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TEMATSKI ZBORNIK RADOVA MEĐUNARODNOG ZNAČAJA

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THEMATIC CONFERENCE PROCEEDINGS OF INTERNATIONAL SIGNIFICANCE

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„DANI ARČIBALDA RAJSA“

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P R E FA C E

Dear readers,

In front of you is the Thematic Collection of Papers presented at the International Scientific Conference "Archibald Reiss Days", which was organized by the Academy of Criminalistic and Police Studies in Belgrade, in co-operation with the IRZ Foundation from Bonn, Germany, the Ministry of Interior and the Ministry of Education, Science and Technological Development of the Republic of Serbia, China Criminal Police University, Lviv State University of Internal Affairs, Volgograd Academy of the Russian Internal Affairs Ministry, Faculty of Security in Skopje, Faculty of Criminal Justice and Security in Ljubljana, Police Academy "Alexandru Ioan Cuza" in Bucharest, Academy of Police Force in Bratislava and Police College in Banjaluka, and held at the Academy of Criminalistic and Police Studies, on 3 and 4 March 2014.

International Scientific Conference "Archibald Reiss Days" is organized for the fourth time in a row, in memory of the founder and director of the first modern higher police school in Serbia, Rodolphe Archibald Reiss, PhD, after whom the Conference was named.

The Thematic Collection of Papers contains 130 papers written by eminent scholars in the field of law, security, criminalistics, police studies, forensics, medicine, as well as members of national security system participating in education of the police, army and other security services from Germany, Russia, Ukraine, Belarus, China, Poland, Slovakia, Moldova, Lithuania, Latvia, Czech Republic, Hungary, Slovenia, Macedonia, Bosnia and Herzegovina, Croatia, Montenegro, Republic of Srpska and Serbia. Each paper has been reviewed by two reviewers, international experts competent for the field to which the paper is related, and the Thematic Conference Proceedings in whole has been reviewed by five competent international reviewers.

The papers published in the Thematic Collection of Papers contain the overview of contemporary trends in the development of police education system, development of the police and contemporary security, criminalistic and forensic concepts. Furthermore, they provide us with the analysis of the rule of law activities in crime suppression, situation and trends in the abovementioned fields, as well as suggestions on how to systematically deal with these issues. The Collection of Papers represents a significant contribution to the existing fund of scientific and expert knowledge in the field of criminalistic, security, penal and legal theory and practice. Publication of this Collection contributes to improving of mutual cooperation between educational, scientific and expert institutions at national, regional and international level.

The Thematic Collection of Papers "Archibald Reiss Days", according to the Rules of procedure and way of evaluation and quantitative expression of scientific results of researchers, passed by the National Council for Scientific and Technological Development of the Republic of Serbia, as scientific publication, meets the criteria for obtaining the status of thematic collection of papers of international importance.

Finally, we wish to extend our gratitude to all the authors and participants at the Conference, as well as to all those who contributed to or supported the Conference and publishing of this Collection, especially to the IRZ Foundation from Bonn, the Ministry of Interior of the Republic of Serbia and the Ministry of Education, Science and Technological Development of the Republic of Serbia.

Belgrade, March 2014

Programme and Organizing Committees

A WORD FROM THE IRZ

What is IRZ and why does it support the International Scientific Conference "Archibald Reiss Days" of the Academy of Criminalistic and Police Studies of the Republic of Serbia?

The abbrevation IRZ stands for the German Foundation for International Legal Cooperation, which was founded over 20 years ago, namely in 1992, on the initiative of the German Federal Ministry of Justice. The IRZ's task is to provide support to the partner countries in the establishment and strenghtening of the rule of law. In this regard, it is very helpful that it has been organized as an association. The IRZ members are large organizations in the feild of law in Germany, such as the Association of Judges, bar associations, chambers of notaries, specifically the existing Lawyers' Association and Chamber of Notaries, Women Lawyers Association and Association of Jurors, to name a few of them. Consequently, the IRZ, as the only active organization, authorized the German Federal Government, and specialized exclusively in the international counseling in the field of law, has direct access to expert knowledge and the experts from these organizations.

At first, the partner countries were exclusively from East and Southeast Europe, which have reformed their legal systems from socialism to a market democracy. Today, the IRZ also operates in North Africa and Asia. Within its work, the IRZ provides consulting services in legislative procedures and provides support in the areas of education and further training of legal practitioners, and is also the co-editor of legal publications. The IRZ is funded by the German tax funds from the budget of the Federal Ministry of Justice and the Federal Ministry of Foreign Affairs, as well as from revenues generated through participation in the IPA and twinning projects.

The IRZ has been present in Serbia since 2000, as a part of the German contribution to the Stability Pact for South East Europe. Since then, in cooperation with numerous project partners, it has implemented a number of programmes - to highlight just a few - cooperation with the Constitutional Court of the Republic of Serbia, where the IRZ significantly contributed to the introduction of individual constitutional complaint in the Serbian legal system, as well as with the Judicial Academy.

Another focus of the work in the last few years was counseling in the field of the reform of the Code of Criminal Procedure. Within the activities related to the counseling, among other things, translation of the German Guidelines for Criminal Investigation and Administrative Fines Proceedings (RiStBV) was published, which governs the basic practical issues relating to the investigative procedure. In addition, a new edition of the translation of the German Code of Criminal Procedure, developed within the IRZ's project work in Bosnia and Herzegovina, was published, in order to allow Serbian lawyers who do not speak German language to independently read the relevant German regulations.

However, it must be emphasized that the counseling within the reform of the Serbian Criminal Procedure Code, from the IRZ's perspective, did not go without disappointments. German experts particularly considered that it was inadequate for a country located in the very heart of Europe to take over institutes from criminal proceedings of the United States of America. Moreover, mixing of continental European and Anglo-American legal institutions in a hybrid law faced general challenging from a technical standpoint. Regardless of that, the IRZ continues to support the reform of the Code of Criminal Procedure in the area where the current law in Serbia is similar to the German system - in the area of investigative procedure. This can be seen also as a contribution of Germany in crime suppression in Serbia. The very focusing on the new prosecutorial investigation, especially on the cooperation between the prosecution and the police, is the reason why the IRZ cooperates in this area with the Academy of Criminalistic and Police Studies, through organization of joint events and seminars. For the same reason, the IRZ supports this scientific conference, since its goal is the strengthening of the capacities for crime prevention and investigation in criminal proceedings.

We especially greet the fact that the materials from this scientific conference will be published in printed form, which will make them available to a wider audience. An additional favorable fact is that this scientific conference pays tribute to Archibald Reiss, after whom the confrence was named, as a Swiss man from German speaking region, who can also be considered as a symbol of cooperation between jurists from German speaking countries and their Serbian colleagues.

Finally, we wish to thank the many individuals and institutions, without which cooperation between the IRZ and the Academy would not be that successful and enjoyable. In the first place, we must point out the German Federal Ministry of Justice and Consumer Protection and the German Ministry of Foreign Affairs, which support and enable the IRZ's work in Serbia from the funds of German contribution to the Stability Pact for South East Europe. In addition, we would like to thank the German Ambassador Mr Heinz Wilhelm and his associates, who are closely following and constructively supporting the work of the IRZ. Finally, the IRZ would like to sincerely thank the Dean of the Academy, Mr Goran Milošević, PhD, and Vice Dean for Science and Research, Mrs Dragana Kolarić, LLD, for the efficient and always pleasant cooperation. We also thank to all those who strongly support the IRZ's counseling of Serbia in the field of inestigative procedure - especially to retired Prosecutor-General Jürgen Dehn and Police Director Hans Dieter Hilken, who as an experienced team of practitioners have been sharing their rich experience in the field of prosecutorial investigation with their Serbian colleagues. We also thank Mr Dragan Simić, who has been following the activities of the aforementioned experts as a professional translator, as well as my colleague Ms Dragana Radosavljević, who as a project manager from Bonn is in charge for the IRZ's activities in Serbia.

Lawyer dr. Stefan Pürner
Head of Section South-East Europe Middle, IRZ

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STRENGTHENING THE STATE'S INSTITUTIONS AND FIGHT AGAINST CRIME

JAČANJE INSTITUCIJA PRAVNE DRŽAVE I BORBA PROTIV KRIMINALITETA

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COOPERATION BETWEEN PROSECUTORS AND POLICE IN THE INVESTIGATION PROCEEDINGS

Jürgen Dehn
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THE PRECONDITIONS OF THE INVESTIGATION PROCEEDINGS

Unlike other procedural laws, the German Code of Criminal Procedure (CCP) provides for a single-phase investigation procedure. The procedure is initiated pursuant to § 160 paragraph 1 of the Code of Criminal Procedure, as soon as the public prosecution office (PO), any public authority or an officer of the police force (§ 163) or the financial authorities takes a measure recognizably aimed on taking criminal action against someone, even if the accused is still unknown.

Legally, for the initiation of the investigation only a so-called initial suspicion is required, which must consist of specific facts. The law stipulates in § 152, paragraph 2 of "low level of actual indication(s)" of a criminal offense. The initial suspicion must show that according to criminological experience an actionable criminal act was committed. To this end even remote indications may suffice; however, mere conjecture does not justify charging someone with a criminal offense. In addition to a legal review, the facts of the case are analysed. The prosecution must consider, in order to avoid the liability of the state, whether the facts for which charges were brought or which are otherwise covered by a penal law may prosecuted by it.

According to the principle of legality, the investigating authorities are obliged to intervene if there is an initial suspicion. If they do not, they are liable to prosecution for obstruction of justice in office. Exceptions are made in so-called authorization and request offenses for which a regulatory authority or a criminal complaint of the injured party is necessary for prosecution. Then at first only the urgent measures are taken to secure the evidence. In most cases, however, a criminal complaint can be replaced by the affirmation of the public interest in prosecution. This can be declared by the public prosecution office, also generally for individual offence categories.

In Abstract, it can be said for the initiation of the investigation proceedings that only low factual preconditions must be met. This is an expression of the principle of legality, which means that persecution is obligatory against any suspect. It is the necessary correlative to the monopoly of the public prosecution office to bring charges. It is aimed at realising the principles of equality before the law and of justice to the extent possible.

THE POSITION OF THE PUBLIC PROSECUTION OFFICE

According to the Code of Criminal Procedure, the public prosecution office is the so called "Master of Investigation Proceedings". The corresponding basic provision of the Code of Criminal Procedure (§ 160) states the following: "As soon as the public prosecution office obtains knowledge of a suspected criminal offence either through a criminal information or by other means it shall investigate the facts to decide whether public charges are to be preferred to explore the facts."

To this end, the public prosecution office is entitled pursuant to § 161 of the Code of Criminal Procedure, " to request information from all authorities and to make investigations of any kind, either itself or through the authorities and officials in the police force ... The authorities and officials in the police force shall be obliged to comply with the request or order of the public prosecution office ..."

The police have pursuant to § 163 the right of the first access. I quote: "The authorities and officials in the police force shall investigate criminal offences and shall take all measures that may not be deferred, in order to prevent concealment of facts. To this end they shall be entitled ... to conduct investigations of any kind." The police can also without the order of the public prosecution office become active, and does so in the majority of all cases. In my district, in the period from October 2004 to September 2005, this was the case in 79.8 % of all cases. However, the police officers remain the extended arm of the public prosecution office. Their competence under § 163 is only a transitional competence. Although the police are organizationally independent, their investigations and the investigations of the public prosecution office always make one unit, even if they were carried out without an order of the public prosecution office.

THE STEERING AND CONTROL OF THE PROCEEDINGS BY THE PUBLIC PROSECUTION OFFICE IN PRACTICE

In important or legally or factually difficult cases, e.g. in so-called complex proceedings, the prosecutor investigates the facts of the case from the moment he first accessed it. Namely, he visits the crime scene and conducts interviews with the accused and the main witnesses in person. Here also be the consequences of the criminal act can be of importance, for example when deciding decision whether to interview the injured person as a witness.

Even if the prosecutor does not investigate the facts of the case by himself, but orders the investigating teams (§ 152 para 1 German Code on Court Constitution), authorities and officials of the police service (§ 161 para 1 CCP) or other bodies, he steers the investigation, at least he determines its direction and its scope. He can also issue specific individual instructions on the manner of implementation of particular investigative actions.

Special attention of the prosecutor shall be given to expedite the procedure. Thus, the investigations shall initially not be further extended than necessary to enable a quick decision of the public prosecution either to bring public charges or to terminate the proceedings. In particular, the possibilities provided in §§ 154, 154 of the Code of Criminal Procedure (streamlining of the proceedings) should be used.

The investigative actions should be performed simultaneously, if possible (compare to no. 12).

The factual circumstances, the testimonies of the accused and the circumstances of importance for the assessment of an appropriate sentence or the ordering of a measure (§ 11 Section 1 No. 8 of the Criminal Code) need to be so thoroughly clarified that the main trial can be conducted smoothly.

In custody matters the investigation need to be particularly expedient. The same applies to proceedings for criminal offenses which are continuingly disturbing the public peace or which are otherwise attracting special attention, also for offenses with a short statute of limitation period.

In practice, the public prosecution office shall maintain close contact with its investigative teams and shall discuss with them various investigative steps.

But even in the simpler proceedings, in which the police are independently conducting the investigation until the handing over of files to the public prosecution office, they are supervised and controlled by the public prosecution office, because the public prosecution office is responsible that investigation proceedings are conducted in conformity with the rule of law. If this is not the case, then it should be distinguished between deliberate violation of the law and incorrect application of law out of ignorance or negligence.

In deliberate violation of the law (e.g. in connection with interrogations), the prosecutor shall under the principle of legality launch criminal proceedings against the officials (for example, causing bodily harm while exercising a public office, § 340 German Criminal Code, or extorting someone to make a statement, § 343 German Criminal Code). Additionally, disciplinary punishment can be considered, which, however, the public prosecutor can only suggest to the superiors in the police.

If the investigation was not correct due to ignorance or negligence, the prosecutor will through written instructions sent to the police station initiate changes shall try orally to indicate the correct procedure in official meetings with the police.

THE ACTUAL POSITION OF THE POLICE

After the exception provision of § 163 has in fact become the norm and that the public prosecutor's own investigations are limited to the significant proceedings, the police are normally investigating independently and thereafter submitting to the public prosecution office the finalized file. Only in exceptional cases additional investigations at the request of the public prosecution office are required.

The reasons for this development are manifold:

The personnel, criminological, technical and technological superiority of the police,
The fact that most criminal acts are reported directly to the police, which is anyhow operating in all other respects in closer proximity to criminal operations,
The increasingly by the police conducted preliminary investigations in the context of crime prevention, which are producing findings that are usable also in repressive fight against crime,
The fact that the police are indeed subject to the principle of legality, but in fact they have largely in their own hands where they are conducting intensive investigations and where not,
The data ownership of the police in the context of ever getting more extensive computerized investigation methods,
The information advantage in the context of the internationalization of policing by institutions such as Interpol and Europol,
The use of undercover agents and informants, who cannot be controlled by the public prosecution office.

All this presents in the one hand, in the relations between the police and the public prosecution office, a rather bleak image, on the other hand, however, also its position has changed both in relation to the police and in relation to the courts.

