, in order to provide complex protection under criminal law, as well as due to the significance of this phenomenon, it is justified to envisage the separate criminal offence of domestic violence. Yet a certain doubt in respect of stipulating such an incrimination arises due to the argument that in the cases where there has been drastic deterioration in family relations, which is expressed in the violence of one member towards another family member such a family cannot survive, that is, in such a case there are no elementary conditions/prerequisites for further shared life of these family members. Also, as regards general prevention, the question arises as to whether criminal law is called upon to prevent potential perpetrators of this criminal offence, that is, the family members from committing acts of violence to one another. Should criminal law protect family members against one another and can it protect them and can it protect the family relations compromised to that extent? Naturally, every family member has the right to the protection of his basic rights, as well as every/any other person, but do they have the right to additional criminal protection from members of their own family? (Stojanović, 2012: 572) The question can be raised rightly why greater criminal-law protection would/should be provided to a member of the family than to a citizen who is not related to a perpetrator. For example, why would a perpetrator be punished more severely if he inflicts a bodily injury on his wife than when he inflicts such an injury on his neighbor?

In other words, in the above case, why does the wife of the perpetrator deserve more criminal-law protection than his neighbor?

Considering the unbelievably broad definition of a family member in the Family Law and even the slightly narrower but still rather extensive definition of a ‘family member’ in the Criminal Code, there is a serious question as to whether the criminal offence of domestic violence objectively deserves at all to be regarded as a criminal act against ‘the family’, i.e. the criminal offence which protects ‘the family’, as it could be routinely concluded given the legal systematization or the classification of this incrimination in the group of criminal offences against marriage and family. It is actually a rather heterogeneous offence with regard to/in terms of the protected object, which can in part be considered a criminal offence against life and limb, partly as offence against sexual freedom, etc. (Škulić, 2012: 68). According to Article 112 paragraph 28 CC, family members are deemed to include the following: spouses, their children, the spouses’ ancestors in the direct line of blood relations, extramarital partners and their children, adoptive parents and adopted children, foster parent and foster child. Family members are also brothers and sisters, their spouses and children, their ex-spouses and their children and the parents of former spouses if they live in a common household, as well as persons who have a common child or a child that is going to be born, although they have never lived in the same family household. The family member is protected very extensively by the criminal offence of domestic violence. The following goods of the family members are protected: 1) life and physical integrity and 2) mental life. Given these forms of protection, domestic violence constitutes a kind of ‘mixed crime’ which can be classified as a criminal offence against life and limb in part relating to the protection of integrity of life and body, whereas in the part in which it relates to the protection of mental life, by endangering tranquility or mental state it could also be regarded as a criminal offence against the freedoms and rights of man and citizen (Stojanović, Škulić, Delibašić, 2018: 286). This crime has its basic form, three aggravated forms and a special form.

2.1 Basic form

The basic form (paragraph 1) exists when the use of violence, threat of attacks against life or body, insolent or ruthless behavior endangers the tranquility, physical integrity or mental condition of a member of his/her family. The question arises as to whether the threat is the act of execution committed by the use of violence or threat to attack the life and body, insolent or ruthless behavior or is it the consequence. If the threat is considered to be the act of execution, then it would be sufficient for the action to be

taken once to constitute a criminal offence. However, the view that compromising the tranquility, physical integrity or mental condition is a consequence of a particular danger that lasts a shorter or longer time seems to be better grounded.

Thus when establishing what constitutes the act of commission of this criminal offence both views are present. The first understanding stems from the grammatical interpretation of the characteristics of the offence, wherein the act is described as endangering. The fact that the act is defined in terms of consequence should not be confusing as similar indirect definitions of acts through consequences are also found elsewhere, especially in typically consequential crimes, such as murder or physical injury. Use of violence, threatening to attack one's life or body, insolent or ruthless behavior would only represent manners of causing. In support of the claim that the act of perpetration of this offence is endangering, it can be illustrated by the fact that a verb is regularly used to describe the act of execution, and the verb used here is to threaten (“whoever... threatening...”). The other view which is present in the literature starts from the fact that endangering here represents the consequence of the offence, and that the acts of execution include: the use of violence, threatening to attack the life or body, as well as insolent or ruthless conduct. This understanding is dogmatically more correct because it is difficult to defend the attitude that in other consequential offences, where due to the specificity of legislative technique the legislator has defined any act that leads towards causing the given consequence – the consequence is actually the act of execution. In relation to other similar consequentially determined offences, domestic violence differs in that the legislator here did not find that every manner of causing the state of vulnerability of the family member satisfies, but rather explicitly stated certain acts of execution of the offence (Vuković, 2012: 127-128).

Bearing in mind the nature of this criminal offence, it involves a continuous situation in which one family member finds himself/herself due to actions taken by another family member towards them. The act of execution would, therefore, be the use of violence, the use of a qualified threat, insolent or ruthless behavior. Criminal offence may, however, exist even when the act is executed only once, but bearing in mind the consequence, it depends on which form of perpetration is present. Whereas in the use of gross violence and the use of qualified threat in some cases it is sufficient that the action is taken only once in order to endanger the tranquility, physical integrity or mental state of the passive subject, brazen and ruthless behavior, as a rule, can cause such danger only if it is repeated several times. It is necessary that the action is such as to be objectively suitable to result in endangering the serenity, physical integrity or mental state of the family member. There must be a causal link between the threat and the act of execution. The

action taken must cause the endangering of tranquility, physical integrity or mental state (Stojanović, 2012: 572-573).

Bearing in mind the nature of this criminal offence, and primarily the social significance of its essence, the protected object and consequence, it can be concluded that the number of necessary activities depends on the nature of the undertaken action. Since the existence of the criminal offence requires that the taking such an act of execution as is objectively suitable to result in endangering the tranquility, physical integrity or mental condition of the passive subject, it means that in some cases it is sufficient that the action is taken once, while in other cases it would have to be taken several times. The repeated act of execution is required in cases which involve the activities which constitute only segments of unique behavior that is suitable to cause the consequence as a feature of the essence of the criminal offence. The passive subject is a family member. In the basic form of the criminal offence this can only be an adult member of the family (Stojanović, DeliĆ, 2013: 110).

The criminal prosecution of the criminal offence of domestic violence is undertaken and conducted *ex officio*. As regards the basic form, in addition to listing relevant arguments, and primarily that criminal law should not be allowed to interfere in interpersonal relations which exist in marriage, the literature suggests that the prosecution be launched at the initiative of the injured party (e.g. Simić, 2015: 532-533). Although appropriate arguments have been provided in support of this suggestion, which are corroborated by examples from practice, thus leading to the conclusion that the authors are right, it should be mentioned that such a suggestion cannot be accepted because it contravenes the Council of Europe Convention of preventing and combating violence against women and domestic violence (Istanbul Convention). Serbia ratified this convention which stipulates that criminal prosecution must not depend on the readiness of the victim to file a complaint or testify against any of the perpetrators (Article 18 paragraph 4), that is that the criminal offences under the Istanbul Convention apply irrespective of the nature of the relationship between the victim and the perpetrator (Article 43) (Delibašić, 2017: 28-29).