COOPERATION BETWEEN PUBLIC PROSECUTION OFFICE AND POLICE IN THE EXAMPLE OF COMPLEX PROCEEDINGS

The need for close cooperation between police and the public prosecution office and its practical implementation can be well illustrated on the so-called complex procedures. Due to

the high importance of the effective combating of crimes occurring in these procedures, several federal states have thru decrees of ministers of the interior and ministers of justice regulated the collaboration in this area. These proceedings comprise, in particular proceedings in the field of economic, tax or customs crimes, corruption, narcotics trafficking, commercial and gang smuggling people into the country or trafficking in human beings, band theft or computer crime. These proceedings can last for months, in the meantime even for years. They usually require complex operational and investigation methods. But even in Germany human and financial resources are limited. Nevertheless, such so-called complex proceedings must be dealt with in a timely and effective manner. For this purpose, so-called internal reserves must be applied and the procedures must be clearly streamlined.

In order to achieve this expedience, the police and public prosecution office have to streamline the procedures by process controlling agreements, development of a joint strategy and the creation of a common concept. Hereby, the available resources are to be used.

They are therefore required to:
Early to implement mutual exchange on the possibility of occurrence of a complex proceeding and to determine the existence of such a case,
To reach agreement on who shall take over such a proceeding,
To set up an investigation concept based on the legal and criminological evaluation and analysis results that is in particular determining the allocation of personnel resources, the main investigation stages and the time frame.

Thereby an intensive exchange of information in all phases of the proceeding shall be ensured. This may also include agreements on how to manage the proceeding. The management authority of the public prosecution office remains thereby unaffected. It is entitled also to deviate from the agreements with the police, if it appears objectively justified.

The early structuring of the investigation and the limitation of the investigation expenses require the earliest possible coordination between the public prosecution office and the police. It must be at the beginning, are not at the end of the investigation and must cover all process-relevant aspects. Thereby not only the consensus should be ensured on the timeframe within which the investigation should be completed, but primarily about how to deal with aspects or investigation results that are preventing an expedient completion.

The legal framework for action of law enforcement authorities is hereby set by the principle of legality and the commandment of providing effective law enforcement derived from the rule of law. It is hereby recognized that this may also mean to set priorities and to focus on certain priorities when an equal prosecution of all criminal offenses, for which there is a reasonable suspicion, effectively cannot be guaranteed. The legislator has therefore by easing the principle of legality provided the possibility to focus on priorities under § § 154, 154 a, 430 of the Code of Criminal Procedure and § 143, paragraph 4 of the German Code on Court Constitution. Accordingly, certain measures to expedite the proceedings are permissible, in particular the partial suspension of the proceedings for minor insignificant offenses.

RESTRUCTURING MODELS

The above remarks depict investigative activities that are in part dominated by the police, and in part dominated by the public prosecution office. This a somewhat vague situation regarding proportions based on the legal structure, according to which two separate and independent authorities are entrusted with the task to conduct investigations. The legislator was aware of this even in the year 1877, because in the motives for the German Code on Court Constitution it is stated that the relationship between the public prosecution office and the police is “unfinished and vague within its borders, ... because of the lack of an organic connection between the two.”

In all proposals that dealt with an amendment to the existing situation, the police have repeatedly put forward the idea to leave to the police the entire investigation and to restrict the role of the public prosecution office to bring charges or to decide on a suspension. Even if such desires may seem explicable due to the self-consciousness of the police, they are still materially unacceptable. The inequality between the police and the public prosecution office in terms of funding and means was already present at the introduction of the public prosecution office. It was also not about created to replace the police, but to exercise control over the abiding of the rule of law. A restructuring in the direction for the police to have sole control over the proceedings would lead back to the situation that existed in the year 1846, depriving the public prosecution office of its guard position and leading to a reduction of the rule of law, that is intolerable.

The contrary model in which the public prosecution office would exercise complete domination over the investigation proceedings could be realised in its purest form by extracting the investigation police from the police force and by placing it under the direct authority of the public prosecution office. However, under present conditions it appears no longer practicable. It is unthinkable that the Interior Ministry would surrender one part of the police force to the judiciary. Also in the subject matter it would hardly be possible to tear apart the danger prevention and crime prosecution activities, because repressive and preventive activities of the police force are increasingly converging and are hardly separable.

THE NECESSITY FOR PARTNERSHIP COLLABORATION

Therefore, for the foreseeable future the somehow “unfinished” model of two side by side investigating independent authorities shall remain, which was created by the legislator centuries ago.

Both sides recognise today:
Neither the public prosecution office nor the police on the basis of legal and actual circumstances would be able to cope with the tasks in criminal proceedings alone. Both have in terms of human, financial and material resources reached their limits, which are partially challenging their abilities to act, especially in large cities. The antagonism between the police and the public prosecution office is a waste of resources that both institutions cannot afford. The more it is required to mutually critically evaluate the existing relationships, but also the undisputedly existing interdependency, in terms of effective performance of tasks. Thereby, on the one hand, it is important to strengthen the partnership element between the public prosecution office and the police with the goal of an effective law enforcement, on the other hand for the public prosecution office to assume the guarantor position for a rule of law and fair investigation and criminal proceedings by the actual use of its management authority in the subject matter.

The following considerations and assumptions are known to experts on both sides. However, their implementation remains a continuous challenge.

ADJUSTMENT OF PROSECUTION FOCAL POINTS, EXCHANGING INFORMATION

Public prosecution office and police must work together to develop crime policy objectives and strategies. These institutions repeatedly pursued in the past their goals for themselves, without cooperation. When, for example, developing a concept to fight prostitution and human trafficking, illegal temporary work or domestic violence, each involved institution must be integrated, since human and financial resources need to be distributed and since numerous tactical and legal issues are arising.

But also in general, the relationship can be further improved at all levels. To this end better mutual exchange of information, communication and transparency would be beneficial, for example in regular meetings organised between relevant prosecutorial officers and police

investigators. This should also include the joint preparation and follow-up of more complex and often more publicly effective criminal proceedings. Also the participation of representatives of the public prosecution office at the briefings of the police or vice versa of the police at the meetings of heads of departments of the public prosecution office should be institutionalized.

HARMONIZATION OF ORGANIZATIONAL STRUCTURES

In several federal states the police have changed their organizational structures in recent years. In Lower Saxony, for example, the police was separated from the interior administration, divided into six police departments, each with a chief of police at the top, and placed under a federal state police chief. Alone the spatial distribution of individual directorates, supposedly selected for criminal-geographical constraints, leads to absurdities in the public prosecution office's assignments. Thus, the police directorate Göttingen covers parts of five public prosecution offices. Also, structural changes in the processing of the crime were and are made. Such reorganisations are as a rule not harmonised with the Justice Department. The police have separately from structures of the public prosecution office defined its organisation and jurisdiction forms. As a result, today can be seen that one and the same police department has several public prosecution offices and courts to contact, because the jurisdictional boundaries are not congruent. Furthermore, policing structures are not comparable with those of the public prosecution office. In many ways, the police have without any coordination "upgraded" themselves in the professional field and bring now the prosecution in a tight spot, because it is in the end obligated to continue the work in proceedings prepared by the police.

The police and the judiciary must ensure that the crime fighting takes place jointly effectively and in compliance with the administrative principles of "economy" and "efficiency". For this purpose it will be necessary in the medium term to harmonise organizational concepts and to adjust different courses of action. A police force structured according to local, offense-specific and/or offender-oriented aspects and public prosecution offices that work with assigned letters, subject areas and types of proceedings need to move closer to each other, because these isolated solutions only lead to further difficulties.

IMPLEMENTATION OF STEERING AUTHORITY OF THE PUBLIC PROSECUTION OFFICE THROUGH CONCRETE INVESTIGATION ORDERS

As already has been mentioned, the majority of criminal proceedings have their origin directly at the police and arrive completed at the public prosecution office. One part of these total 80% of all proceedings has its origin also at the public prosecution office, whether incoming reports or through separation from other proceedings. In such cases, just as in the cases in which the public prosecution office orders subsequent investigation activities, it should be noted that the authority of the public prosecution office to manage the subject matter in investigation proceedings also indispensably includes the giving of concrete investigation orders to the police. However understandable it may be for reasons of work overload of public prosecutor's after superficial and time-saving sifting through documents to give a general investigation order, such an undifferentiated discovery order is not helpful in the further proceeding. This disregards the aspects of case management, process economics and under the rule of law required concretization of the criminal allegations against the accused. The general discovery order that is usually meaningless for the commissioned police ultimately can represent for the competent prosecutor only a temporary gain of time. On the other hand, a thorough review of the file at the beginning of the investigation proceeding, which must be preceded by a concrete discovery order to the police, structures from the outset the further course of the proceeding and facilitates the prosecutor the further processing when again the file is brought to him.

Therefore, it seems always advisable for the prosecutors to give concrete discovery orders to the police not only in larger and more specialized proceedings, but also in the field of volume crime. The supervision by the department heads, but also the audits of individual public prosecution offices by the Public Prosecutor-General should explicitly refer to this very important aspect in the implementation of this management authority of the public prosecution office in the investigation proceedings.

TRANSPARENCY IN THE DECISION-MAKING PROCESSES OF THE PUBLIC PROSECUTION OFFICE

The decision-making processes of the public prosecution office are not sufficiently transparent for the police. The results of criminal proceedings, whether acquittal or conviction, are communicated to the police insufficiently, in particular the content of criminal verdicts or the content of suspension decisions. The police officer would in principle like to know what has become of "his" case and what errors or omissions can be corrected, if necessary, in future investigation proceedings. Errors in the conduct of investigations have a tendency to creep in due to lack of information. The high turnover in the police force often prevents direct and comprehensive information of the previous police officer.

"Working for the trash can of the public prosecution office" is frustrating and demotivating for the police, when in their opinion, after a completed investigation with much effort, the public prosecution suspends the proceeding in the lower crime range without any reaction. Here common strategies are required, either how to make savings in the investigative work of the police or how to make decision-making processes at the public prosecution office more transparent.

DELEGATION OF DISPOSITION OPTIONS ONTO THE POLICE

The ever increasing burden of the public prosecution office and the police by volume and petty crime necessitates considerations how to accomplish a process economical and as efficient as possible completion of these proceedings. Especially in this context a not to be underestimated force potential is consumed with spending a lot of time. The aim of the law enforcement authorities should therefore be in future to save time and energy in dealing with the volume and petty crimes, but still to comply with the law. Rejected should be own police powers to sanction offenses. They would not comply with the separation of powers principle in our legal system. It belongs to its pillar principles that the prosecution of crime is exclusively entrusted to the judiciary. However, the prosecution could define an investigation framework which is suitable to make a decision at an early stage. Obligatory process relevant minimum data must be set that needs to be investigated by the police before delivery to the public prosecution office. Furthermore, it should have an instrument, which clearly defines petty crime cases as such. At a defined petty crime, the police could then be authorized, for example, for first-time offenders, provided they agree, to charge them an amount defined in a catalogue to compensate the damage incurred. With this expedited completion, the country could immediately sanction petty crimes, that would surely develop a general deterrent effect. It is difficult to explain to the general population that administrative violations in road traffic are promptly punishable by fines and that first-time offenders in petty crimes are often let free due to the practice of suspension of proceedings without sanction.

However, it should be noted that the public prosecution office, as part of its supervision authority, shall examine the sanctions imposed by the police and shall finalize the process. If

the police indicates to the accused from the outset that the decision is reserved for the public prosecution office, there are no objections to it that the investigating police officers in the case of consent of the accused provisionally imposes a catalogue amount for the fine, which is then usually confirmed by the competent public prosecutor.

PREVENTION

The modern security strategy is characterized by a focus on prevention. In contrast to the police, which under risk prevention have a mandate to conduct prevention, the Code of Criminal Procedure does not provide any such thing to the public prosecution office, but only the mandate to prosecute crimes. However, purely prosecuting crimes while ignoring the social framework conditions and development of our society is very poor thinking by the public prosecution offices. "A lawyer who is only a lawyer is a poor thing (Martin Luther)". Therefore, the cooperation between public prosecution offices and prevention councils cannot be considered an administrative obligation under the law, but it is the content of the operations in the office and should be encouraged.

The public prosecution office has for this no resources available, neither jobs nor funds are allocated to this purpose. However, the collaboration of public prosecution offices in crime prevention councils is supported by many institutions because the public prosecution office appears often to be the only authority that is still capable of preventive intervention aided with the means to apply pressure through judicial criminal proceedings.

THE (NEW) POWER OF THE PUBLIC PROSECUTION OFFICE IN RELATION TO THE COURTS

The public prosecution office was in numerous supplements to the Code of Criminal Procedure given various suspension possibilities, for example against meeting requirements according to § 153 of the Code of Criminal Procedure, that were unthinkable of at the adoption of the Code of Criminal Procedure. They presuppose an independent dealing with the investigative results and grant it an almost judicial execution power. Furthermore, due to the abolition of judicial preliminary investigation and by enforceable compulsion and obligation of witnesses and experts to testify and to appear (§ 161 Code of Criminal Procedure), the public prosecution office has grown into a positions that was once reserved for judges.

This means de facto a strong increase in tasks of the public prosecution office. It was to a considerable degree assigned completion competences. As a result, for example, the image of the public prosecution office in Germany has shifted from being the authority that brings charges to the suspension authority. About 75 % of all incoming cases against known perpetrators are being suspended. Of the remaining 25 % about 10 % are completed in Abstract proceedings and 15% with bringing charges. Between the suspended proceedings about 50 % are attributable to suspension due to lack of evidence, 10 % to suspensions for petty crime without any conditions, 5 % to suspensions for petty crime with conditions, 7% to suspensions for minor additional offenses and 3 % to suspensions with referring to private prosecution. Without the gradually extended execution competencies of the public prosecution office, having in mind the significant proliferation of cases, an increased number of jobs in the judiciary would have to be created.

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TAX CRIMES AND TAX MISDEMEANOURS IN SERBIA AND SOME EU COUNTRIES

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Abstract: Collecting of taxes and other contributions, or certain fiscal charges in general, is of vital importance to any state, because, in such a way, it acquires funds by which it replenishes the budget from which government expenditure is financed, which is of a great importance for citizens as well, since it enables financing of public healthcare institutions, educational institutions and schools, government administration, etc. The *ratio legis* also follows from this to define, by the actual Constitution of the Republic of Serbia (Article 52), the liability to pay taxes and other levies, as well as to prescribe punishability for breach of such duty.

In the text there are analyze of the tax crimes in Serbian criminal law system and of the basic relevant provisions connected to the tax misdemeanours according to the according to the Tax Proceedings and Tax Organization Law of Serbia (TPTOL). In the article is explained that the Tax Proceedings and Tax Organization Law prescribes two types of tax offences: 1) tax crimes, and 2) tax misdemeanours. A number of criminal offenses, which were originally prescribed in the TPTOL, are now provided for in the provisions of the Criminal Code. As a rule, for a tax misdemeanour, as opposed to a tax crime, the intent to avoid certain fiscal liability is not required; instead a misdemeanour exists when, objectively, the corresponding wrongful act is committed. There are several categories of misdemeanours in the TPTOL, depending on who the offender of a misdemeanour is. There are misdemeanours committed by: 1) a legal entity or an entrepreneur, 2) a natural person, 3) a tax broker and other tax debtor, and 4) a responsible person in the Tax Administration.