It should be mentioned that a part of the literature extensively determines the notion of violence. Thus one finds that violence in terms of this incrimination can be physical, psychological, emotional and economical, “whereas sexual violence is incriminated in chapter XVII among the criminal offences against sexual freedom” (Konstantinović Vilić, 2011: 176, according to Vuković, 2012: 130). A similar understanding of violence starts from the definition of the act of violence given in the Family Law, the starting

point in defining acts of violence that was favorably accepted in the literature. Such extensive definition of violence is unacceptable for a number of reasons. Firstly, violence in its linguistic meaning implies exclusively violent conduct – the use of force, i.e. exclusively physical violence (the use of physical force). The use of force and threatening to attack a life or body does not encompass any psychological, emotional or economic/financial conditioning of another, because the language norm does not allow for it. Additionally, these actions resemble the abuse of another, which the legislator, had he wanted, could have included in the description of domestic violence, since similar actions already exist in the Criminal Code. Similar reasoning is possible only within the action of brazen and ruthless behavior and not within some kind of extensive interpretation of the notion of violence. After all, such an interpretation is unacceptable bearing in mind how the legislator applies the act of violence in other incriminations in the Criminal Code. Furthermore, the separation of sexual violence is extremely inconsistent. If sexual violence against a member of the family is to be qualified only as an offence against sexual freedom, then there are no sufficient reasons for physical injury of a family member to be considered to be within the scope of domestic violence as a criminal offence. The same function could have been adequately encompassed by the existing incrimination of light and serious bodily injury. Finally, some forms of thus perceived violence expand the zone of the punishable in an unacceptable way. Thus emotional violence is understood as “non-demonstration of love and attention, rejection, neglect of the emotional needs of a family member, etc.” (Konstantinović Vilić, 2011: 177, according to Vuković, 2012: 130). The listed actions cannot constitute the criminal offence of domestic violence. They may be regarded as a form domestic violence in the feminist, victimological and generally criminological discourse, but similar views do not satisfy the strict requirements of the principle of legality in criminal law (Vuković, 2012: 129-130).

Only a family member can be the perpetrator, whereas an accomplice, instigator or observer can be the persons outside the family circle, i.e. any other person. This criminal offence can be perpetrated only with intent, and it is punishable by imprisonment of three months to three years.

2.2 Aggravated forms and special form

The criminal offence of domestic violence has three aggravated forms and one special form. The aggravated form occurs (paragraph 2) if weapons, dangerous implements or other means suitable to inflict serious injury to body are used in the execution of the

basic form so that the body is severely injured or health seriously impaired, which is punishable by six months to five years.

If some form under the first two paragraphs results in a serious bodily injury or serious health impairment or if they are committed against a minor, it will involve the aggravated form (paragraph 3) punishable by imprisonment of two to ten years. A particularly important fact, established in a research conducted on the territory of the Municipality of Zemun, shows that in 66 % of the situations, in families with children, violence is used in their presence. Other studies also show that in the families where domestic violence occurs, children witness about three thirds of violent incidents (Popović, 2015: 485). Bearing in mind that violence between partners when committed in the presence of the children constitutes a kind of violence against children, and it is psychological violence which frequently may have far more serious consequences than physical violence, there are arguments in this case to defend the view that violence in the presence of children constitutes violence against children, i.e. that there is this additional aggravated form of the criminal offence. However, this view has not been accepted as yet in practice (Delibašić, 2017: 29).

The most serious form occurs if the death of a family member has resulted from one of the forms stipulated in the first three paragraphs, when the perpetrator may be punished by three to fifteen years of imprisonment. It should be emphasized here that the difference between this criminal offence and the criminal offence of aggravated murder lies in the fact that the death of the family member here is covered by the offender's negligence, whereas in the criminal offence of aggravated murder under Article 114 item 10 CC there is intentional murder of a family member previously abused by the perpetrator.

The special form (paragraph 5) prescribes a prison sentence of three months to three years and a fine for the person who violated the measures for the protection against domestic violence imposed by the court on the basis of the law. This form is rather debatable both from the point of view of the legal systematics, as well as for a number of practical reasons, primarily those that refer to specific evidentiary issues. Certain measures for the protection against domestic violence can be pronounced in civil proceedings based on the rules of the Family law, but there is no logic for their violation to be sanction in this way, even more so because the violation of such measures would in most cases involve the basic form of the criminal offence of domestic violence (Škulić, 2009: 18).

3. Act on Prevention of Domestic Violence

The Act on the Prevention of Domestic Violence has brought a lot of novelties in the functioning of state authorities, which are, above all, reflected in better coordination between them. Victims of domestic violence have received a new type of protection, and the procedure for preventing family violence instituted on the basis of this law is efficient and economical from the perspective of the victim (Marković, 2018: 259). The basic characteristics of this law are reflected in the definition (introduction) of new institutes and providing for a specific procedure for domestic violence, noting that the procedure does not have to be instituted at all for the perpetration of the criminal offence of domestic violence. Conversely, it may be instituted due to domestic violence encompassed by the broader interpretation of this notion than in terms of criminal law. Moreover, the procedure can be initiated and appropriate measures can be imposed even where there has been no violence at all, but is imminent. Then the proceedings are initiated and appropriate measures are imposed against a person who has not committed a criminal offence (and even does not have to be a perpetrator of a misdemeanor) and such a person is considered to be a possible perpetrator according to legal terminology. A special peculiarity of this act is the possibility of imposing urgent measures. If following a risk assessment, the competent police officers in charge find that there is the imminent danger of domestic violence, they may issue an order which imposes an emergency measure against the offender who has been held in the competent organizational unit of police. The emergency measures include: the measure of temporary removal of the perpetrator from the apartment and the measure of interim injunction for the perpetrator to contact the victim of violence and to approach them.

This law also applies to cooperation in the prevention of domestic violence in criminal procedures for criminal offences such as: stalking, rape, sexual intercourse with a helpless person, sexual intercourse with a child, sexual intercourse through abuse of position, prohibited sexual acts, sexual harassment, pimping and procuring, mediating in prostitution; showing, procuring and possession of pornographic material and juvenile pornography, inducing a minor to witness sexual acts, neglect and abuse of a minor, domestic violence, failure to provide maintenance, violation of family duty, incest, trafficking in human beings, as well as in other criminal offences if the criminal offence results from domestic violence. It also applies to the provision of protection and support for the victims of criminal offences defined by this law. Considering that the law has been applied since 1 June 2017, it remains to be seen in the forthcoming period whether it will fulfill the expectations and - depending on that - whether and how it should be modified or improved.

Of course, as regards the Act on Prevention of Domestic Violence it should be said that there are those in the scientific and professional public who have criticized it severely. Thus, for example, it has been pointed out that that this act protects a set of human right while neglecting the existence of other human rights (Lazić, Nenadić, 2017: 501). Some of them also point out that it was passed under the influence of feminist ideology which regards the family as “a battlefield of violence” and that it is the cause of problems that will be created by this act in future, because it contains provisions that speak about a possible perpetrator of domestic violence. In addition to the undeniable fact that virtually everyone can be a possible perpetrator of domestic violence (after all, everyone is a potential perpetrator of any other criminal offence, e.g. murder, endangering public traffic, etc.), it is noted that for the feminist dogma the family is no good even when there is no domestic violence in it because it might occur in the future. What critics point out in particular regarding this law is the fact that – unlike some other regulation which envisage a range of measures aimed at preserving the family (mediation, conciliation, counseling), no measure is foreseen in that regard. On the contrary, the law contains only those measures that are exhausted in any kind of interruption of family members’ association (removal from the apartment, restraint order, ban on communication), that is, the measures aimed at dissolving the family (Ristivojević, 2017: 108-110).

4. Decisions of the European Court for Human Rights

The European Convention for the Protection of Basic Human Rights and Freedoms guarantees the right to life and liberty. Bearing in mind that the criminal offence of domestic violence endangers these very basic human rights, the protection of these rights appears to be imperative. Hence it is good that this criminal offence is stipulated in the Criminal Code.