Author also writes about comparison between Serbian system of tax crimes and tax misdemeanours and the system of some countries which are EU member states and surroundings countries, i.e. the countries of the former Yugoslavia. In the article there are to some recommendations of the EC, and short analyze of the effect of the actual Stabilization and Association Agreement (SAA).

In the conclusion of the article it is expressed that it is not logical to prescribe criminal offenses in two different sources of law – in the TPTOL and in the Criminal Code, whereby the criterion for selection of criminal offenses that are in the CC and those that are in the TPTOL is not clear either. Author concludes that some criminal offenses prescribed in the TPTOL have certain minor legal and technical errors and imperfections, such as formulation of different basic forms for which the same punishment is prescribed. Besides, it seems that there are *too many tax criminal offenses in Serbia* and that, from the aspect of legal systematic, it would be preferable to act in one of two possible ways: 1) To prescribe all the criminal offenses in the TPTOL, in which, naturally, still, tax misdemeanours would be also prescribed, or 2) To prescribed all the criminal offenses exclusively in the Criminal Code, and to have the TPTOL prescribing tax misdemeanours only.

Keywords: *Tax Crimes, Tax Criminal Offences, Tax misdemeanours, Serbian Criminal Law, Misdemeanour Law, Criminal Law in EU.*

INTRODUCTION ABOUT TAX CRIMES IN CRIMINAL LAW SYSTEM OF THE REPUBLIC OF SERBIA

Collecting of taxes and contributions, or certain fiscal charges in general, is of vital importance to any state, because, in such a way, it acquires funds by which it replenishes the budget from which government expenditure is financed, which is of a great importance for citizens as well, since it enables financing of public healthcare institutions, educational institutions and schools, government administration, etc. The *ratio legis* also follows from this to define, by the actual

Constitution of the Republic of Serbia (Article 52), the liability to pay taxes and other levies, as well as to prescribe punishability for breach of such duty.[1] Non-fulfilment of tax liabilities, as well as liabilities to pay certain contributions, is punishable and, depending on the amount of such liabilities, a misdemeanour or penal response may be in question.

Tax crimes in Serbia are partly prescribed in the Tax Proceedings and Tax Organization Law,[2] and partly in the Criminal Code,[3] which is not an ideal legal and technical solution from the aspect of normative systematic and that will be specifically commented on in the text below. Tax crimes could be also the part of organised crime or some other so called serious forms of crimes.[4]

All the tax crimes, irrespective of whether they are prescribed in the TPTOL or in the Criminal Code, have a number of common characteristics: 1) As a rule, they are of blanket character, which means that the act is committed by violation of other regulations that are outside the law, which prescribes the concrete criminal offense; 2) The form of guilt is exclusively the intent; 3) Majority of such criminal offenses also imply existence of a special intent; [5] 4) They are of self-seeking character; 5) As a rule, cumulative sentencing of the offender is prescribed, both by imprisonment and a fine and, in some situations, special security measures are also prescribed; 6) They are mostly in the form of so called delicts of omission;[6] and 7) The offender of an act of such criminal offenses, or certain forms thereof, may only be the person who has a certain capacity – an entrepreneur or the responsible person in a legal entity.

TAX CRIMES IN THE TAX PROCEEDINGS TAX ORGANIZATION LAW

The Tax Proceedings and Tax Organization Law (TPTOL) prescribes two types of tax offences: 1) Tax crimes, and 2) Tax misdemeanours.

Four tax crimes and a series of misdemeanours are prescribed in the TPTOL, which are classified in those that may be committed by both a natural person in the capacity of an entrepreneur and by a legal entity and those that may be committed by a natural person only in the capacity of a responsible person.

Here one should also bear in mind that, in compliance with the **Serbian** Law on the Liability of Legal Entities for Criminal Offenses, there is a possibility, which is yet to take hold in practice to the full extent, for a legal entity to be liable for a criminal offense as well, which also applies to tax crimes. A number of criminal offenses, which were originally prescribed in the TPTOL, are now provided for in the provisions of the Criminal Code, which is particularly related to tax evasion, which substituted the former criminal offense of avoidance of tax payment (Article 172 of the TPTOL that has ceased to be valid). In addition to the criminal offense of avoidance of tax payment, the following criminal offenses are also deleted from the TPTOL – non-payment of withholding tax and compiling or submitting of falsified documents of importance for taxation.

Unfounded declaration of amounts for tax refund and tax credit

The criminal offense of unfounded declaration of the amount for tax refund and tax credit is prescribed in Article 173a of the TPTOL. This act takes one basic form and two serious forms. The basic form is committed by the person, who, with the intent to realize the right to unfounded tax refund or tax credit, files the tax return of false contents, declaring therein an amount for tax refund or tax credit, from RSD 500,000 to 3,000,000. The perpetrator of that basic form shall be sentenced from three months to three years imprisonment and a fine. The subjective element of the act is the fraudulent intent, irrespective of the amount the refund of which is unlawfully requested. The objective condition for incrimination exists only when this form of fraud is related to a tax credit, when an amount from RSD 500,000 to 3,000,000 must be in question.

Both serious forms involve fraud that is related to the getting of tax credit. The first serious

1 More about: M. Škulić, *Economical Criminality*, „FMP“, Bar, 2013. pp. 57 – 58.
2 Hereinafter referred to as the TPTOL.
3 Hereinafter referred to as the CC.
4 More about: Z.Stojanovic and D.Kolaric, *Criminal-Law Responding to Serious Crimes*, Faculty of Law, University of Belgrade, Belgrade, 2010, p. 88 – 89.
5 More about: Z.Stojanovic, *Criminal Law – General Part,* Faculty of Law, University of Belgrade and „Pravna knjiga“, Belgrade, 2013, pp. 169 – 176.
6 More about: I.Vuković. *The Criminal Offenses of Unreal Omissions*, Faculty of Law, University of Belgrade, Belgrade, 2012, pp. 21 – 24.

form exists when an amount exceeding RSD 3,000,000 to 10,000,000 is in question. The second serious form exists when the amount exceeds RSD 10,000,000.

For each form of the criminal offense of unfounded declaration of the amount for tax refund and tax credit, cumulative sentencing is prescribed both by imprisonment within the corresponding time periods, and a fine. When the offender of either the basic form, or any of serious forms of this criminal offense, is a natural person or an entrepreneur, or the responsible person in a legal entity, he/she is obligatorily also imposed the security measure prohibiting practicing the profession, activity, and duty from one to five years.

For the basic form, a prison sentence from three months to three years and a fine are prescribed. For the first serious form, a prison sentence from six months to five years and a fine are provided for and, for the second serious form, a prison sentence from one to ten years and a fine.

Endangering tax collection and taxation control

The criminal offense of endangering tax collection and taxation control is prescribed in Article 175 of the TPTOL. This criminal offense takes two forms that are both punishable by the same sentence, which is a bad solution in legal and technical terms. It is not logical to formulate different basic forms of one criminal offense for which the same sentence is prescribed.

The first basic form is committed by the person who, with the intent to endanger collection of tax that is not due for collection or that has not been assessed, but the procedure of its assessment or control has been instituted, or of the tax assessed for himself/herself or other person, upon institution of the interim measure securing tax collection in compliance with the law, or in the procedure of forced collection or taxation control, alienates, hides, damages, destroys or renders unusable an item over which an interim measure is instituted securing collection, or an item that is the subject of forced collection of tax or taxation control, shall be sentenced to up to one year imprisonment and a fine.

The second basic form is committed by the person who gives false data on the facts that are of importance for undertaking forced collection of tax, and/or taxation control. The special subjective element of the first basic form is the existence of the intent to endanger tax collection. Such a subjective element is not required in the second form of this criminal offense, which is an omission and, one should deem that mere giving of false data, when there is no intent to thereby endanger tax collection, is not this criminal offense and, under certain conditions, there may exist tax fraud prescribed by the Criminal Code.

Unlawful circulation of excise products

The criminal offense of unlawful circulation of excise products is prescribed in Article of 176 the TPTOL. This criminal offense takes two forms. The first form is committed by the person who unlawfully puts into circulation, and/or sells products which are, in compliance with the law, deemed to be excise products. This form may be committed by any person. The second form of this criminal offense may be committed only by an entrepreneur or the responsible person in a legal entity that is engaged in production or import of products which in compliance with the law have to be specially marked with controlling excised stamps. The act of committing of this form involves the failure to undertake measures to label the products with control excise stamps prior to their putting into circulation.

For the first form of the criminal offense of unlawful putting into circulation of excise products, a prison sentence from six months to five years is prescribed. For the second form of this criminal offense, a prison sentence from six months to three years is provided for.

The law also prescribes cumulative sanctioning when offenders of the criminal offense, referred to in Article 176 of the TPTOL, are an entrepreneur or the responsible person in a legal entity. They are also always imposed the security measure prohibiting practicing the profession, activity or duty from one year to five years. The products that are, in compliance with the law, considered to be excise products and that are unlawfully put into circulation, as well as the products that are not specifically labeled with the prescribed control excise stamps and the pecuniary advantage, realized by the criminal offense, shall be seized.

Unlawful storage of goods

The criminal offense of unlawful storage of goods is prescribed in Article 176a of the TPTOL. This criminal offense takes two forms.

The first form is committed by the person who stores goods on which a tax is paid in a room that is not registered for that use or who allows storage of goods in his/her room and the room is not registered for that. The second form of this criminal offense exists when, in a room registered for storage of goods, goods are stored on which tax is paid, and concerning which there is no prescribed documentation on the origin of goods and the paid tax.

For both forms of this criminal offense the same sentence is prescribed, and that is cumulative prison sentence from three months to three years and a fine. Additionally, the third cumulative sanction is also prescribed, when the offender is the responsible person in a legal entity or an entrepreneur, and that is the security measure prohibiting practicing the profession, activity or duty for a duration from one to five years. In legal and technical terms, it is not justified to prescribe, within the same incrimination, two separate forms of a criminal offense with respect to which the same punishment is prescribed.

RELATIONSHIP BETWEEN PENAL PROVISIONS IN THE TPTOL AND THE RULES OF THE CRIMINAL CODE OF SERBIA

In normative terms, all the penal provisions, contained in the TPTOL**,** are the norms that represent *lex specialis* with respect to which the norms the Criminal Code represent *lex generalis.* This means that the rules from the TPTOL are primarily applied and**,** if they do not provide for something specific, the Criminal Code is applied.

The Criminal Code must certainly be applied with respect to the majority of criminal offenses that are otherwise prescribed in the TPTOL. This particularly applies regarding the definition of the responsible person, who is the offender of a number of criminal offenses prescribed in the TPTOL. That definition is provided for in Article 112, paragraph 5, of the CC:

A responsible person shall be the owner of a business entity or other organization, or a person within an enterprise, institution or other organization entrusted with, by virtue of his function, invested funds, or his powers, a specific scope of duties in the management of property, production or other business activity or in supervision thereof or who is *de facto* in charge of specific tasks. An official person shall also be deemed a responsible person in the case of criminal offenses for which a responsible person is designated as the perpetrator, that have not been prescribed by the Criminal Code in the chapter dealing with criminal offenses against official duties, i.e. as criminal offenses of an official.

In the actual Criminal Code, there are two tax crimes, which used to be in the TPTOL. Those are tax evasion and non-payment of withholding tax. The existence of such normative dichotomy, as not an exactly an ideal solution, will be specially commented on in the text below. Some criminal offenses prescribed in the Criminal Code may be related to tax fraud and tax evasion, as well as to other tax crimes and tax misdemeanours. First of all, this is related to the abuse of office and abuse of office of a responsible person.[7] Under certain situations, an apparently ideal concurrence of criminal offenses may be in question.

Tax evasion in Criminal Code of Serbia

The criminal offense of tax evasion (Article 229 of the CC) takes one basic form and two serious forms.[8] The basic form of the criminal offense of tax evasion exists when, with the intent to fully or partly avoid certain fiscal liabilities in the form of payment of taxes, contributions or other prescribed levies, any of the following alternatively prescribed acts is committed: 1) Giving of false data on legally acquired income, on items or other facts that have impact on assessment of fiscal liabilities; 2) Failure to report in case of mandatory reporting of legally acquired income, and/or items or other facts that have impact on assessment of fiscal liabilities; and 3) Otherwise concealment of data that are related to the assessment of fiscal liabilities.

The first and the third type of the basic criminal offense of tax evasion involve certain acts in the form of *feasance:* 1) *giving* of false data, etc., and 2) Otherwise *concealment* of certain data.[9]

7 Compare M.Vukovic, *Tax evasion in Police's and Court's Practice*, Official Gazette of the RoS („Službeni glasnik"), Belgrade, 2009, pp. 196 – 202.

8 More about Z. Stojanovic and N.Delic, *Criminal Law* - spe*cial part*, XIV Edition, "Pravna knjiga", Belgrade, 2011, p. 172.

9 Compare: Z. Stojanovic and O.Peric, *Criminal Law - special part*, XIV Edition, "Pravna knjiga", Belgrade, 2011, p. 173.

Although, in both cases, the acts of feasance in penal terms are in question, the first such act – giving, in the logic of things, has an expressly *active character,* while the other act of feasance in this case – *concealment,* is considerably less active but, naturally, even then, it always must have to do with the act of feasance, and not of omission delict. The second type of the basic form of the criminal offense of tax evasion is the act of *non-feasance*, i.e. it involves the *failure* to perform certain duty.

With respect to each of the alternatively prescribed acts of committing of the basic form of the criminal offense of tax evasion, the offender must have a special *subjective element*, and that is the *intent* to, in such a way, i.e. through some of the alternatively provided for acts, either fully or partially avoid certain fiscal liabilities, i.e. payment of taxes, contributions or other prescribed levies. This means that the criminal offense of tax evasion, when the form of guilt is in question, may be committed exclusively with the direct intent.

If a concrete offender undertakes two out of the alternatively prescribed acts of committing of the basic form of tax evasion, or even in a concrete case in Serbia, an offender commits all the three, otherwise alternatively specified acts of committing of this criminal offense, there shall be no several tax evasions, but only one such criminal offense, because then the case of apparent concurrence on the ground of alternativity would be in question. This would naturally still have certain impact in penal terms, which means that, in each concrete case, it would be of importance for meting punishment, because, by the obvious logic, then the aggravating circumstance would certainly be in question.

For each of the specified alternatively prescribed types of the basic form of tax evasion it is necessary that the amount of fiscal liability, the payment of which is avoided, is in question, which exceeds RSD 150,000. That is the so called *objective condition for incrimination*. If the amount of fiscal liability, the payment of which is avoided, is below RSD 150,000, there shall be no criminal offense of tax evasion but, under certain conditions, the corresponding tax misdemeanour may be in question.

Both serious forms of tax evasion are determined by the amount of fiscal liability the payment of which is avoided by some of the alternatively prescribed acts of committing of the basic form of this criminal offense. The first serious form of tax evasion exists when the amount of fiscal liability the payment of which is avoided exceeds RSD one million and five hundred thousand while, when that amount exceeds RSD seven million and five hundred thousand, the other (the most) serious form of this criminal offense will be in question.

For the basic form of tax evasion, a prison sentence of up to five years is prescribed. The first serious form of the criminal offense of tax evasion is punishable by a prison sentence from one to eight years while, the third serious form of this criminal offense, i.e. the most serious form of tax evasion, is punishable by prison sentence from two to ten years. Because of the nature of the criminal offense of tax evasion, which has a pronounced self-seeking character, and it is of a great importance for very concrete criminal and political reasons, the legislator, for each of the forms of this criminal offense, i.e. both for the basic form, and for both of the serious forms, prescribed that the offender is always also cumulatively imposed a fine.

Non-payment of withholding tax in Criminal Code of Serbia

The criminal offense of non-payment of withholding tax was introduced in the Criminal Code (Article 229a) by amendments in 2009, by taking over of a similar criminal offense that had existed in the TPTOL.

Up to the recent amendments of the Criminal Code, this criminal offense had been related only to non-payment of taxes (as specified in the title thereof), and not to other levies as well, which was a mistake, which happened because it was not taken into account that the TPTOL expressly prescribes that it is applied to all the public revenues collected by the Tax Administration, as well as to the public revenues of the units of local self-government.[10]

This criminal offense takes the basic form and two serious forms. Both the basic, and serious forms, may be committed only by the person, who has the capacity of the responsible person or who is an entrepreneur. The offender must also have a special subjective element – the intent to avoid payment of withholding tax, and/or other fiscal liabilities that are stipulated in the law.

The basic form of non-payment of withholding tax is committed by the responsible person

10 More about Z. Stojanovic, *Commentary of the Criminal Code*, 4th revised Edition, "Official Gazette of the RoS, Belgrade, („Službeni glasnik"), 2012, pp. 679 – 680.

in a legal entity – a taxpayer, as well as by an entrepreneur – a taxpayer who, with the intent to avoid payment of withholding tax, contributions for compulsory social insurance after allowance for or other prescribed levies, fails to pay the amount that is accrued as the withholding tax, and/or contribution for compulsory social insurance after allowance for, in the prescribed incoming payments account for public revenues or fails to pay other prescribed levies.

For each form of this criminal offense, cumulative sentence is prescribed both by corresponding imprisonment and a fine. For the basic form, a prison sentence of up to three years is provided for.

Both serious forms are qualified by the amount of accrued and unpaid tax. The first serious form exists when that amount exceeds RSD 1,500,000 and a prison sentence from six months to five years and a fine are prescribed for it. When the amount exceeds RSD 7,500,000, the offender is sentenced to imprisonment from one to ten years and a fine.

TAX MISDEMEANOURS IN THE TPTOL

In Article 176b of the TPTOL**,** tax misdemeanours are defined in the following way: „Tax misdemeanours are misdemeanours prescribed hereby and by other **internal revenue** regulations.“ This is a *very poor definition* in legal and technical terms, which cannot inflict any special damage in practice, but it does not serve any particular purpose either.

Namely, nothing is achieved by tautologically stipulating that tax misdemeanours are the „misdemeanours“ prescribed by the actual TPTOL or other law, because this would certainly be implied even without any „definition“. It was totally unnecessary to define a tax misdemeanour in the TPTOL**,** because this issue is quite adequately resolved by the Law on Misdemeanours.

According to Article 2 of the Law on Misdemeanours, a misdemeanour is an unlawful culpably committed act that is stipulated as a misdemeanour by the law or other regulation of the competent authority and for which a misdemeanour sanction is prescribed. Formally, the *existence of guilt* as well is not required here, as a subjective element of the general notion of misdemeanour (like the *objective-subjective notion of criminal offence*), and yet, if there is no guilt, there can be no misdemeanour either, because then a misdemeanour may objectively exist (and that is how it is actually defined in the Law on Misdemeanours), but there is no *liability* for it. This follows from Article 18 of the Law on Misdemeanours, according to which a natural person is liable for a misdemeanour that can be attributed to his/her guilt, because he/she was of sound mind and committed the misdemeanour with the intent or negligently, and was aware or was obliged to be- aware and could have been aware that such an act is prohibited.

As a rule, for a tax misdemeanour, as opposed to a tax crime, the intent to avoid certain fiscal liability is not required; instead a misdemeanour exists when, objectively, the corresponding wrongful act is committed. There are several categories of misdemeanours in the TPTOL, depending on who the offender of a misdemeanour is. There are misdemeanours committed by: 1) A legal entity or an entrepreneur, 2) A natural person, 3) A tax broker and other tax debtor, and 4) A responsible person in the Tax Administration.

Particularly important are the following misdemeanours of taxpayers, who are a legal entity or an entrepreneur: failure to file the tax return, failure to calculate and non-payment of tax, reporting of smaller amounts of taxes, and giving of incorrect data in the tax return.

Failure to file the tax return, failure to calculate and non-payment of taxes is prescribed by Article 177 of the TPTOL. This misdemeanour is committed by a taxpayer – a legal entity or an entrepreneur, who fails to file the tax return prescribed by the tax law, including the individual tax return, fails to calculate and fails to pay tax within the deadline prescribed by the law. The offender is, for the misdemeanour, imposed a fine amounting from 15% to 20% of the amount of the tax assessed in the procedure of taxation control. The law further elaborates different variants of this misdemeanour, and fines are always provided for to the corresponding percentage with respect to the amount of tax liability.

Reporting of smaller amounts of tax is the misdemeanour prescribed in Article 178 of the TPTOL. It is a type of fraud but, as opposed to the corresponding tax crime, here there is no fraudulent intent of the offender. If the amount of tax assessed in the tax return is lower than the amount that should have been assessed in compliance with the law, the taxpayer – a legal

entity or an entrepreneur shall be imposed, for the misdemeanour, a fine amounting to 1% of the difference between the two amounts. The higher the difference between the reported amount of tax and the actually due tax, the higher the fine, according to the corresponding scale, which is imposed on the offender.

Giving of incorrect data in the tax return is the misdemeanour prescribed in Article 178a of the TPTOL. Such a misdemeanour is committed by a taxpayer - a legal entity or an entrepreneur who, in the tax return, gives incorrect data the consequence of which was or could have been assessment of a smaller amount of tax, shall be imposed a fine for the misdemeanour amounting to 1% of the difference between the amount of tax that is assessed or should have been assessed in compliance with the law and the amount of tax that is assessed or should have been assessed according to the data from the tax return. The higher the difference between the amount that was incorrectly specified in the tax return and the actually due amount, the higher the fine, according to the corresponding percentage, that is imposed on the offender of the misdemeanour.

The TPTOL also prescribes a series of other tax misdemeanours that boil down to different forms of failure to submit applications for registration, errors in keeping records of importance for taxation, giving of incomplete data, etc. Some misdemeanours are also related to some forms of obstruction of tax authorities, such as hindering of the undertaking of forced collection, failure to submit the necessary documentation, etc.

Tax misdemeanours of taxpayers - natural persons are prescribed in Article 180 of the TPTOL. A fine from RSD 5,000 to 100,000 is prescribed for them. There is a whole series of acts of committing of such misdemeanours, like failure to inform the Tax Administration about tax liabilities, failure to file the return, hindering or preventing the authorized officer of the Tax Administration from performance of the duty in tax proceedings stipulated by the law, failure to enter the tax identification number in the return, etc.

As a specific misdemeanour of a natural person there is the failure to file the informative tax return (Article 180a of the TPTOL). This misdemeanour is committed by a taxpayer – a natural person, who fails to file to the Tax Administration the informative tax return or fails to specify all of his/her assets therein. The offender is imposed a fine amounting to 3% of the market value of the unreported assets. The matter at issue is a specific mechanism for investigation of the origin of assets.

Misdemeanours of responsible persons in the Tax Administration are prescribed in Article 182 of the TPTOL. Such misdemeanours are actually not typical tax misdemeanours, but offences against one's office. The offender may be the responsible person in an organizational unit of the Tax Administration, who is imposed a fine from RSD 10,000 to 100,000. A misdemeanour exists when a taxpayer is withheld free information on **internal revenue** regulations, denied insight in data on assessment and collection of taxes that are kept about him/her in the Tax Administration, etc.

Imposing stricter punishment on recidivists

Article 182a of the TPTOL provides for a special mechanism for serious punishment of recidivists in the area of tax misdemeanours. If a taxpayer, within two years from the date of validity of the judgment of conviction for a tax misdemeanour, commits the same misdemeanour, in addition to a fine, he/she may also be imposed the protective measure prohibiting engaging in certain activities for a duration from six months to three years.

Relationship between misdemeanour norms in the TPTOL and in the Law on Misdemeanours and relationship with tax crimes

The Law on Misdemeanours is *lex generalis* with respect to the provisions on misdemeanours contained in the TPTOL, which represent *lex specialis*. This particularly applies to the general notion of misdemeanour and conditions for liability for a misdemeanour that are defined in the Law on Misdemeanours.

Very significant is too the rule of *non bis in idem* (*prohibition of double jeopardy*) and normative distinction between the crimes and misdemeanours in the Serbian legal system. Namely, some tax misdemeanours are similar to certain tax crimes and, as explained in the previous text, as a rule, the main element, which differentiates certain tax crimes from some tax misdemeanours, is the specific form of guilt that must exist for certain feasance or non-feasance to be a criminal offense, and that is a specific intent.

In view of the already well-established practice of the European Court of Human Rights, which took the position that, in compliance with Art. 6 of the European Convention on Human Rights, *the same person may not be prosecuted twice for the same offence* (irrespective of the type of the criminal offence), if it has already been validly adjudicated. This also applies to both tax misdemeanours and tax crimes, which should be more taken care of in practice, because, with us, the wrong practice is still sometimes present whereby the same person with respect to the same feasance or non-feasance is reported «in parallel» both for a misdemeanour and for a criminal offense.

Current comparison: Serbia / EU / surrounding countries

In the EU member states, in general, great importance is attributed to the suppression of tax offences, equally regardless whether tax crimes or tax misdemeanours are in question. In terms of legal systematic, there are different solutions in the EU. Some countries, like Germany, Austria, and France, prescribe tax crimes and tax misdemeanours in the so-called secondary criminal legislation, i.e. in special tax laws, similar to the TPTOL in Serbia. Other countries, such as Estonia, Finland, Lithuania, Croatia, and Hungary, prescribe certain tax crimes in the Criminal Code and, in tax laws, they prescribe misdemeanours.

Speaking about the region, under which we actually primarily imply the countries that were once within the former SFRY, there are rather similar and well-established normative solutions. Basic tax crimes, and that is, first of all, tax fraud, are prescribed in the Criminal Code, and misdemeanours are prescribed in the corresponding tax law. This is the case in Slovenia, Croatia, Bosnia and Herzegovina, and the Republic of Srpska, Montenegro, and Macedonia. Practically, in the region, it is not common to stipulate tax crimes in the tax law, instead it is done in the Criminal Code, and misdemeanours are prescribed in the tax law. In the EU, there are examples where tax crimes are not prescribed in the Criminal Code, but in the corresponding tax law, which in legal and technical terms, is a part of the so-called secondary criminal legislation. We are giving some characteristic examples from the EU and the region.

EU COUNTRIES

Germany

Tax crimes in Germany are prescribed in the Fiscal Code of that country. First of all, it includes Tax evasion,[11] and that Code also prescribes other mechanisms that are of penal importance when tax crimes are in question, as well as certain tax misdemeanours. In Fiscal Code of Germany the criminal offence of tax evasion exists in according to the Section 370.

(1) A penalty of up to five years' imprisonment or a monetary fine shall be imposed on whoever: 1. furnishes the revenue authorities or other authorities with incorrect or incomplete particulars concerning matters of substantial significance for taxation, 2. fails to inform the revenue authorities of facts of substantial significance for taxation when obliged to do so, or 3. fails to use revenue stamps or revenue stamping machines when obliged to do so. It is necessary that and as a result understates taxes or derives unwarranted tax advantages for himself or for another person.

(2) Attempted perpetration of the tax evasion in Germany shall be punishable

(3) In particularly serious cases, a penalty of between six months and ten years' imprisonment shall be imposed. A case shall generally be deemed to be particularly serious where the perpetrator: 1. deliberately understates taxes on a large scale or derives unwarranted tax advantages, 2. abuses his authority or position as a public official, 3. solicits the assistance of a public official who abuses his authority or position, 4. repeatedly understates taxes or derives unwarranted tax advantages by using falsified or forged documents, or 5. as a member of a group formed for the purpose of repeatedly committing acts pursuant to subsection (1) above, understates value-added taxes or excise duties or derives unwarranted VAT or excise duty advantages.

(4) Taxes shall be deemed to have been understated in particular where they are not assessed at all, in full or in time; this shall also apply even where the tax has been assessed provisionally

11 More about: C.Müller und K.Bieneck (Hrsg), *Wirtschafrtsrecht – Handbuch des Wirtschaftsstrafrecht und –ordnungswidrikeitensrechts*, „Achendorf Rechtsverlag" und „Verlag Dr. Otto Schmidt, Köln, 2000, pp. 2315 – 2316.

or assessed subject to re-examination or where a self-assessed tax return is deemed to be equal to a tax assessment subject to re-examination. Tax advantages shall also include tax rebates; unwarranted tax advantages shall be deemed derived to the extent that these are wrongfully granted or retained. The conditions of the first and second sentences above shall also be fulfilled where the tax to which the act relates could have been reduced for other reasons or the tax advantage could have been claimed for other reasons.

(5) The act may also be committed in relation to goods whose importation, exportation or transit are banned.

(6) Subsections (1) to (5) above shall apply even where the act relates to import or export duties which are administered by another Member State of the European Communities or to which a Member State of the European Free Trade Association or a country associated therewith is entitled. The same shall apply where the act relates to value-added taxes or harmonized excise duties on goods designated in Article 3(1) of Council Directive 92/12/EEC of 25 February 1992 (OJ L 76, p. 1) which are administered by another Member State of the European Communities.

(7) Irrespective of the *lex loci delicti*, the provisions of subsections (1) to (6) above shall also apply to acts committed outside the territory of application of the Code.

Estonia

Tax crimes are prescribed in the Criminal Code while misdemeanours are prescribed in the tax law. There are the following tax crimes in the Criminal Code of Estonia: 1) Tax evasion to a large extent and 2) Major tax fraud.

In Estonian Criminal Code tax evasion to large extent is prescribed in the § 389:

(1) Failure to submit information or submission of incorrect information to the tax authority for the purpose of reduction of an obligation to pay a tax or obligation to withhold, or increase or creation of a claim for refund, or violation of an obligation to withhold if the act results in a tax underpayment, refund, set off or compensation without basis of an amount corresponding to or exceeding major damage, is punishable by a pecuniary punishment or up to 3 years' imprisonment.

(2) The same act if it results in a tax underpayment, refund, set off or compensation without basis in the amount of 5 000 000 kroons or more is punishable by up to 5 years' imprisonment.

(3) If the offence was committed by a legal person, it is punishable by a pecuniary punishment.