In this regards, the European Court of Human Rights has reached several decision taking a stance regarding this issue. Thus in the case *Tomasic and Others V. Croatia*, the European Court of Human Rights took the view that when authorities know or would know about the existence of a real or imminent danger to life of a particular individual, they are obliged to take measures within their powers which it considers reasonable in order to eliminate that risk. In the specific case, the offender murdered his partner and their child and the court finds that the state did not take into account the risk that existed for their lives that existed due to previous threats and did nothing to minimize that risk after the perpetrator was released from prison, which resulted in violation of Article 2 (right to life) of the European Convention for the Protection of

Basic Human Rights and Freedoms. In addition to this decision, the reference decisions of the ECHR in cases of domestic violence also include the following cases: *Kontrova v. Slovakia*, *Bevacqua and S. v. Bulgaria*, as well as *E. S. and Others v. Slovakia* which emphasized the obligation of the state to ensure adequate legal protection to victims of domestic violence, first of all in terms of criminal law, that is, the state's refraining from reaction is considered a violation of Article 8 (right to respect for private and family life) of the European Convention on the Basic Human Rights and Freedoms (Milenković, 2017: 243-244).

However, until the court decision in the case of *Opuz v. Turkey* (2009), no verdict found that violence against women constituted a violation of Article 14 (prohibition of discrimination) of the European Convention on the Basic Human Rights and Freedoms, so that this judgment moved the limits of the previous practice and it represents a decision with far-reaching consequences as to how states should act in the cases/event of domestic violence. The petition against Turkey was filed by N. O., claiming that the state authorities failed to protect her mother and herself against domestic violence, which resulted in the death of her mother and her abuse. In the period between 1995 and 2002, H. O. attacked his wife and her mother six times with serious life-threatening consequences to their health, and the investigation was suspended three times because of the victim's refusal to file a lawsuit and twice because/as a result/due to lack of evidence. No proceedings were instituted on the grounds that the women withdrew their complaints each time, although they explained each time that the withdrawal was caused by threats to life by H. O. when they tried to move out, H. O. murdered his mother-in-law, claiming that she had induced his wife to lead an immoral life and that he had done it for the sake of his honor and honor of his children (he was sentenced to life imprisonment). The ECHR pointed out that there had been a violation of Article 2 (right to life) in connection with the murder of his mother-in-law and a violation of Article 3 (prohibition of inhuman or degrading treatment) in connection with the failure of the state to protect the offender's wife. The court pointed out that it is necessary that there are legal mechanisms that will enable the procedure to be concluded even when the victims withdraw their complaints, that is, a lawsuit or a proposal for prosecution. For the first time in the case of domestic violence, the court found that there was a violation of Article 14 (prohibition of discrimination) in conjunction with Articles 2 (right to life) and 3 (prohibition of torture), because the violence the two women suffered was gender-based, pointing out at the same time that most cases of domestic violence involve women as victims, and that this is particularly contributed to by the

discriminatory passivity of the judicial system, i.e. the impunity of perpetrators (Milenković, 2017: 244).

5. Istanbul Convention

Striving to eradicate violence against women and domestic violence in Europe, taking into account the increasing scope of the case law of the ECHR which sets significant standards in the area of violence against women, the member states of the Council of Europe and the other signatories adopted the Convention on the Prevention and Combating Violence against Women and Domestic Violence in Istanbul on 11 May 2011, which came into force on 1 August 2014.¹ The Preamble to this Convention stipulates that its objectives are: a) protecting women from all forms of violence and preventing, prosecuting and eliminating violence against women and domestic violence; b) contributing to the suppression of all forms of discrimination against women and promoting essential equality between women and men, including the empowerment of women; c) developing a comprehensive framework, policies and measures to protect and assist all victims of violence against women and domestic violence; d) promoting international cooperation in the area of eliminating violence against women and domestic violence; e) providing support and assistance to organizations and authorities in effective cooperation in order to adopt a comprehensive approach to the elimination of violence against women and domestic violence.

The Istanbul Convention is the first European regional instrument of international law of a binding nature that sets international standards for the prevention and protection of women against violence with which each country that has acceded to the Convention must be harmonized. It is conceptually inspired in many ways by the UN Declaration of 1993 (UN General Assembly Resolution 48/104, 20 December 1993, known as the Declaration on elimination of Violence against Women, DEVAW), but unlike the declaration that is an expression of concerted political will of the member states represented in the UN General Assembly, the Istanbul Convention has the force of contractual obligation for its states-signatories (Jarić, 2015: 58).

This Convention, in Article 3 item b defines domestic violence as any act of physical, sexual, psychological or economic violence that occurs in the family or household, or between former or present spouses or partners, regardless of whether the perpetrator shares or used to share the household with the victim.

¹ Serbia ratified this Convention on 31 October, 2013.

The process of harmonization of our legislation with the Istanbul Convention began with the amendments to the Criminal Code of 2016 and the adoption of the Act on the Prevention of Domestic Violence. As only a part of the obligations was fulfilled, it is necessary to conduct a serious and thorough debate in order to successfully complete the process. Noting that Serbia had already fulfilled a part of its obligations even before ratifying the Istanbul Convention, it should be noted that new criminal offences were introduced, such as: persecution, forced marriage, mutilation of the female genitals and sexual harassment. Nevertheless, the legislator has a lot of obligations to fulfill. Thus, a way must be found to compensate the damage, that is, to fulfill the obligation to ensure that those who have suffered serious bodily injury or those whose health has been impaired due to offences covered by the Istanbul Convention receive appropriate compensation from the state if the damage is not covered from other sources such as the perpetrator, insurance or state health and social benefits. Further, it is necessary to add a new form of the criminal offence of illegal termination of pregnancy which would sanction forced sterilization, and in the case of criminal offences punishable by imprisonment for a term not exceeding three years (unlawful termination of pregnancy under Article 120, paragraph 1 CC, illicit sexual activity under Article 180 paragraph 1 CC, and domestic violence under Article 194 paragraphs 1 and 4 CC), it is necessary to stipulate that those who attempt such criminal offences will be punishable by law. It is also necessary to delete paragraph 4 in the criminal offence of sexual harassment (Article 182a) which stipulates that the prosecution is undertaken at the proposal (Delibašić, Nikolić, 2017: 216-217).

The largest problem that remains for the legislator is the need to harmonize the criminal offence of rape with the Istanbul Convention, which is based on the view that unwanted sexual activity is equivalent to forced sexual intercourse, which is unacceptable in criminal law. A possible solution would be to broaden the criminal offence of rape from Article 178 CC so that it may read as follows: *whoever uses force or threat to life or the body of such or other person close to them performs vaginal, anal or oral penetration of sexual nature on the body of such person, using any part of the body or an object shall be punished with imprisonment of five to twelve years*. Besides, another, more lenient form of the criminal offence of rape should be added, reading as follows: *whoever performs action from paragraph 1 of this Article without consent shall be punished by prison of three years* (Delibašić, Nikolić, 2017: 217).

6. Conclusion

Domestic violence is an exceptionally harmful social phenomenon which occurs in a range of different forms and has far greater proportions than it could have ever been assumed, and it is present in all social and ethnic groups. Victims of domestic violence, for fear of the perpetrator, shame, lack of confidence in state authorities and many other reasons, rarely report domestic violence, so that the dark figure is very large in respect of this criminal offence. The persons who are aware of domestic violence in certain families also fail to report it because our society has for a long time believed that what happens behind the door of someone's home is the problem only of that family and that the society must not interfere in 'family' relations.