Major tax fraud is prescribed in Criminal Code of Estonia in according to the § 389:

(1) Conscious submission of incorrect information to the tax authority for the purpose of increase or creation of a claim for refund, if such act results in a tax underpayment, refund, set off or compensation without basis of an amount corresponding to or exceeding major damage, is punishable by a pecuniary punishment or up to 5 years' imprisonment.

(2) The same act if it results in a tax underpayment, refund, set off or compensation without basis of 5 000 000 kroons or more is punishable by one up to 7 years' imprisonment.

(3) If the offence was committed by a legal person, it is punishable by a pecuniary punishment or compulsory dissolution.

Major tax fraud exists in Criminal Code of Estonia in accordance with the provisions of the § 389:

(1) Conscious submission of incorrect information to the tax authority for the purpose of increase or creation of a claim for refund, if such act results in a tax underpayment, refund, set off or compensation without basis of an amount corresponding to or exceeding major damage, is punishable by a pecuniary punishment or up to 5 years' imprisonment.

(2) The same act if it results in a tax underpayment, refund, set off or compensation without basis of 5 000 000 kroons or more is punishable by one up to 7 years' imprisonment.

(3) If the offence was committed by a legal person, it is punishable by a pecuniary punishment or compulsory dissolution.

Latvia

Tax crimes are prescribed in the Criminal Code. They are: 1) Evasion of Tax Payments and Payments Equivalent Thereto and 2) Avoiding Submission of Declaration.

The Evasion of Tax Payments and Payments Equivalent Thereto exist in accordance with the Section 218 of Criminal Code of Latvia:

For a person who commits evasion of tax payments and payments equivalent thereto or of concealing or reducing income, profits and other items subject to tax, if losses on a large scale are caused thereby to the State or local government, the applicable punishment is deprivation of liberty for a term not exceeding four years or temporary deprivation of liberty, or community service, or a fine, with or without confiscation of property and with deprivation of the right to engage in entrepreneurial activity of a specific type or of all types or to a specific employment, or the right to take up a specific office for a term of not less than two years and not exceeding five years.

For a person who commits the acts of evasion of tax payments, if commission thereof is in an organised group, the applicable punishment is deprivation of liberty for a term not exceeding ten years, with or without confiscation of property and with deprivation of the right to engage in entrepreneurial activity of a specific type or of all types or to a specific employment, or the right to take up a specific office for a term of not less than two years and not exceeding five years.

Hungary

Basic tax crimes are prescribed in the Criminal Code and they include: Tax and Social Security Fraud, Violation of Payment Obligation to the Labour Market Fund, and Infringement of the Obligation of Payment of Social Security, Health Insurance or Pension Contribution:

(1) A person, who untruthfully states or conceals any fact (data) relevant for the establishment of tax obligation, social security contribution, accident insurance contribution, health insurance contribution, pension contribution to private pension fund membership fees before the authorities, or the private pension fund in respect of such fees, and thereby or by other fraudulent conduct diminishes tax revenues, the amount of revenues from social security contributions, accident insurance contributions, from health insurance contributions, pension contributions or of private pension funds from membership fees. The perpetrator shall be punishable by imprisonment of up to two years, labour in the public interest, or a fine.

(2) The punishment shall be imprisonment of up to three years for a felony, if the amount of tax revenue, revenue from social security contribution, accident insurance contribution, health insurance contribution, pension contribution or the revenues of private pension funds from membership fees is reduced by a considerable degree as a consequence of the crime.

(3) The punishment shall be imprisonment between one to five years, if the amount of tax revenues, revenues from social security contribution, accident insurance contribution, from health insurance contribution, from pension contribution or the revenues of private pension funds from membership fees is reduced by a substantial degree as a consequence of the crime.

(4) The punishment shall be imprisonment between two to eight years, if: *a)* the amount of tax revenues, revenues from social security contribution, accident insurance contribution, from health insurance contribution, from pension contribution or the revenues of private pension funds from membership fees is reduced by a particularly considerable or higher degree as a consequence of the crime

(5) A person shall be punishable in accordance with Subsections (1)-(4), who defrauds the authority with the purpose of the non-payment of an established tax, social security contribution, accident insurance contribution, health insurance contribution, pension contribution or membership fees to a private pension fund, if he thereby considerably delays or impedes the collection of the tax, social security contribution, accident insurance contribution, health insurance contribution, pension contribution or private pension fund membership fees.

(6) The perpetrator of the crime described in Subsection (1) above shall not be punishable if settling his tax debt, social security contribution, accident insurance contribution, health insurance contribution, pension contribution debts or membership fees owed to a private pension fund prior to indictment.

SURROUNDING COUNTRIES

We are giving examples too, from a number of countries in the region, i.e. of the countries of the former Yugoslavia, which legal systems generally have the source in the same legal tradition from the time of the former SFRJ.

Slovenia

The basic tax crime in Slovenia is Tax Evasion, which is prescribed in Art. 249 of the Slovenian Penal Code. Tax misdemeanours are prescribed in the Act on Tax Proceedings (Art. 398 and 398a).[12]

Tax Evasion is prescribed in Art 249 of the Penal Code of Slovenia and that crime commits:

(1) Whoever, with the intention either of evading, in whole or in part, the payment of taxes, contributions or any other prescribed liabilities of natural or legal persons by himself, or of enabling another person to do so, or unduly acquiring the tax returned in the Republic of Slovenia or in other Member States of the European Union in whole or in part, or provides false information about income, expenses, property, goods or other circumstances relevant to taxation and other prescribed liabilities, or otherwise defrauds the tax authorities competent for the assessment or supervision of charging and paying of such liabilities, whereby the amount of liabilities evaded or the undue tax recovery represent a major property benefit. The perpetrator of the basic forms of tax evasion shall be sentenced to imprisonment for not less than six months and not more than three years.

(2) Whoever, with the intention under the previous paragraph, fails to report the income acquired or other circumstances whose report is mandatory and which have an influence upon the assessment of tax obligations, contributions or other prescribed liabilities of natural and legal persons, whereby such obligations which he intended to evade represent a major property benefit, shall be punished to the same extent.

(3) Whoever, with the intention of preventing establishment of an actual tax liability does not, on the request of the competent tax authority, provide information, submit business books and records which he is obliged to keep, or if the books and records are incorrect in their substance, or does not provide explanations in relation to the subject of tax inspection, or obstructs tax inspection, shall be sentenced to imprisonment for not less than one and not more than two years.

(4) If a major property benefit has been gained though the offence under paragraphs 1 or 2 of this Article and the perpetrator intended to gain such property benefit, he shall be sentenced to imprisonment for not less than one and not more than eight years.

(5) If the act referred to in paragraphs 1 or 2 of this Article was committed within a criminal association, the perpetrator shall be sentenced to imprisonment for not less than three and not more than twelve years.

Croatia

The basic tax crime in Croatia is Evasion of Tax and Other Levies and it is prescribed in the Criminal Code (the Penal Code). The General Tax Act prescribes a series of misdemeanours, similarly as in the **Serbian** TPTOL. In Art. 206, paragraph 1 of the General Tax Act, tax misdemeanour is defined as violation of **internal revenue** regulations that is prescribed by the General Tax Act or a separate law on types of taxes. Concrete misdemeanours are prescribed in Art. 207 and 208 and 210.

The criminal offence of the Evasion of Tax and Other Levies is prescribed in the Article 286 of Penal Code of Croatia and that criminal offence commits:

(1) Whoever, with an aim that he or another legal or natural person evades wholly or in part payment of tax, social security or health insurance contributions, other statutory contributions or levies, furnishes false data on legally acquired income, on items or other facts relevant for the assessment of such an obligation, or whoever, with the same aim, in the case of a mandatory tax return, does not report legally acquired income, or an item or other facts relevant for the assessment of such obligations which he is bound to report by law, whereas the amount of the obligation whose payment is being evaded exceeds ten thousand Kuna, shall be punished by imprisonment for six months to five years.

(2) If the amount of the obligation whose payment is being evaded exceeds three hundred thousand Kuna, the perpetrator shall be punished by imprisonment for one to ten years.

Montenegro

All the criminal offenses, which were once prescribed in the Law on Tax Administration of

12 In the systematic of this article, Slovenia and Croatia are among the surrounding countries**,** but these both countries are also the members of EU.

Montenegro, are incorporated in the Criminal Code of Montenegro and the Montenegrin Law on Tax Administration prescribes, in Art. 105 thereof, tax misdemeanours for which a fine from tenfold to two-hundredfold amount of the minimum wage in that state is prescribed. Article 264 of the Criminal Code of Montenegro prescribes the criminal offense of Evasion of tax and other contributions, which is very similar to the tax evasion prescribed in Article 229 of the Criminal Code of Serbia.[13]

The crime of **Tax and contribution evasion is prescribed in Article 264 of Criminal Code of Montenegro. This criminal offence** commits:

(1) Anyone who, with the intention that s/he or another fully or partially evades payment of taxes, contributions or other prescribed dues, gives false data on lawfully obtained revenues, objects or other facts influencing establishing of amounts of such obligations or who, with the same intention, in case of obligatory reporting, does not report lawfully obtained gain or objects or other facts that influence the establishing the amount of such obligation or who with the same intention in some other way conceals data regarding establishing of such obligations and the amount of obligation the payment of which is being evaded exceeds € 1.000, shall be punished by imprisonment for a maximum term of three years and a fine.

(2) If the amount of obligation as of Paragraph 1 of this Article which is being evaded exceeds € 10.000, the perpetrator shall be punished by an imprisonment sentence of one to six years and a fine.

(3) If the amount of obligation referred to in Paragraph 1 of this Article whose payment is being evaded, exceeds € 100.000, the perpetrator shall be punished by an imprisonment sentence of one to eight years and a fine.

Macedonia

The only pure tax crime in Macedonia is Tax Evasion, prescribed in Art. 279 of the Penal Code. Some other criminal offenses also have certain attributes of tax offences, like **Customs fraud (Art. 278a of the** Penal Code **of Macedonia) and Covering of goods that are object of smuggling and customs fraud (Art. 279 b of the PC of Macedonia). T**ax misdemeanours **are prescribed in the Law on Tax Procedure (Art. 179, 179a, 179v, and 179g).**

The crime of Tax evasion is prescribed in Article 279 of Penal Code of Macedonia and that criminal offence commits:

(1) A person who with the intention, for himself or for another, to avoid the full or partial payment of tax, contribution, or some other duty, which he is obliged to do by law, gives false information about his revenues or the revenues of the legal entity, objects or other facts which have an influence upon the assessment of the amount of these obligations, or who with the same intention, in the case of compulsory application, does not report an income, object or some other fact which is of influence upon such obligations, and when the amount of the obligation has a larger value, shall be punished with imprisonment of six months to five years and with a fine.

If the amount of the tax obligation from paragraph 1 of the Art. 279 is significant, the offender shall be punished with imprisonment at least four years and with a fine. If the crime of tax evasion is performed by a legal entity, it shall be sentenced with a fine.

Bosnia and Herzegovina

Tax crimes **in Bosnia and Herzegovina are prescribed in** the Criminal Code**. There are two such** criminal offenses**:** Tax Evasion (Art. 210) and Failure to Pay Taxes (Art. 211). The Law **on** Tax Administration, **in Article 80, paragraph 1, stipulates the notion of** tax misdemeanours **as acts of the person, established by the law or a bylaw, who has caused** violation **of internal revenue regulations or has failed to comply with them and for which a punishment is** prescribed. **Concrete** tax misdemeanours are prescribed in **Art. 81 – 94.**

The crime of Tax Evasion is prescribed in the Article 210 of Criminal Code of Bosnia and Herzegovina and that criminal offense commits:

(1) Whoever evades payment of amounts required under the legislation of Bosnia and Herzegovina on taxes or social contributions by not submitting required information, or by submitting false information on acquired taxable income or on other facts which may effect the determination of the existence or the amount of such obligation, and the obligation that is

13 More about Z. Stojanovic, *Commentary of Criminal Code Montenegro*, Ministry of Justice of Montenegro and "Mission of the OSCE in Montenegro", Podgorica, 2010, pp. 568 - 569.

evaded exceeds the amount of 10.000 KM, shall be punished by a fine or imprisonment for a term not exceeding three years.

(2) Whoever perpetrates the offence referred to in paragraph 1 of this Article and the evaded obligation exceeds the amount of 50.000 KM, shall be punished by imprisonment for a term between one and ten years.

(3) Whoever perpetrates the offence referred to in paragraph 1 of this Article and the evaded obligation exceeds the amount of 200.000 KM, shall be punished by a term of imprisonment for a term not less than three years.

The Republic of Srpska

The crime of tax evasion prescribed in the Criminal Code of Republic of Srpska is very similar to the criminal offense of tax evasion in Criminal Code of Serbia.[14] **The Law on Tax Procedure of the Republic of Srpska, to a certain degree similarly as the Serbian** TPTOL, classifies misdemeanours according to the type of offenders to: 1) Those that may be committed by a legal entity as a taxpayer within which the responsibility of the responsible person in a legal entity - a natural person is actually prescribed (Art. 94 and 98) and 2) Those that may be committed by a natural person as a taxpayer (Art. 95), 3) Those committed by a bank when improperly opening an account of a taxpayer (Art. 97), and 4) Misdemeanours of a responsible person.

CONCLUSION

According to the established methodology of drafting of laws in the Republic of Serbia, a brand new law, which would completely supersede a formerly existing law, is passed when the level of amendments exceeds 1/3 of the text, which is not actually the case with the TPTOL. On the other hand, that law should not be amended too quickly and frequently either, and amendments must also follow the corresponding changes in the basic criminal legislation. In the previous text, it was pointed to the example of the error related to the transfer of one criminal offense from the TPTOL into the CC, which was then, after several years of the existence of leaks, corrected by amendments of the CC.

In the conclusion of this article some arguments are also stated in favour of the decision of the legislator on one of more adequate legal and technical options, when we speak about the selection of the law that will be the only one to govern tax crimes, instead of the current «combined» solution according to which some criminal offenses are prescribed in the TPTOL**,** and some in the Criminal Code. In the **Serbian** legislation, tax offences are basically dealt with in an adequate way, although there is some room for certain improvements:

First of all, it is not logical to prescribe criminal offenses in two different sources of law – in the TPTOL and in the Criminal Code, whereby the criterion for selection of criminal offenses that are in the CC and those that are in the TPTOL is not clear either.

It would be more adequate to prescribe tax crimes in a single law – either in the TPTOL**,** or in the Criminal Code. Both solutions are possible and legitimate, as illustrated in the previous text by examples from the comparative legislation.

Some criminal offenses prescribed in the TPTOL have certain minor legal and technical errors and imperfections, such as formulation of different basic forms for which the same punishment is prescribed.

A tax misdemeanour is, in wider terms, very poorly defined in the TPTOL and, in essence, such a definition is not needed at all, because the general notion of misdemeanour is otherwise specified in the Law on Misdemeanours, which is *lex generalis* in this matter with respect to the TPTOL, which is *lex specialis*.

The system that is applied in Serbia is a little unusual, because all the misdemeanours, which is logical, are prescribed exclusively in the TPTOL, which, in addition, prescribes some criminal offenses as well, which makes that law a part of the so-called secondary criminal legislation.

However, two tax crimes are, in addition, prescribed in the Criminal Code. It seems that

14 More about: M.Babic and I.Markovic, *Criminal Law – Special Part,* 3rd Edition, Faculty of Law Banja Luka, („Pravni fakultet u Banja Luci"), Banja Luka, 2009, p. 223 – 224.

there are *too many tax criminal offenses in Serbia* and that, from the aspect of legal systematics, it would be preferable to act in one of two possible ways: 1) to prescribe all the criminal offenses in the TPTOL, in which, naturally, still, tax misdemeanours would be also prescribed, or 2) to prescribed all the criminal offenses exclusively in the Criminal Code, and to have the TPTOL prescribing tax misdemeanours only.

Compared to the EU member states, and even to the countries in the region, it seems that the TPTOL contains *too many tax offences*, both tax crimes (that are, additionally, prescribed in the Criminal Code), and tax misdemeanours, whereby some of such offences also overlap to a certain extent. Therefore, it would be advisable to prescribe a considerably smaller number of tax offences, which would naturally cover all the relevant problems that are related to this matter.

In essence, it would be sufficient to have only one or possibly two tax crimes and a few tax misdemeanours. Such a legal systematic would be simpler to apply in practice and, as can be seen from the examples in the comparative legislation, if incriminations are properly formulated, there is no danger of occurrence of leaks either.

REFERENCES

1. C. Müller und K. Bieneck (Hrsg), *Wirtschafrtsrecht – Handbuch des Wirtschafts-strafrecht und –ordnungswidrikeitensrechts*, „Achendorf Rechtsverlag“ und „Verlag Dr. Otto Schmidt, Köln, 2000.
2. I. Vuković, *The Criminal Offenses of Unreal Omissions*, Faculty of Law, University of Belgrade, Belgrade, 2012.
3. M. Babic and I. Markovic, *Criminal Law – Special Part,* 3rd Edition, Faculty of Law Banja Luka, Banja Luka, 2009.
4. M. Vukovic, *Tax evasion in Police's and Court's Practice*, Official Gazette of the RoS („Službeni glasnik“), Belgrade, 2009.
5. M. Škulić, *Economical Criminality*, „FMP“, Bar, 2013.
6. Z. Stojanovic, *Commentary of Criminal Code Montenegro*, Ministry of Justice of Montenegro and “Mission of the OSCE in Montenegro”, Podgorica, 2010.
7. Z. Stojanovic and N.Delic, *Criminal Law* - spe*cial part*, XIV Edition, “Pravna knjiga“, Belgrade, 2011.
8. Z. Stojanovic and O.Peric, *Criminal Law - special part*, XIV Edition, “Pravna knjiga“, Belgrade, 2011.
9. Z. Stojanovic, *Commentary of the Criminal Code*, 4th revised Edition, “Official Gazette of the RoS, Belgrade, („Službeni glasnik“), 2012.
10. Z. Stojanovic and D.Kolaric, *Criminal-Law Responding to Serious Crimes*, Faculty of Law, University of Belgrade, Belgrade, 2010.
11. Z. Stojanovic, *Criminal Law – General Part,* Faculty of Law, University of Belgrade and „Pravna knjiga“, Belgrade, 2013.

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APPLICABILITY OF GUARANTEES REFERRED TO IN ARTICLES 5 AND 6 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS TO THE EXECUTION OF CRIMINAL SANCTIONS IN BOSNIA AND HERZEGOVINA

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Abstract: In addition to the substantive and procedural criminal law, the case-law of the Constitutional Court of Bosnia and Herzegovina has been increasingly considering the issues of the new branch of the criminal law – executive criminal law. In that context, this study outlines the most distinctive decisions of this court related to the execution of criminal sanctions. The introductory notes are followed by the analysis of corresponding provisions of the Law on the Execution of Criminal Sanctions in the Federation of BiH and the Law on the Execution of Criminal Sanctions of Republika Srpska, which application was the basis for lodging appeals with the Constitutional Court of Bosnia and Herzegovina. Problems regarding the application of the security measure of mandatory psychiatric treatment and confinement in a healthcare institution were also considered. Cases wherein appeals were manifestly (*prima facie*) ill-founded are particularly outlined.

Keywords: **criminal sanctions, execution,** international standards, Bosnia and Herzegovina, Constitutional Court of Bosnia and Herzegovina, European Court of Human Rights.

INTRODUCTORY NOTES

Four laws on the execution of criminal sanctions are being applied in Bosnia and Herzegovina: Law of Bosnia and Herzegovina on the Execution of Criminal Sanctions, Detention and Other Measures[1], Law on the Execution of Criminal Sanctions of Republika Srpska[2], Law on the Execution of Criminal Sanctions in the Federation of BiH[3] and Law on the Execution of Criminal Sanctions, Detention and Other Measures in the Brčko District of BiH[4]. The laws should have been harmonised with the most recent international standards, recommendations and judgments, as well as with the domestic expert practice. These concern Recommendations of the Council of Europe, and of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment – CPT, the Joint Project of the European Union and the Council of Europe – "Efficient prison management in Bosnia and Herzegovina from 2009 to 2011", the Final Report on the Evaluation of the BiH Prison System prepared by the Directorate of Internal Oversight of the Council of Europe dated 13 May 2011, the Project on the Effectuation of Conditional Release prepared as part of the BiH Justice Sector Strategy by the Consulting Company Lucid Linx d.o.o. Sarajevo under the auspices of the Government of Great Britain of 2009 and 2010, the Project on the Security of the Prison System in BiH administered by the *European Union Police Mission* u BiH (EUPM) in the period from 2008 to 2010, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or

1 Revised text (*Official Gazette of BiH*, No. 12/10).
2 *Official Gazette of Republika Srpska*, No. 12/10.
3 *Official Gazette of the Federation of BiH*, No. 44/98 and 42/99.
4 *Official Gazette of the Brčko District of BiH*, No. 31/11.

Degrading Treatment or Punishment from 2002, Recommendation No. R (83) 2 concerning the legal protection of persons suffering from mental disorder placed as involuntary patients, Recommendation No. R (98) 7 concerning the ethical and organisational aspects of health care in prison, Declaration of Malta – World Medical Association on ethical treatment of hunger strikers of 2006, Recommendation (2003) 22 of the Council of Europe to member states on conditional release (parole), Recommendation R (84) 12 concerning foreign prisoners, Recommendation R (82) 17 concerning custody and treatment of dangerous prisoners, Recommendation R (99) 22 concerning prison overcrowding and prison population inflation, Recommendation R (2003) 23 on the management by prison administrations of life sentence and other long-term prisoners, Recommendation R (79) 14 concerning the application of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, Resolution (65)1 on suspended sentence, probation and other alternatives to imprisonment, Council of Europe Standards concerning the treatment of endangered prisoners, Recommendation of the Council of Europe CM/Rec (2012) 12 concerning foreign prisoners and the existing domestic practice of correctional facilities and the Ministry of Justice of BiH in implementing laws and identifying new legal situations. Significant contribution to such harmonisation was made by way of the decisions of the Constitutional Court of Bosnia and Herzegovina[5], which brief overview is given in the text that follows.

THE SECURITY MEASURE OF MANDATORY PSYCHIATRIC TREATMENT AND CONFINEMENT IN A HEALTHCARE INSTITUTION (ARTICLE 147 OF THE LAW ON THE EXECUTION OF CRIMINAL SANCTIONS IN THE FEDERATION OF BIH)

In the Decision on Admissibility and Merits, No. AP 2271/05 of 21 December 2006[6], the Constitutional Court concluded that that there is a violation of rights under Article II(3)(d) of the Constitution of BiH and Article 5 paragraph 1 (e) and paragraph 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[7] in cases where the act of deprivation of liberty with regards to persons who committed the criminal offence in a state of mental incapacity fails to meet the requirement of "legality" within the meaning of the European Convention for the reason that the valid laws lack the precise definition of the following terms: possibility, conditions, manner and procedure of pronouncing, extending and (or) terminating the measure of mandatory medical treatment and placement in an appropriate health care institution of these persons, including the access to "court" for the purpose of reviewing the legality of detention, which leaves ample room for the arbitrary application of law. Moreover, placing those persons in a special prison ward also fails to meet the requirement of "legality" under Article 5 paragraph 1 e) of the European Convention. Furthermore, the violation of this right exists for the reason that the valid laws fail to meet the legal quality requirements to the extent that they violate the rights under Article 5 paragraph 1 e) and paragraph 4 of the European Convention.

First and foremost, the Constitutional Court observes that the competent courts' decisions imposed on all the appellants the measure of mandatory medical treatment and confinement in a healthcare institution, which existed according to the former Criminal Code of the Federation of BiH, on the grounds that they had committed various criminal offences in a state of mental incapacity. Furthermore, prior to determining the said measure it was established, through appropriate medical expertise and findings, that all the appellants were suffering from serious mental disorders making them a threat to the environment, and therefore it was necessary for them to undergo a medical treatment and to be confined in a healthcare institution. However,

5 Hereinafter: the Constitutional Court.
6 The case-law adopted in this case is also followed in the Decisions Nos. AP 1090/07 and AP 672/07.
7 Hereinafter: the European Convention.

after the pronouncement of this measure, the new Criminal Code of the Federation of BiH entered into force in 2003, which adopted a different approach. Namely, the new Criminal Code of the Federation of BiH stipulates that a measure of mandatory psychiatric treatment may be imposed only on a person who committed a criminal offence in a state of substantially diminished mental capacity or in a state of diminished mental capacity if there is a threat that the causes of such mental state could have effect on the perpetrator to commit another criminal offence in the future. Hence, the new Criminal Code of the Federation of BiH contains no longer a possibility to impose the said security measure on a person who committed a criminal offence in a state of mental incapacity. It is precisely the aforesaid fact that the appellants have based their request for release on in order to be given a chance to continue their medical treatment while free, believing that such legal provisions imply their release and medical treatment under the supervision of the competent social welfare centres. The appellants also reckoned that the Zenica Correctional Facility Forensic Ward is not an appropriate health care institution within the meaning of the European Convention, thereby referring to the Special Report of Ombudsman for BiH. Bearing in mind the aforementioned, the Constitutional Court held that the appellants, actually, challenged the legality of their further deprivation of liberty within the meaning of Article 5 paragraph 1 item (e) of the European Convention.

The cases at hand concerned the continuation of the execution of the imposed measures. In that regard, the Constitutional Court points out that it is obvious that upon the adoption of new legislation, the case-law regarding the extension of such a measure has varied in the Federation of BiH. Namely, some courts hold that after the enactment of the new Criminal Codes and the Criminal Procedure Code of the Federation of BiH the aforementioned persons are no longer within their respective jurisdiction, but rather within the jurisdiction of the social welfare centres. Therefore, the courts usually adopt decisions ordering detention of the said persons for up to 30 days, as referred to in Article 410 paragraph 2 of the new Criminal Procedure Code of the Federation of BiH, and then they forward the case to a relevant social welfare centre. However, the social welfare centres lack necessary capacities and conditions to receive such persons. There is no appropriate procedure in place either. Therefore, these persons continue to be detained in the Zenica Correctional Facility Forensic Ward, without a decision of any relevant public authority though. On the other hand, some courts do adopt decisions on extension of security measures already imposed, but they do that in accordance with the former Criminal Procedure Code of the Federation of BiH and the Law on the Protection of Persons with Mental Disabilities[8] and the Law on the Execution of Criminal Sanctions[9], in which case they entirely comply with the procedures used to be prescribed by those laws (Criminal Procedure Code of the Federation of BiH) or with the procedures still prescribed (the Law on the Protection of Persons with Mental Disabilities and the Law on Execution) - review at regular intervals, obtaining medical findings and physician's opinion, providing for the right to appeal etc.

The Constitutional Court holds that vague laws leave ample room for arbitrariness, which is manifestly confirmed through different case-law of courts in similar cases. In the first case, where the courts consider that they have no jurisdiction and where the social welfare centres are not able to receive these persons, nor do they have any prescribed procedures in place, there is room for ordering the extension of detention measure against the mentally ill persons who committed criminal offences in a state of mental incapacity, without any decision whatsoever issued by the relevant state authority. This is inconsistent with the requirements that must be satisfied for the deprivation of liberty to be "legal" in these cases within the meaning of Article 5 paragraph 1 e) of the European Convention. This is so, in particular, because other relevant regulations, i.e. the Law on the Protection of Persons and the Law on the Execution have not been harmonised with the new criminal legislation, rather they only refer to the application of the former Criminal Procedure Code of the Federation of BiH, which is no longer in force.

On the other hand, the Constitutional Court points out that the case-law of the courts deciding on extension of detention according to the FBiH Criminal Procedure Code that ceased to be in effect also raises issues since an invalid law is applied. In the Constitutional Court's opinion, this case law, unlike the previous one, is based on a law requiring a proper procedure

8 Hereinafter: the Law on the Protection of Persons.
9 Hereinafter: the Law on the Execution.

which allows for extension of a security measure imposed on the mentally ill persons through court's decision. However, the mentioned case-law is based on the invalid Criminal Procedure Code and provisions of the Law on Protection of Persons with Mental Disabilities and Law on Execution of Criminal Sanctions, which have not been yet harmonized with the newly enacted Criminal Code and FBiH Criminal Procedure Code, which rather refer to the application of former regulations. That is indicative of a violation of "rule of law" principle under Article I (2) of the Constitution of Bosnia and Herzegovina and the principle of legal certainty thereof. Therefore, the Constitutional Court holds that such case-law and decisions adopted under the related procedures cannot satisfy the requirement of "lawfulness" under Article 5 paragraph 1 e) of the European Convention.

Furthermore, the appellants have stated, by invoking the Special Report of the Ombudsman for BiH, that the institution where they have been placed, which is a special ward of the Zenica Prison, is not a proper healthcare institution. In connection with that, the Constitutional Court points out that the European Court of Human Rights[10], in its case-law, has concluded that the "lawfulness" of any deprivation of liberty is required in respect of both the ordering and the execution of that measure in relation to the person concerned. The said "lawfulness" presupposes conformity with the domestic law as well as conformity with the requirements listed under Article 5 paragraph 1 of the European Convention. The European Court of Human Rights also concluded that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention of a person as a mental health patient will only be "lawful" for the purposes of Article 5 paragraph 1 e) of the European Convention if effected in a hospital, clinic or other appropriate institution.[11]

The Constitutional Court notes that, as a rule, security measures imposed on persons who committed criminal acts in a state of mental incapacity have been given effect in the Forensic Ward both at the time when the former Criminal Code and Criminal Procedure Code was in force and since the time when the new criminal legislation entered into force. Those persons were placed in the prison ward although even at the time when the security measure of compulsory medical treatment and placement in a healthcare institution was imposed on the appellants the Law on Execution of Criminal Sanctions was in effect, which requires execution of the related measure "in a healthcare institution established to serve that purpose only or in a special ward of the healthcare institution", and only in exceptional cases "in a special ward of a correctional institution". However, the Constitutional Court notes that the institution prescribed by the Law on Execution of Criminal Sanctions has never been established, and the said persons were placed in a special ward of the prison in Zenica as a rule and not as an exception.