This attitude is, of course, unacceptable, because when serious violence takes place, even if it happens within the family, the society must adequately respond, primarily to protect the victim of violence. Additionally, the children who are frequently exposed to violence - whether they suffer or witness it (where, as a rule, the victim is the mother) - learn this pattern of behavior and very soon become violent themselves. When these children, who were originally the victims of violence, become bullies among their peers, at school, university, street, etc., then it is no longer "the inside problem of a family" but rather of the whole society. Then the society reacts by appropriate repressive measures, instead of timely reacting and preventing these children from being the victims of violence and then become offenders themselves (Delibašić, 2017: 29-30).

The European Convention for the Protection of Basic Human Rights and Freedoms guarantees the right to life and liberty. Bearing in mind that the criminal offence of domestic violence endangers these very fundamental human rights, the protection of these rights is an imperative and it is therefore good that the criminal offence has been included in the Criminal Code. In relation to this, the European Court of Human Rights reached several decision taking a stance regarding this issue.

Serbia has established a legal framework for suppressing domestic violence by signing the Istanbul Convention, passing the Act on the prevention of Domestic Violence, and adding a large number of relevant provisions to the existing laws. A prominent part in this framework belongs to the criminal offence of domestic violence under Article 194 of the Criminal Code. This criminal offence has an aggravated form (paragraph 3) which, among other, exists if the basic form of the offence targets a minor. Bearing in mind that violence committed in the presence of a child (but also of a minor) is a kind of psychological violence towards the child, there are arguments to defend the view that

such cases constitute acts of violence against a child or a minor, i.e. that they constitute aggravated form of the criminal offence. Yet the judicial practice has not accepted this view so far.

The process of harmonization of our legislation with the Istanbul Convention began with the amendments and additions to the Criminal Code of 2016 and the adoption of the Act on the Prevention of Domestic Violence. As only a part of the obligations was fulfilled, it is necessary to conduct a serious and thorough debate in order to successfully complete the process. Noting that Serbia had already fulfilled a part of its obligations even before ratifying the Istanbul Convention, it should be noted that the legislator has a lot of obligations to fulfill. Thus, a way must be found to compensate the damage, that is, to fulfill the obligation to ensure that those who have suffered serious bodily injury or those whose health has been impaired due to offences covered by the Istanbul Convention receive appropriate compensation from the state if the damage is not covered from other sources such as the perpetrator, insurance or state health and social benefits.

Domestic violence is certainly a very complex phenomenon which cannot be suppressed easily because it is characterized by a large number of peculiarities, primarily by the fact that it involves complex interpersonal relation within a family, so that resolving this problem must be approached in an organized way in all areas of social activity, including consistent enforcement of criminal law provisions which suppress such conduct. It should be borne in mind that protection against domestic violence is an element of security culture and if domestic violence is prevented or suppressed, the possibility for children from such families – victims or witnesses of domestic violence – to learn this model of behavior and later become perpetrators of violent acts themselves, which will make the society as a whole a much safer place (Delibašić, 2017: 30).

References

- Delibašić, V. (2017): Zaštita od nasilja u porodici kao element bezbednosne kulture, *Kultura polisa*, Novi Sad.
- Delibašić, V., Nikolić, M. (2017): Ispunjene i neispunjene obaveze prema Istanbulskoj konvenciji, *Reformski procesi i poglavlje 23 (godinu dana posle) - krivičnopravni aspekti*, Zlatibor.
- Draškić, M. (2008): Nasilje u porodici: prva presuda Vrhovnog suda Srbije, *Anali Pravnog fakulteta u Beogradu*, Beograd.
- Jarić, V. (2015): Doprinos Ujedinjenih nacija u Srbiji zaštiti žena žrtava nasilja u porodici i u intimnim partnerskim odnosima: od međunarodnog prava do prakse, *Temida*, Beograd.

- Konstantinović Vilić, S. (2011): Krivičnopravna zaštita žrtava nasilja u porodici, *Pravna klinika za zaštitu prava žena*, Niš.
- Lazić, R., Nenadić, S. (2017): Javno tužilaštvo pred izazovima Zakona o sprečavanju nasilja u porodici, *Reformski procesi i poglavlje 23 (godinu dana posle) - krivičnopravni aspekti*, Zlatibor.
- Marković, S. (2016): Nasilje u porodici u sudskoj praksi Republike Srbije i Evropskog suda za ljudska prava, *Evropske integracije i kazneno zakonodavstvo (poglavlje 23 - norma, praksa i mere harmonizacije)*, Zlatibor.
- Marković, S. (2018): Pojedina iskustva u primeni zakona o sprečavanju nasilja u porodici, *Organizacija pravosuđa i efikasnost sudske zaštite (Evropski standardi i stanje u Srbiji) - krivičnopravni aspekt*, Zlatibor.
- Milenković, M. (2017): Kaznenopravni instrumenti sprečavanja nasilja u porodici - razlozi za i protiv, *Reformski procesi i poglavlje 23 (godinu dana posle) - krivičnopravni aspekti*, Zlatibor.
- Popović, D. (2015): Kriminalistička analiza krivičnih dela nasilja u porodici izvršenih na teritoriji Opštine Zemun, *Kultura polisa*, Novi Sad.
- Ristivojević, B. (2017): Rađanje porodičnog krivičnog prava u Srbiji: porodica kao njegoa prva žrtva, *Reformski procesi i poglavlje 23 (godinu dana posle) - krivičnopravni aspekti*, Zlatibor.
- Simić, D. (2015): Krivičnopravna zaštita od nasilja u porodici, *Kultura polisa*, Novi Sad.
- Stojanović, Z. (2012): *Komentar Krivičnog zakonika*, Beograd.
- Stojanović, Z., Delić, N. (2013): *Krivično pravo posebni deo*, Beograd.
- Stojanović, Z., Škulić, M., Delibašić, V. (2018): *Osnovi krivičnog prava, krivično materijalno pravo, knjiga I*, Beograd.
- Škulić, M. (2009): Osnovni elementi normativne konstrukcije krivičnog dela nasilje u porodici - neka sporna pitanja i dileme, *Nasilje u porodici*, Beograd.
- Škulić, M. (2012): Krivičnopravni aspekt - osnovni stavovi, *Nasilje u porodici, zbornik radova sa naučnog skupa*, Beograd.
- Škulić, M. (2012a): Krivično delo nasilje u porodici, *Nasilje u porodici, zbornik radova sa naučnog skupa*, Beograd.
- Vuković, I. (2012): Nasilje u porodici kao krivično delo - pojedini problemi u primeni prava, *Nasilje u porodici, zbornik radova sa naučnog skupa*, Beograd.

Adrian Stan*

**NULLUM CRIMEN SINE LEX CERTA. THE LACK OF
PREVISIBILITY IN CRIMINAL LAW. LEGAL VERSUS
ILLEGAL IN THE RECENT ROMANIAN CONSTITUTIONAL
COURT JURISPRUDENCE**

In our analysis, the central element is the idea of the previsibility, more called foreseeability of the criminal law, as a derivation of the great principle „nullum crimen sine lege”. While this principle does not refer textually to all the qualitative conditions of the law, reality has shown that these new regards, among which the foreseeability, have come to the fore when speaking of the qualitative criteria of the norm. So it happened in the ECHR jurisprudence, and so happens in Romanian law constitutional control.