Bearing in mind the case-law of the European Court, the Constitutional Court holds that, although placing of mentally ill persons in a special ward is, to a certain extent, in accordance with the domestic law which provides for such a possibility - but only as an exception - it is not, nevertheless, in compliance with the European Convention which requires mentally ill persons to be placed in a hospital, clinic or other appropriate institution serving that purpose. Given the aforesaid, the Constitutional Court maintains that the requirement of "lawfulness" of deprivation of liberty within the meaning of Article 5 paragraph 1 e) of the European Convention has not been met, even in relation to the institution where this measure is executed.

Furthermore, the Constitutional Court notes that the BiH Ministry of Justice and FBiH Ministry of Justice referred to a series of substantial activities aimed at resolving the issue of "proper institution", but this issue has not been completely resolved at the time of adoption of this decision of the Constitutional Court even though the European Court was given assurances by the local state authorities in this regard. The Constitutional Court shall refrain from assessing whether this kind of institution should be established at the State or Entity level since that is an issue to be resolved by the domestic executive and legislative authorities. However, the Constitutional Court deems that it is necessary to point out that this issue should be urgently resolved in order to conform with the requirements under Article 5 paragraph 1 e) of the European Convention with the purpose of protecting the appellants' human rights. This includes adoption of relevant regulations on establishing an appropriate institution, as well as its actual

10 Hereinafter referred to as the European Court.
11 See European Court, the *Ashingdane v. The United Kingdom* judgment.

formation and usage. However, it does not require the immediate and unconditional release of the appellants if it is undoubtedly confirmed by medical findings and doctor's opinion that the health condition of the appellants does not allow for such a decision to be made.

In this regard, the Constitutional Court refers to the case-law of the European Court according to which the termination of the placement of an individual who has previously been found by a court to be of unsound mind to present a danger to society is a matter that concerns not only that individual but also the society and community in which he/she will live if released. Given the seriousness of this public interest, in particular the seriousness of the criminal offences committed in a state of mental incapacity, the European Court, in case *Luberti v. Italy,* concluded that the competent state authority justifiably acted with caution when it adopted the decision on release of the appellant even when the medical findings indicated that he had recovered.[12]

Given the aforesaid and regardless of the activities of the competent authorities in resolving this issue, the Constitutional Court holds that due to the lack of prompt action by the competent authorities the appellants' right under Article 5 paragraph 1 e) of the European Convention was violated because the deprivation of liberty was not "in accordance with law" as required by the European Convention.

POSPONEMENT OF EXECUTION OF PRISON SENTENCE (ARTICLE 28 OF THE LAW ON EXECUTION OF PRISON SANCTIONS IN THE FEDERATION OF BIH)

In the Decision on Admissibility and Merits, no. AP 1594/05 of 20 September 2006, the appellant complained about his arrest by alleging that he had been arrested in a "heinous" manner and that he had been taken from his apartment to the Correctional Institution in Zenica, that had not received any referral letter from the Municipal Court before the arrest and that this was the reason why he had not been given an opportunity to file a request for the postponement of execution of prison sentence within the meaning of Article 28 of the Law on Execution of Criminal Sanctions in the Federation of BiH. Furthermore, he alleged that he had been on sick-leave when he had been arrested.

It follows from the Municipal Court's response to the appeal that there were three attempts to serve summons and referral letter on the appellant and that the court issued a warrant authorizing the judicial police to bring the appellant to the institution executing the prison sentence, namely the Correctional Institution in Zenica. The Constitutional Court found that the prison sentence which the appellant was to serve in the Correctional Institution in Zenica was based on the judgments rendered by the competent courts and that the facts to which the judgments referred constituted the criminal offence punishable by the prison sanction in accordance with the national law at the relevant time.

Therefore, the Constitutional Court holds that the appellant's allegations on the violation of Article II(3)(d) of the Constitution of BiH and Article 5 of the European Convention are unfounded and that the appellant was arrested on the basis of the judgment of the competent court and in accordance with the national law.

12 Judgement of 23 February 1984, Series no. 85.

APPEAL *RATIONE MATERIAE* INCOMPATIBLE WITH THE CONSTITUTION OF BIH (POSTPONEMENT OF EXECUTION OF PRISON SENTENCES – ARTICLE 69(1)(I) AND (Z) OF THE LAW ON EXECUTION OF CRIMINAL SANCTIONS OF THE REPUBLIKA SRPSKA)

In Decision on Admissibility, no. AP 2284/11 of 15 September 2011, the Constitutional Court concluded that the issue of "well-foundedness of any criminal charge" against the appellant was not determined in the proceedings wherein the issue as to whether the law requirements had been met to postpone the execution of prison sentence had been dealt with. The Constitutional Court notes that in the present case the appellant challenges the rulings of the Basic Court and County Court, whereby his request for the postponement of execution of prison sentence was dismissed. Therefore, the Constitutional Court is to answer the question whether the guarantees under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention are applicable to the present case.

Article 6(1) of the European Convention, providing for the right to a fair trial, reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". However, in the present case, the appellant filed an appeal against the rulings of the ordinary courts which had solely dealt with the issue as to whether the law requirements to postpone the execution of prison sentence had been met according to the judgments of the Basic Court and County Court, and not with the issue of "well-foundedness of any criminal charge" against the appellant. Therefore, taking into account the fact that the present case does not concern the decisions taken in the procedure dealing with the criminal charge against the appellant, nor does it concern the appellant's rights and obligations, Article 6 is not engaged. As the Constitution of BiH does not provide for wider scope of protection than that provided for by Article 6 of the European Convention, the appellant's complaints about the violation of Article II.3 of the Constitution of BiH and Article 6(1) of the European Convention are *ratione materiae* incompatible with the Constitution of BiH.

PLACEMENT IN SOLITARY CONFINEMENT FOR A DISCIPLINARY OFFENCE REFERRED TO IN ARTICLE 93, PARAGRAPH 4, ITEM 8 AND ARTICLE 18 OF THE LAW ON EXECUTION OF CRIMINAL SANCTIONS IN THE FEDERATION OF BIH

In its Decision on Admissibility, no. AP 2076/05 of 9 November 2006, the Constitutional Court has taken the position that the proceedings in which the appellant was sentenced to a disciplinary penalty – solitary confinement for the period of 15 days – on account of a disciplinary offence under Article 93(4)(8) and Article 18 of the Law on Execution of Criminal Sanctions in the Federation of BiH after the disciplinary proceedings, which had been conducted pursuant to the provisions of the aforesaid law, cannot be considered the proceedings involving the determination of "criminal charges" against the appellant.

The Constitutional Court has established that in the referenced case the appellant was sentenced to solitary confinement in the prison in which he has been serving his sentence on the basis of a final judgment by the court. The Constitutional Court holds that the specific case of sentencing to solitary confinement does not involve the appellant's deprivation of liberty in terms of Article 5 of the European Convention because the appellant has already been deprived of his liberty in accordance with law. Imposing of solitary confinement is, therefore, only the manner or modification of serving the existing imprisonment sentence, due to the imposed disciplinary measure. The maximum penalty of solitary confinement, which the appellant could

have expected under the law, is 20 days, while the appellant received 15 days. The Constitutional Court, further, notes that the case at hand did not involve additional prolongation of his prison sentence or reducing his prospects for an early release, which is considered to be especially harsh punishment pursuant to the case law of the European Court, which gives a criminal character to a disciplinary offence. In addition, the conditions of staying in solitary confinement have been specifically regulated, stipulating, *inter alia*, medical checks on an everyday basis (Articles 98 and 99 the Law on Execution of Criminal Sanctions in the Federation of BiH).

In view of the aforementioned, the Constitutional Court concludes that the specific case at hand involves a disciplinary offence which, according to the nature and harshness of the imposed penalty, cannot be considered criminal in terms of Article 5 of the European Convention. As a consequence, the disciplinary proceedings in question do not fall within the meaning of Article 6 of the European Convention. Hence, in the present case, Article 6 of the European Convention is not applicable, on account of which the appeal is *ratione materiae* incompatible with the Constitution of BiH.

LETTER OF CONFINEMENT (ARTICLE 24 OF THE LAW ON EXECUTION OF CRIMINAL SANCTIONS IN THE FEDERATION OF BIH)

In its Decision on Admissibility, no. AP 1814/08 of 14 September 2010, the appellant complained that the challenged letter of confinement, pursuant to which he had been sent to serve his imprisonment sentence, had been issued by a court lacking territorial jurisdiction – the Municipal Court in Zenica and that the letter of confinement was never delivered to the appellant but to the prison administration. In that regard, the Constitutional Court held that it was necessary to respond to the question whether the relevant procedure of issuance of the letter of confinement for serving his imprisonment sentence concerned "the grounds of any criminal charge" against the appellant in terms of Article 6(1) of the European Convention. In respect of the requirement that the challenged letter of confinement amounts to a violation of the right to a fair trial, the Constitutional Court finds that the letter of confinement did not contain the determination of any "criminal charge" against the appellant in terms of Article 6(1) of the European Convention, as in the present case there already exists the judgment whereby the referenced proceedings on the merits of the appellant's request have been finally completed and which acquired the force of *res iudicata.*[13]

In view of the aforementioned, the Constitutional Court holds that the proceedings in question exclusively concern the determination of the existence of legal requirements for the issuance of the letter of confinement for serving of his prison sentence. Therefore, the proceedings in question do not fall under the scope of the right to a fair trial in terms of Article 6(1) of the European Convention, so it follows that the appeal is in this part *ratione materiae* incompatible with the Constitution of BiH and the European Convention.

FAILURE TO EXHAUST DOMESTIC LEGAL REMEDIES

In the decisions on admissibility no. AP 1719/05 of 20 September 2006, no. AP 2624/08 of 17 September 2009 and no. AP 1732/10 of 14 September 2010 the appellants complained of the violation of their constitutional rights under Article II(3)(b) and II(3)(c) the Constitution of BiH, i.e. Articles 3 and 4 of the European Convention, which allegedly occurred during the time of serving of prison sentence at the Criminal Correctional Institution Zenica. The Constitutional Court notes that the supervision over the work of this institution is, pursuant to the provisions

13 See, *mutatis mutandis,* decision on admissibility of the former European Commission of Human Rights, *X v. Austria,* application no. 1760/63, Annual Book IX (1966), pp. 166 (174) and application no. E 10431/83, of 16 December 1983, Decisions and Reports (DR) 35, p. 243.

of Article 152 of the Law on Execution of Criminal Sanctions in the Federation of BiH, the responsibility of the Ministry of Justice of the Federation of BiH. In the case at hand, being dissatisfied with the conditions relative to the serving of his prison sentence at the Criminal Correctional Institution Zenica, the appellant had to apply primarily to the prison authorities and then, pursuant to Article 92 of the Law on Execution of Criminal Sanctions in the Federation of BiH, he would be entitled to file a complaint to the Federal Ministry of Justice, with a view to improving the conditions of his sentence serving, which the appellant did not do.

As the appellants did not avail of the mechanisms of protection under the Law on Execution of Criminal Sanctions in the Federation of BiH, in order to obtain a final decision, the requirement of exhaustion of effective legal remedies under Article 16(1) of the Rules of the Constitutional Court has not been met[14]. Accordingly, as the requirement of exhaustion of all effective legal remedies available under the law has not been met, the appeal cannot be considered.

AN APPEAL MANIFESTLY (*PRIMA FACIE*) ILL-FOUNDED

The Time of the Interruption of Imprisonment Shall Not Be Counted in the Term Served (Article 59(3) of the Law on Execution of Criminal Sanctions in the Federation of BiH)

In respect of the appellant's allegations in the decision on admissibility, no. AP 2488/09 of 10 October 2012, that his right to liberty and security of person under Article 5(3) of the European Convention has been violated, as he was unlawfully deprived of his liberty, the Constitutional Court recalls that Article 5 of the European Convention as a whole relates to the protection of physical liberty, in particular the protection from arbitrary arrest and detention. Article 5(1)(a) of the European Convention stipulates that no one shall be deprived of his liberty save in the procedure prescribed by law in case of the lawful detention of a person after conviction by a competent court. In that context, the Constitutional Court notes that the appellant is serving his sentence of imprisonment pursuant to the final judgments by the Municipal Court in Tuzla and the Municipal Court in Visoko, which is in accordance with Article 5 of the European Convention. Moreover, it is evident that the enforcement of the aforesaid judgments is carried out in the procedure prescribed by law and that, contrary to the appellant's allegations, the Law on Execution of Criminal Sanctions in the Federation of BiH has not stipulated that in case of suspension of serving of imprisonment sentence a special ruling has to be issued. In addition, the Constitutional Court notes that the appellant's prison sentence has not been extended in the particular case, but only the expiry of the prison sentence has been recorded because the serving thereof has been interrupted by the appellant's jailbreak. Therefore, the Constitutional Court holds that in the present case recording of a new expiry date of his prison sentence in the appellant's personal sheet given the period the appellant spent on the run – does not raise in any way the issue of violation of the rights guaranteed by Article 5 of the European Convention.

Article 24 of the Law on Execution of Criminal Sanctions in the Federation of BiH

In respect of the allegations of the violation of the right under Article 5 of the European Convention in the decision on admissibility, no. AP 1814/08 of 14 September, the Constitutional Court notes that the appellant has been sentenced by a final judgment to sentence of imprisonment, therefore by the judgment having become final the legal requirement for the execution of criminal sanction has been met. The Law on Execution of Criminal Sanctions in the Federation of BiH anticipates the possibility of postponement of the execution of criminal sanction in specific cases, which the appellant used, his request was granted twice, but his repeated request was finally dismissed and he was referred to serve his sentence. The appellant holds that the dismissal of this request, i.e. the issuance of the letter of confinement by the

14 *Official Gazette of BiH* nos. 60/05, 64/08 and 51/09.

Municipal Court, has violated his right to liberty and security of person under Article 5(4) of the European Convention.

The Constitutional Court notes that the appellant, in essence, complains of the certainty of his deprivation of liberty for the sake of referring him to serve his sentence. Sending someone to serve his sentence on the basis of a "conviction by a competent court" is the ground pursuant to which a person may be deprived of liberty in terms of the provisions of the European Convention. The fact that the courts could not establish any reasons for which the imposed sentence would be postponed, i.e. that the requirements for the issuance of the letter of confinement for serving the imposed sentence were met, will not in itself amount to unlawful deprivation of liberty in order to send someone to serve his sentence in terms of the provisions of Article 5(4) of the European Convention.

Articles 24 and 29 of the Law on Execution of Criminal Sanctions in the Federation of BiH

In the decision on admissibility, no. AP 577/07 of 20 March 2007, the appellant has been sentenced by a final judgment to a prison sentence, therefore by the judgment having become final the legal requirement for the execution of criminal sanction has been met. The Law on Execution of Criminal Sanctions in the Federation of BiH anticipates the possibility of postponement of the execution of criminal sanction in specific cases, which the appellant tried to avail of. The Constitutional Court notes that the appellant's request for postponement of the execution of his sentence of imprisonment has not been granted because it was established that there were no reasons for postponement of the execution of the sentence in terms of the aforesaid law. The repeated request by the appellant for postponement of the execution of his sentence, requested because the appellant fell under an acute illness, was dismissed by the challenged rulings in accordance with the aforementioned law, since the appellant only attached a finding by an internal medicine doctor from which it was not possible to conclude that he had acquired an acute illness.