We first noticed the early moments of the idea of clarity of the law from the classical age of criminal law, and then briefly analyze the provisions of the Rome Convention which provide for the principle of the lawfulness of incrimination, with its famous exception. In the following, we have quoted a few judgments of the European Court of Human Rights in the matter, in which it can be observed that the rigor of the predictability of the law has gained a great deal of power in the Court. Then, going to Romanian domestic law, we see how a special law deals with the way in which laws are to be drafted, and the control of the Constitutional Court refers to this, as sometimes unclear or ambiguous texts are made.

Keywords: *lex certa, previsibility, foreseeability, clarity, legal, illegal*

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I. Inlightment traditions

The principle of the legality of incrimination includes under its sign the entire edifice of modern criminal law¹, being expressly provided for by all European criminal codes. Cesare Beccaria himself said, in 1764², taking on an older idea of Montesquieu that „only the laws can establish the appropriate punishments for offenses, and this authority can only be held by the legislator. No magistrate can apply offenses against another member of the same society.”³ Thus, it can be seen that the principle of legality has a more political origin than a criminal-law one, which is based on the idea of a social contract, the powers of the absolutist state and the defeat of arbitrariness.”

The author of „The Spirit of the Laws” went some years before even further into arguing about the idea of clarity of laws, which seems surprisingly actual, as we shall see, saying that „the style must be concise ... the language of the law must be simple ... when the law is written in a pompous style, it is no more than a parade object. Laws do not have to be subtle; they are designed for people with modest possibilities of understanding. When exceptions, limitations, amendments to a law are not necessary, it is better not to exist. Such details always send to new details. There must be no changes to a law without any valid reason. In creating laws, it must be taken into account that they do not disturb the nature of things. A prohibition of a thing that is not bad, under the pretext of an imaginary perfection, must be avoided. It takes the law to have a certain candor. Intended to punish the wickedness of people, they themselves must be as gentle as possible.”⁴

Later, at the beginning of the 19th century, German penalist Anselm von Feuerbach transposed in legal terms the political foundation of the principle of legality, giving it the form known today by the famous Latin text *nullum crimen, nulla poena sine law*.

II. European regulations and evolutions

The international doctrine⁵ distinguishes between two forms of the principle of legality of incrimination: formal legality, which encompasses all criminal and procedural rules

¹ Pașca, V., *Criminal Law. General Part*. IV th Edition, Universul Juridic Publishing House, Bucharest (2014), p. 33.

³ Beccaria, C., *On crimes and punishments*, Scientific Publishing House, Bucharest (1965), p. 13.

⁴ Montesquieu, Ch., *The Spirit of The Laws*, Scientific Publishing House, Bucharest (1964), XXIX,16.

⁵ Pradel J., *Droit penal comparé*, 4 edition, Dalloz, Paris (2016), pp. 789-790.

and substantive or substantive legality, which has the meaning of *law quality*, in terms of accessibility and foreseeability⁶.

States of the Council of Europe established in late 40s have considered the principle to be of such importance that it requires codification at this supranational level. Thus, the European Convention on Human Rights, signed in Rome in 1950, at art. 7 states that „No one shall be convicted of an act or omission which at the time of the commission did not constitute an offense under national or international law. Also, a more severe punishment can not be applied than that applicable at the time the offense was committed”. The second paragraph says that „this Article shall be without prejudice to the trial and punishment of a person guilty of an act or omission which, at the time of committing the offense, was considered to be criminal under the general principles of law recognized by civilized nations”.

The vision of the authors of the ECHR is that the provisions of Art. 7 have an absolute character and they are part of what can be called the „hard content” of such human rights regulations, meaning that signatory states are not allowed to deviate from their provisions. Article 15 of the Convention includes this rule among those which are incompatible with the application of which the High Contracting States and those which have acceded subsequently can not derogate. The derogation is prohibited even in case of war or danger that would threaten the life of the nation. This, we can say, proves the increased significance of the article in the system of European human rights protection.⁷

The presence of the *nullum crimen* principle among human rights is based on justifications that concern both the criminal policy of the states and the criminological nature. Indeed, *we are actually talking about a principle, but we are also talking about a human right that has received a superior regulation*, namely the right to be accused, judged and condemned, only for an act as a crime in national law, in an accessible, clear and foreseeable manner, as we shall see. By imposing a clear definition of offenses, the lawfulness of incrimination is one of the essential guarantees of the right to freedom and legal certainty⁸.

⁶ We shall use the term *foreseeability*, even if some authors call it also predictability.

⁷ See also Anițulesei I-N., Different approaches to the *nullum crimen, nulla poena sine lege* principle in European Criminal Law. Is there a principle of legality recognized in European Criminal law?, in *Criminal Law Writings*, no. 2/2018 Universul Juridic Publishing House, Bucharest (2018), p. 9-25.

⁸ Desportes, F., Le Gunehec, F., *Droit pénal général*, Ed. Economica, Paris (2001), p. 153.

A very interesting discussion was generated in ECHR law and jurisprudence by the second paragraph of art. 7, called sometimes as „The Nuremberg clause”⁹. It has been argued that, due to the increasing codification of international criminal law, *nullum crimen* plea assumes less and less relevance before the International Criminal Courts. Nonetheless, legislative acts or constitutional courts’ decisions, allowing the prosecution of alleged perpetrators of international crimes committed in the past, continues to attribute the legality principle a central role within domestic criminal proceedings or complaints before the Court of Strasbourg.

This is particularly true in relation to Eastern European countries, which, since the end of the Cold War, have showed a significant interest in prosecuting and punishing alleged perpetrators of war crimes and crimes against humanity taking place under the regime in the Soviet Union.

International Court itself acknowledged sometimes that it had applied the law retroactively, suggesting that the conduct had not formally been prohibited, even not under international law. And one cannot be accused of something that does not exist. But we should beware not to take this explanation at face value. In the famous passage, the Tribunal emphasized that the accused „must know that he was doing wrong”, alluding to an inner knowledge of right and wrong and a (fading) voice of human conscience¹⁰.

In this context, in *Kononov v. Latvia*¹¹, the petitioner argued that by retrospectively applying the criminal law rules, the Latvian courts sentenced him in 2000 for facts regarded as „war crimes” committed in 1944 when this notion was not well defined in international criminal law, breaching the provisions of art. 7 of the Convention”. However, the Court ruled that in 1944 war crimes were defined as „acts contrary to norms and customs of the war”, that the international law applicable at that time had already established the basic principles that such facts were incriminated as such and that it contained "a comprehensive a series of examples of acts constituting war crimes”.

⁹ Mariniello, T., The ‘Nuremberg Clause’ and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence, in *Nordic Journal of International Law* 82 (2013) 221–248, at 7.09.2018.

¹⁰ Van der Wilt, H., *Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test*. Available from: https://www.researchgate.net/publication/283040842_Nullum_Crimen_and_International_Criminal_Law_The_Relevance_of_the_Foreseeability_Test, accessed at 10.09.2018.

¹¹ Application no.36376/04, Grand Chamber, 17 may 2010, par. 205-213.

The Court also ruled in *Kononov vs Latvia* that „The impact on the civilian population of the First World War prompted provisions in the Treaties of Versailles and Sèvres on the responsibility, trial and punishment of alleged war criminals. The work of the International Commission in 1919 (after the First World War) and of the United Nations War Crimes Commission (UNWCC) (during the Second World War) made significant contributions to the principle of individual criminal liability in international law. “Geneva law” (notably the Conventions of 1864, 1906 and 1929; see paragraphs 53 to 62 above) protected the victims of war and provided safeguards for disabled armed forces personnel and persons not taking part in hostilities. Both the “Hague” and the “Geneva” branches of law were closely interrelated, the latter supplementing the former”.

The doctrine spoke of facts so-called *mala per se*, for which the foreseeability or predictability standard should be lower. It follows from the above that persons charged with a crime cannot rely on established, foreseeable legal practice of state authorities in order to defend their interests unless such practice respects basic human rights, especially human dignity and freedom and the right to life. One might recall in this context the *dictum lex iniusta non est lex*. To plead for the protection of *nullum crimen sine lege* – in cases where the principle interferes with such values – can be recognized as something like an abuse of law. At the same time, inasmuch the Convention declares that this would run counter to Article 7, it can also argue that the lack of criminalization – when it is necessary to protect values in democratic societies – falls within the ban on arbitrariness on the grounds of the ECHR.¹²

Passing through the large discussion about second paragraph of art. 7, which is not the central theme of our analyse, we have to observe that the lawfulness of the offense and punishment is embraced by several concepts. *Lex scripta* signifies the limitation, in principle, of the sources of criminal law to normative acts of force equal to or above the law, which can not be invoked to justify criminal liability. *Lex praevia* requires the criminal law to apply only to the future, to the acts committed after its entry into force. *Lex stricta* requires the legislator and the judge not to use the analogy¹³ or the *strictissimae interpretatione* of the criminal rules.

¹² Rychlewska, Aleksandra, *The Nullum Crimen Sine Lege Principle in the European Convention of Human Rights: The Actual Scope of Guarantees* (August 24, 2017). Polish Yearbook of International Law, Vol. 36 (2016), pp. 163-186. Available at SSRN: <https://ssrn.com/abstract=3025949>, accessed at 10.09.2018.

¹³ By a provision introduced after the establishment of communist power in 1948, the Romanian Criminal Code included a provision of analogy over the defendant: „socially dangerous acts, which have a clear

In *Kokkinakis vs Greece*¹⁴, The Court points out that Article 7 par. 1 of the Convention „is not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him liable”.

All these imperatives of the law would require broad observations, but we will stop at another „quality” imposed to the law.

Lex certa imposes a rule of a qualitative condition, to be drafted with sufficient clarity so that any addressee can figure out whether an action or omission falls under the protection of the law. In fact we can observe that nowadays, the certainty of criminal provisions is understood most like a foreseeability, or predictability, and this condition makes a principal control by international Courts, as the ECtHR, and, by observing its jurisprudence, by the national Constitutional Courts.

It has been said that besides the desiderate of legal certainty of the citizen, the definitely determined character of the criminal norm even comes to support the achievement of the main function of criminal law, which is the protection of social values. The criminal law is enacted to be respected, but it is obvious that it can be respected only to the extent that it determines precisely the scope of the imposed or prohibited actions, in other words to the extent that it can be understood by its recipients¹⁵.

III. ECtHR judgments on the foreseeability of criminal law

Contemporary criminal law is no longer reserved only for jurisdiction exclusive of each sovereign State. The growing transnational dimension of modern and more evolved forms of crime favored the gradual internationalization and Europeanization of this branch of law. This reason has sensitized the actors of the criminal legal scene to need

resemblance to any of the facts provided by the criminal law, are considered as implied and punished by the provision of law that provides and punishes the similar deed.”

¹⁴ Application No. 14307/88, Grand Chamber, 25 may 1993, par. 52.

¹⁵ Streteanu, F., Nițu, D., *Criminal Law. General part*, vol I, Universul Juridic Publishing House, Bucharest (2014), p. 39.

to seek common and effective answers to problems that emerge from the borders of each State. In such a context, national criminal law is no longer self-sufficient and, on the contrary, it needs to get out of the shadow projected by the state barriers and find new headquarters at the supranational level where to concentrate a more or less extensive part of sovereignty in this matter.¹⁶

ECtHR was requested to answer difficult questions regarding the clarity and of national laws, and if this can be seen as a human right violation, because from the concept of clarity and certainty also comes the foreseeability. The Strasbourg Court has shown that this depends to a large extent on the content of the text in question. In *Cantoni vs. France*¹⁷, The Court of Strasbourg stated that „article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy. From these principles it follows, in the Court’s opinion that a criminal offence must be clearly defined in the law. This requirement is satisfied where the accused can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable. When speaking of „law”, Article 7 implies qualitative requirements, notably those of accessibility and foreseeability”.

In *Scoppola vs. Italy*¹⁸, ECtHR stated that „In consequence of the principle that laws must be of general application, the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorizations as opposed to exhaustive lists. That means that many laws are inevitably couched in terms which, to a greater or lesser extent are vague, and their interpretation and application depend on practice. Consequently, in any system of law, however clearly drafted a legal provision may be, including a criminal law provision, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.”

¹⁶ Rossi, F., Presento e futuro del processo de armonizzazione europea della parte generale del diritto penale, *Diritto penale contemporaneo*, no. 4/2015.

¹⁷ Application no. 17862/91, Grand Chamber, 11 nov. 1996.

¹⁸ Application no. 10249/03, Grand Chamber, 17 september 2009, par. 100.

More recently, in *Del Rio Prada vs. Spain*¹⁹, The Court held that „When speaking of “law” Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability. These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.”

Also, it was said that „It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorizations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.”

The jurisprudence of the Strasbourg Court against Romania in terms of foreseeability of the law has developed relatively recently, in any case later than the aforementioned decisions. The reference case is *Drăgoțoiu and Militaru-Pidhorni against Romania*²⁰. Claimants, employees of a private bank, accused and convicted of bribery, argued before the Court that the facts of which they were accused were not offenses at the time they were committed, according to national law. In their view, the offense of bribery implied that the author had the status of a civil servant or an official or employee of a state-owned enterprise, while they were employees of a private bank. They acknowledge that, at the time the sentence was pronounced, the facts of which they were accused could be regarded as criminal offenses, but that was not changed until 8 July 1992, that is, one year after the offense was committed.

Although the Government tried to persuade the Court that there was an orientation of the legal Romanian doctrine to assimilating the quality of the petitioner, the European Court held that the prohibition of extensive application of the criminal law reveals that, in the absence of at least an accessible jurisprudential interpretation reasonably foreseeable, the requirements of art. 7 can not be regarded as being respected in respect of an accused. However, the lack of prior jurisprudence regarding the assimilation of the bribe taking of employees of a bank with those of „officials” and „other employees” of the organizations referred to in the definition text of Art. 145 of the Criminal Code (The

¹⁹ Application no. [42750/09](#), Grand Chamber, 21 oct.2013, par. 91-93.

²⁰ Application no. [77.193/01](#) and [77.196/01](#), 24 aug. 2007.

Code which was at that time in force) results, in the present case, from the fact that the Government did not provide precedents in this respect. The fact that the doctrine freely interprets a text of law can not substitute for the existence of case law. Judging otherwise would mean not respecting the object and purpose of this provision, which is to ensure that no one is arbitrarily condemned. On the other hand, the Court notes that the Government has not provided any example of a doctrine interpreting criminal liability of bank employees for bribery.

Consequently, the Court also pointed out that „even as professionals who could use the advice of lawyers, it was difficult, if not impossible for the applicants, to provide for a recurrence of the case-law of the Supreme Court of Justice and, therefore, to know that at the time who committed their deeds could lead to a criminal sanction”. So, the art. 7 par. 1 was violated, and the *nullum crimen* principle was not respected by the authorities.

IV. Foreseeability in Romanian criminal law. The Constitution and the Law no.24/2000 on the law-making technique

In *The Pure Theory of Law*, Hans Kelsen said that the assertion that a law in force was unconstitutional is in itself a contradiction, for the reason a law can only be valid on the basis of the fundamental one. If we have reason to assume that a law is valid, the reason for its validity must be found in the state Constitution. An invalid law, says Kelsen, is not at all a law, and there is no legal basis, so no legal claim can be made in relation to it. When we speak of a law that is unconstitutional, we will understand that the law in question can be cancelled, according to the Constitution, not only by the joint procedure, that is by another *lex posteriori*, but by a special procedure, provided by constitution. As long as the rule is not cancelled, it should be considered valid, and as long as it is valid, it can not be unconstitutional²¹.

We will see that, in the foreseeability control, the Constitutional Court can say what behavior is legal and what it is illegal, because of the imprecision of the law.

The principle of *nullum crimen, nulla poena sine lege* does not have a unitary wording in the 1991 Romanian Constitution system, revised in 2003. The Act refers only to the lawfulness of punishments, and not to the other measures that can be taken against those

²¹ Kelsen, H., *The Pure Theory of Law*, Humanitas Publishing House, Bucharest (2000), p. 324 .

who commit offences under the criminal law²². The anteriority of the law of incrimination results from the interpretation *per a contrario* of art. 15 al. 2 of the Constitution²³ and the lawfulness of incriminations results from the provisions of art. 73 al. 3 lit. h²⁴. Therefore, a higher standard for the drafting of criminal rules is set, considering that the rigors of adopting an organic law filter out possible incompatibilities with international and European criteria. It can also be said that by incorporating in the constitutional order the provisions on the rights and freedoms of citizens from the conventions and treaties ratified by the Romanian state, they have become national law and being directly applied. It has been said that we are facing a primacy of international human rights law, which implies the recognition of an international (or at least European, Conventional) centralization, illustrating the finest monistic theories of international law-The primacy of supranational Law²⁵.

It is about a parliamentary standard, so, in an abstract way, the Constitution does not accept the incriminations and penalties to be statuated by government or by other authorities. But regarding the Romanian Constitution, it does not contain a text which guarantees the qualities of the law.

When being asked in specific control if an incrimination has a standard of foreseeability, the Romanian Constitutional Court had to use an interesting mechanism, regarding an article which is more general, and guarantees the force of all legislation. It is about art. 1(5) from the Constitution, that says „in Romania, the compliance of the Constitution and other laws is obligatory”. But this text is not sufficient, and the Court had to identify a law that imposes the standard of legal text clarity, Law nr. 24/2000.

This ordinary law regulates, as we said, the normative elaboration technique, and the standard for Parliament or Government when they create the law text, in our case the incriminations. Article 36 (1) from this „law of laws” rules that the „normative texts must be written in a specific normative, concise, sober, clear and precise legal language and style that excludes any ambiguity, strictly observing the grammatical and spelling rules”. Overall, this requires a clear, previsible legislation from which any citizen will understand what behavior is permitted and what is not.

²² Pașca, V., *op.cit.*, p. 34.

²³ „The law only provides for the future, except for more favorable criminal or contravention laws”.

²⁴ „Organic law regulates: (...) the offenses, punishments and the regime of their execution”.

²⁵ Constantin, V., *International Public Law*, West University Timișoara Publishing House, Timișoara, 2004, p. 91.

The constitutional basis of the valorization of the normative legal norms in the constitutionality control is given also in Romanian system by the provisions of art. 1 par. (3) „Romania is a state of law [...]”, as well as art. 1 par. (5), cited above. The correlation between the two rules contained in art. 1 of the Constitution is made by the Constitutional Court as follows: „the principle of legality is constitutional”, so that „the violation of the law has the immediate consequence of disregarding art. 1 par. (5) of the Constitution, which states that compliance with the laws is mandatory. The violation of this constitutional obligation implicitly has effect on the principle of the rule of law, enshrined in art. 1 par. (3) of the Constitution.”

In support of this interpretation of the principle of legality, by incorporating the provisions of an organic law as a constitutional criterion, the Court has emphasized that it is a „fundamental institution of the state, guarantor of the supremacy of the Constitution, the rule of law and the principle separation and balance of powers. All this presupposes, among other things, the jurisdiction of the Court, within the limits of the Constitution, of course, to ensure the compliance of the entire active fund of the legislation with the fundamental norms and principles.”²⁶

Enforcing the control of the foreseeability and clarity of some incriminations in the light of the Special Law regulating the drafting of the laws represents an evolution in the approach of constitutionality control based on art. 1 par. (5) of the Romanian Constitution, in the sense of special importance given to the rules of legislative technique, which became the standard of accuracy and rigor of the regulations and, therefore, of their constitutionality. The Court sometimes invokes even rules of principle regarding legislative technique, and not only certain provisions of Law no. 24/2000.

Evolution is a reaction of the Romanian Constitutional Court to a problem that, together with other legal systems, the Romanian legislation is also facing, that of a very large number of criminal special laws, to the detriment of their quality, a problem that requires effective remedies. Constitutional control is a sanctioning remedy, but a concerted institutional effort is needed to solve it²⁷. The law, even it does not require this standards, may be in force for some time, and the offenders may be punished for violating a norm that can later be declared unconstitutionally, for being not foreseeable

²⁶ Decision no. 728 from 9 July 2012, published in Official Monitor of Romania, Part I, no. 478 from 12 July 2012.

²⁷ Safta, M, *The use of the normative legal norms in constitutional control* in The Legislative Council Legislative Information Bulletin no. 2/2016, www.clr.ro, accessed 11.09.2018.

or clear. Remedies exist, but we can say the evil is done, because of the consequences of a criminal trial, and even of using the arrest warrant in that procedure.

The mentioned authors of constitutional law consider that this evolution is, in large part, the effect of applying art. 20 of the Constitution, in the sense of interpreting the constitutional provisions in accordance with the international human rights instruments to which Romania is a party, in particular the ECtHR and its development in the *case law* of the Court, which we will refer to in the following.

V. Some Decisions of the Constitutional Court of Romania on the foreseeability of Criminal Law

The foreseeability and clarity of criminal law rules has recently been brought to the attention of the Romanian Constitutional Court, and in recent years it has been said that almost an assault on criticism has been brought to lawsuits, some more and others less well founded. The defendants are, of course, pursuing a concrete procedural remedy, which would, if the Court's exceptions were allowed, be reviewed in the judgments following the acquittal orders.

Many criminal law offences from the criminal Code or special criminal regulations, or parts of them were criticized in trials or in doctrine²⁸, but we will here observe only two of them because of the importance of arguments of the Romanian Court, which are similar to many ECtHR decisions in this matter.

So, in Decision no. 363/2015²⁹, the Constitutional Court of Romania was called upon to consider whether Art. 6 of the Law on combating tax evasion (Law no. 241/2005) respects the standards of clarity and predictability³⁰.

Thus, the Court notes that „from a formal point of view, the predictability means bringing to public knowledge of the normative acts of infraconstitutional rank and their entry into force, which are realized on the basis of art. 78 of the Constitution, respectively the law shall be published in the Official Gazette of Romania, Part I, and

²⁸ Pașca, I-C, *The tendency of criminalizing preparatory acts as self-standing Offences or Attempt to commit an offence*, in Journal of Eastern-European Criminal Law, no. 1/2017 Universul Juridic Publishing House (2017), p. 49.

²⁹ Decision no. 363/2015, published in Official Monitor no. 495 from 6 July 2015.

³⁰ According to the text, „it is a criminal offense and it is punished by imprisonment from one year to 6 years withholding and non-payment in the maximum 30 days from maturity of the amounts representing taxes or withholding contributions”.

shall enter into force 3 days after the date of publication or at a later date stipulated in its text.”

“By referring to the provisions criticized for the above principles, the Court finds that „they do not respect the requirement of accessibility of the law, since the provisions of Art. 6 of the Law no. 241/2005, in addition to not defining in themselves the notion of „withholding taxes or contributions”, do not refer to a legally binding legal act which is in connection with them, namely to be indicated in in particular, legal norms that determine the category of taxes or withholding contributions, which would also include the tax on the transfer of real estate property from the personal patrimony. The only mention of this is contained in an administrative act given in the application of primary regulatory acts, without being related to the regulatory object of Law no. 241/2005, criminal law within the meaning of art. 173 of the Criminal Code.”

The consequence of the decision was the exclusion of the offence from the law, even if there can be a lot of discussions about the effects of this decision, similar, but not identic with *abolitio criminis*.

In another recent decision³¹, which became famous because *de facto* it led to a genuine decriminalization of some public service offences, quite frequently investigated by the Romanian authorities, article 297 of Criminal Code, was partially declared unconstitutional for the lack of foreseeability. The question was if the so-called general text „does not fulfill the service attributions” is sufficiently clear or not. The Court detailed that the offense will be committed only if it is about a legal service attribution, not any type of prohibited behaviour.

The Constitutional Court stated that „According to the jurisprudence of the European Court of Human Rights, art. 7 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which enshrines the principle of the lawfulness of criminalization and punishment (*nullum crimen, nulla poena sine lege*), in addition to prohibiting in particular the extension of the content of existing offenses to acts which previously did not constitute offenses, also provides the principle that criminal law should not be interpreted and applied extensively to the detriment of the accused, analogy. It follows that the law must clearly define the applicable offenses and penalties, this requirement being fulfilled when a person has the opportunity to know

³¹ Decision 405/2016, published în Official Monitor no. 517 from 8 July 2016.

from the actual legal normative text itself, if necessary by interpreting it by the courts and obtaining a appropriate legal assistance, what are the acts and omissions that can incur its criminal responsibility and what is the punishment that they risk under their authority.

The Court observed that European Court of Human Rights has found that the significance of the notion of foreseeability depends to a large extent on the content of the text which it is concerned about and the scope it covers, as well as on the number and quality of its recipients. The principle of the foreseeability of the law does not exclude the person from being determined to resort to clarifying guidance in order to be able to assess, to a reasonable extent in the circumstances of the case, the consequences which might result from a particular deed. This is especially the case for professionals who are required to exercise great care in the exercise of their profession, which is why they expect them to pay special attention to assessing the risks presented by them.

In view of these considerations in principle, the Court will examine the extent to which the phrase „performs poorly” complies with the standard of clarity and predictability required by the Basic Law and the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court notes that, according to Art. 8 par. (4) of the Law no. 24/2000 regarding the normative technical norms for the elaboration of the normative acts, „the form and the aesthetics of the expression must not be prejudicial to the legal style, the precision and the clarity of the provisions”, and, according to art. 36 par. (1) of the same normative act, „the normative acts must be drafted in a specific normative, concise, sober, clear and precise legal language and style which excludes any ambiguity, strictly observing the grammatical and spelling rules”. The Court considers that in drafting normative acts, the legislative body must ensure that the use of terms is achieved in a rigorous manner, in a legal language and style, which is primarily a specialized and institutionalized language. The doctrine has shown that the accuracy and clarity of the language used in the legal field is obtained by analyzing and using the most appropriate terms and expressions, taking into account their current meaning, as well as grammatical and spelling requirements, ensuring the insurance the terminological unit of the legal style.

Thus, the Court observes that although the legislator in the legislative procedure can operate on common terms, they must be used appropriately in that field; only in this way the respect of a terminological unit of the legal style can be achieved.

VI. Conclusions

The elementary principle of criminal law *nullum crimen sine lege, nulla poena sine lege became*, in the international law of the system of the Council of Europe among the most frequently analyzed. The so-called foreseeability of the criminal law is one of the most redundant problems of modern criminal law, becoming, recently, a matter increasingly taken into consideration by the European Constitutional Courts and Romanian one in particular.

The consequences of declaring a criminal rule unclear and unpredictable are the most serious, as the text can no longer remain in force, being declared contrary to the Constitution and excluded from the law. Therefore, we believe that the development of jurisprudence in this sense is perpetual, based on the *diritto vivente* doctrine, in which the level of predictability is not a fixed, standardized one, but differs according to the one in charge, also according to the criminal policy and the evolution of society.

What it is legal at a moment can not be legal in another moment in the future. The interpretation of the Constitutional Courts must be made in the light of current social conditions. It is indisputable that society evolves, and new political, social, economic, cultural realities must be normalized and found in the content of positive law. The right is alive, so that we can say about society, and it must adapt to the changes that have taken place.

References

- Anițulesei I-N., Different approaches to the *nullum crimen, nulla poena sine lege* principle in European Criminal Law. Is there a principle of legality recognized in European Criminal law?, in *Criminal Law Writings*, no. 2/2018 Universul Juridic Publishing House, Bucharest (2018)
- Beccaria, C., *On crimes and punishments*, Scientific Publishing House, Bucharest (1965)
- Constantin, V., *International Public Law*, West University Timișoara Publishing House, Timișoara, 2004
- Desportes, F., Le Guehec, F., *Droit pénal général*, Ed. Economica, Paris (2001)
- Kelsen, H., *The Pure Theory of Law*, Humanitas Publishing House, Bucharest (2000)
- 6.Mariniello, T., The ‘Nuremberg Clause’ and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence, in *Nordic Journal of International Law* 82 (2013) 221–248, at 7.09.2018
- Montesquieu, Ch., *The Spirit of The Laws*, Scientific Publishing House, Bucharest (1964)

8. Pașca, I-C, The tendency of criminalizing preparatory acts as self-standing Offences or Attempt to commit an offence, in *Journal of Eastern-European Criminal Law*, no. 1/2017 Universul Juridic Publishing House (2017)
- Pașca, V., *Criminal Law. General Part. IV th Edition*, Universul Juridic Publishing House, Bucharest (2014)
- Pradel J., *Droit penal comparé*, 4 edition, Dalloz, Paris (2016)
- Rossi, F., Presento e futuro del processo de armonizzazione europea della parte generale del diritto penale, *Diritto penale contemporaneo*, no. 4/2015
- Rychlewska, Aleksandra, The Nullum Crimen Sine Lege Principle in the European Convention of Human Rights: The Actual Scope of Guarantees (August 24, 2017). *Polish Yearbook of International Law*, Vol. 36 (2016), pp. 163-186. Available at SSRN: <https://ssrn.com/abstract=3025949>, accessed at 10.09.2018
- Safta, M., The use of the normative legal norms in constitutional control in The Legislative Council Legislative Information Bulletin no. 2/2016, la www.clr.ro, accessed 11.09.2018
- Streteanu, F., Nițu, D., *Criminal Law. General part*, vol I, Universul Juridic Publishing House, Bucharest (2014)
- Van der Wilt, H., Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test. Available from: https://www.researchgate.net/publication/283040842_Nullum_Crimen_and_International_Criminal_Law_The_Relevance_of_the_Foreseeability_Test, accessed at 10.09.2018

Legislation:

- Romanian Criminal Code (2009)
- Romanian Constitution (1991, rev.2003)
- European Convention of Human Rights

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