The rights as established in Article 5 of the European Convention are, by their contents, the fundamental rights protected by the European Convention – immediately after the right to life. Article 5 of the European Convention provides protection of the right to freedom and prohibits arbitrary attitude towards limiting of that right. Exceptions from prohibition of deprivation of liberty are listed in Article 5(1) of the European Convention enumerating the cases where deprivation of liberty is allowed. It is an exhaustive list that has to be interpreted narrowly.[15] Only such an approach is consistent with the aim and purpose of Article 5 of the European Convention, i.e. to ensure that no one shall be deprived of liberty in an arbitrary manner. In addition, a deprivation of liberty, in itself, is to be imposed in accordance with essential procedural regulations and rules of the applicable domestic law. A failure to comply with an essential procedural requirement or some procedural aspect of the domestic law, even where courts take the position that it has no essential relevance, may amount to a violation of Article 5, paragraph 1.[16]

In view of the above, the Constitutional Court holds that there is no violation of the appellant's rights under Article 5 of the European Convention, as one of the grounds for depriving an individual of his/her liberty is "the lawful deprivation of liberty resulting from the judgment of the competent court". Article 24 of the Law on Execution of Criminal Sanctions in the Federation of BiH prescribes the procedure for sending a convicted person to serve his/her prison term. Paragraph 8 of the mentioned Article stipulates the following: "if a duly summoned and instructed convicted person has not reported to the institution by the deadline, the court shall order for the convicted person to be apprehended by the judicial police." Based on the documents enclosed to the appeal, the Constitutional Court finds that the ground for the deprivation of liberty, as well as the procedure conducted are in accordance with Article 24 of the Law on Execution of Criminal Sanctions in the Federation of BiH.

As to an alleged violation of the appellant's rights under Article II/3d) of the Constitution of BiH and Article 5, paragraph 4 of the European Convention, a violation of the rights of a

15 See, the European Court, *Ireland v. The United Kingdom*, judgment of 18 January 1978, Series A−25.
16 See, ECtHR, *Bozano*, Judgments of 18 December 1986, Series A−111 and *Van der Leer*, of 21 February 1990, Series A−170.

person deprived of liberty by arrest or detention to lodge an appeal with a court, by which the lawfulness of his/her detention will be decided speedily by a court and his/her release will be ordered if the detention is not lawful, is highlighted. According to the case-file, the Constitutional Court notes that these allegations are manifestly ill-founded, as the appellant availed himself of this remedy by lodging an appeal (in terms of Article 29 of the Law on Execution of Criminal Sanctions in the Federation of BiH) with the Cantonal Court against the first instance rulings dismissing his appeal to postpone the execution of the sanction. In addition, the lawfulness of the mentioned rulings and all the allegations of the appellant were considered speedily by the Cantonal Court, which dismissed the appeal as ill-founded. The Constitutional Court concludes that the appellant's claim in the specific case is not justified, *i.e.* that the facts presented in no way justify the assertion that the appellant's constitutional right has been violated.

Placement in solitary confinement for a disciplinary offence referred to in Article 93, paragraph 4, item 8 and Article 18 of the Law on Execution of Criminal Sanctions in the Federation of BiH (Article 6 of the European Convention applicable to the specific case, contrary to the conclusion in Decision no. AP 2076/05)

As to the appellant's allegations and given that the appellant's complaint relates to the disciplinary sanction imposed on him – placement in solitary confinement, the Constitutional Court, in its Decision no. AP 1859/06 of 17 September 2008, first considered the applicability of Article 6, paragraphs 1 and 3 of the European Convention. The Constitutional Court was to establish whether the relevant disciplinary procedure related to the determination of "criminal charges" against the appellant within the autonomous meaning of that notion under Article 6, paragraph 1 of the European Convention, which guarantees that "In the determination … of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." If the Constitutional Court found that it concerned "criminal charges" against the appellant and that the offence entailed elements of criminal offences and not solely elements of disciplinary offences, than the Constitutional Court would have to examine the appellant's allegations that his right to a fair trial under Article 6 of the European Convention was breached in the course of the disciplinary procedure.

In the view of the European Court, a "criminal charge" is an autonomous concept, meaning that an offence classified as disciplinary under the domestic law may raise an issue of "criminal charge" within the meaning of Article 6, paragraph 1 of the European Convention, in case that the legislation is essentially criminal, rather than civil, in nature – in order to ensure that the State, by simply classifying some offence as disciplinary under the domestic law, cannot circumvent its obligation to secure a fair trial[17]. In order to determine whether the legislation is essentially criminal in nature, a number of factors are to be taken into consideration, including, in particular, the following: (a) whether the aim or one of the aims of the relevant laws is the prevention or sanction of certain behaviour; (b) if the aim of preventing or sanctioning certain behaviour exists, does the behaviour that is to be either prevented or sanctioned imply culpability (the issue of culpability) and (c) what is the amount of penalty that may be imposed. Generally, the disciplinary procedure cannot be classified as "criminal"; however, exceptions are possible in specific circumstances.[18]

The Constitutional Court notes that the relevant offence in the specific case is classified under the domestic law as disciplinary, and not as criminal, in nature. Article 93, paragraph 4, item 8 of the Law on Execution of Criminal Sanctions in the Federation of BiH stipulates that "brawls and fights among inmates" are serious disciplinary offences. However, according to the consistent case-law of the European Court, the classification of offences under the domestic law serves only as a first criterion, *i.e.* a starting-point for the assessment of the applicability of Article 6 of the European Convention. In its judgments the European Court laid down other two objective criteria, as follows: the nature of offences and the degree of severity of penalties. The former criterion, the nature of offences, has two sub-criteria: the scope of the norm defining

17 See, ECtHR, *Engel versus the Netherlands (no. 1),* Judgment of 8 June 1976, Series A, No. 22; *Oztürk,* Judgment of 27 May 1984, Series A, No. 73, pp. 46−50.
18 See, ECtHR, *Engel and Others,* Judgment of 8 June 1976, Series A, No 22, pp. 33−36, paras. 80−85.

the offence and the purpose of sanctions. According to the mentioned criteria, in order for an offence not classified under the domestic law as criminal to be considered as criminal within the meaning of Article 6 of the European Convention, the scope of the norm defining the offence has to be determined generally and the purpose of sanctions must be to prevent and to punish an offender. The third criterion, which is in many cases the most important one, relates to the nature and degree of severity of the penalty to be imposed on an offender. As to the nature and degree of severity of the penalty, the case-law indicates that prison sentences are held to be criminal sanctions *par excellence* and that they therefore give a certain colouring of criminal to a purely disciplinary matter, to the extent that it must be concluded that Article 6 of the European Convention is applicable.[19]

The Constitutional Court notes that the appellant in the specific case, after committing the disciplinary offence referred to in Article 93, paragraph 4, item 8 of the Law on Execution of Criminal Sanctions in the Federation of BiH and pursuant to Article 97 of the Law concerned, was imposed the disciplinary sanction of placement in solitary confinement for 10 days after the disciplinary procedure had been conducted in accordance with the provisions of the relevant Law. Pursuant to Article 94, paragraph 1 of the Law on Execution of Criminal Sanctions in the Federation of BiH, the procedure to establish disciplinary liability of a convicted person was instituted by the authorised persons of the institution and the case was forwarded to the Commission appointed in accordance with Article 97, paragraph 1 of the relevant Law. The task of the mentioned Commission is to conduct disciplinary procedures and to pronounce disciplinary sanctions. In the course of proceedings before the first instance disciplinary commission, a convicted person is entitled to be duly informed about the allegations relegating to the offence; to reply in writing or to make an oral statement; to have a fair and public hearing within a reasonable time by a commission established by law; to attend hearings; to be defended by a defence counsel of his/her choice and to lodge an appeal against a negative decision passed by the commission. Disciplinary procedures must be fair and the principle of proportionality must be complied with in pronouncing disciplinary measures. Before pronouncing sanctions for disciplinary offences, the disciplinary commission takes into consideration the following facts: severity of the disciplinary offence committed, degree of liability, circumstances under which the disciplinary offence was committed, previous activities and behaviour of the offender as well as all other circumstances that may affect the decision by commission members. According to paragraphs 5 and 6 of Article 97 of the relevant Law, a convicted person is entitled to lodge an appeal against the decision imposing a disciplinary sanction by the disciplinary commission to the governor within 15 days counting from the date of receipt of the decision, whereas the governor's decision on the appeal is final and binding and no administrative dispute is allowed. Disciplinary offences are classified as serious or minor ones. Pursuant to Article 96, paragraph 2, the sanction of solitary confinement for a period up to 20 days or a fine may be imposed for a serious disciplinary offence. On the other hand, criminal proceedings in Bosnia and Herzegovina are based on the following generally recognised procedural principles: fair and lawful conduct of criminal proceedings, presumption of innocence, protection of individual liberty, right to defence, lawfulness of evidence, right to be tried without delay, equality of arms, the principle of margin of appreciation, accusatory principle, the principles of orality, publicity, adversariality, multiple-instance proceedings and proportionality.[20]

In view of the above, the Constitutional Court has no doubt that the specific disciplinary procedure can be classified as "criminal" and, therefore, Article 6 of the European Convention is applicable. In examining the admissibility of a case, the Constitutional Court must first establish whether the requirements enumerated in Article 16(2) of the Rules of the Constitutional Court are met for making a decision on the merits of a case. In this regard, the Constitutional Court outlines that according to its jurisprudence and the case-law of the European Court, an appellant must assert the violation of her/his rights safeguarded by the Constitution of Bosnia

19 See, ECtHR, *Campbell and Fell versus The United Kingdom,* Judgment of 28 June 1984, Series A, No. 80, § 72; ECtHR, *Ezeh and Connors versus The United Kingdom,* Judgment of 9 October 2003, Reports of Judgments and Decisions 2003−X, pp. 21, 28, 129 and 130, and former Human Rights Commission, Application No.7754/77, Decisions and Reports of the European Commission of Human Rights 11(1978) pp. 216−218.

20 See, *Commentary on the Criminal Procedure Law,* Sarajevo: Council of Europe and European Commission, 2005, 39 and 40.

and Herzegovina and these violations must be deemed probable. An appeal will be manifestly ill-founded if there is no *prima facie* evidence, which would, with sufficient clarity, indicate that the mentioned violation of human rights and freedoms is possible[21], and if the facts in which regard the appeal has been submitted manifestly do not constitute the violation of rights that the appellant has stated, *i.e.* if the appellant has no "arguable claim"[22], as well as when it is established that the party to the proceedings is not a "victim" of a violation of the rights safeguarded by the Constitution of Bosnia and Herzegovina.

As to the instant case, the appellant complains that in the course of the mentioned proceeding his right to a fair and impartial proceeding was violated, as well as his right to interrogate witnesses, the right to defense and the right to his claim being considered by an impartial body due to which he considers that his right to a fair trial was violated. He further states that during the proceeding, i.e. during the session of the Disciplinary Commission behind closed doors, the prison teacher was present although he or his defense counsel were not present, in which case the adversarial principle and the equality principle were violated. At the same time, the appellant complains that he is denied the access to the relevant documents, in which manner he is deprived of the possibility to give his opinion about them and he considers that the decision of the Disciplinary Commission cannot be based on the evidence about which he and his defense counsel were not previously informed. He also points out that he sought the exemption of the Director of the Institution in a way that he sought that the Federation Ministry of Justice decide his appeal filed against the first instance judgment and not the Director of the Institution for the reason that the Director of the Institution was publicly telling lies abut him. That was the reason for him to request protection of his rights through the court.

In this connection, the Constitutional Court reminds that pursuant to the previous case-law the jurisdiction of the Constitutional Court under Article VI (3) (b) is limited only to "the issues under the Constitution of BiH". It is not the task of the Constitutional Court to review the ordinary courts' findings relating to facts and application of the substantive law[23], unless the decisions of those courts are in violation of the constitutional rights. This is the case if in an ordinary court's decision the constitutional rights of an individual were disregarded or wrongly applied, including the cases where the application of the law was obviously arbitrary, where the applicable law was in itself unconstitutional or where fundamental procedural rights (fair trial, access to court, effective remedies etc.) were violated.[24]

The Constitutional Court concludes that apart from the arbitrary statements, the appellant did not submit to the Constitutional Court any relevant piece of evidence based on which the conclusion could be made that his right to a fair trial was violated in the course of the proceeding concerned. The Constitutional Court observes that the proceeding in question was conducted based on thorough evaluation of evidence, witnesses' statements, defence of the appellant and appropriate application of the substantive law. In view of the aforesaid, the Constitutional Court considers that the appellant has not offered the facts that could justify the allegations that there was a violation of the constitutional rights he refers to given that there is nothing indicating that the appellant has "justifiable claim" that raises the issues under the Constitution of BiH and European Convention, and there is nothing noticeable that would represent an indication of the violation of the appellant's rights to a fair trial.

CONCLUSION

Taking into account the decisions of the Constitutional Court, one may say that normative arrangements in the field of execution of criminal sanctions in Bosnia and Herzegovina are mainly good. On the other hand, given the fact that Bosnia and Herzegovina is a signatory party to the Additional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment from 2002[25], it is necessary to secure full functioning of the bodies of

21 See, ECtHR, *Vanek versus Slovakia*, Judgment of 31 May 2005, Application No. 53363/99 and the Constitutional Court, Decision No. AP 156/05 of 18 May 2005.

22 See, ECtHR, *Mezőtúr-Tiszazugi Vízgazdálkodási Társulat versus Hungary,* Judgment of 26 July 2005, Application No. 5503/02.

23 See, European Court, *Pronina vs Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01.

24 See, Constitutional Court, decision no. U 29/02 of 27 June 2003, published in the "Official Gazette of BiH" no. 31/03.

25 Bosnia and Herzegovina ratified this Convention on 26 June 2008 and on 15 September 2008it entered into force in Bosnia and Herzegovina.

Bosnia and Herzegovina, which will maintain or represent national mechanisms for prevention from torture in all prison institutions in BiH and thus contribute to stricter application of the standards of human rights of detainees and prisoners. The cooperation between security agencies of BiH and correctional institutions in BiH should be regulated by law, in particular with regards to persons proclaimed to be a threat to national security and are currently serving the prison sentence, or their citizenship of BiH has been revoked – by limiting the conveniences outside the institution to such persons at the time of duration of the mentioned legal situations. Furthermore, one should think of whether it is justified to introduce legal arrangements of conditional release with regards to prison sentence up to two years, according to which a prisoner, after serving two thirds of the sentence, would be granted compulsory release, which implies fulfilment of the legal conditions under the criminal law. This kind of the arrangement would be in accordance with the Recommendation (2003) 22 of the Committee of Ministers issued to the members states on conditional release, which, only under specific circumstances, allows for application of the compulsory conditional release that is to be determined by law. Except for being an encouragement to the prisoners to display exemplary conduct and take part in the treatment, there is an opinion that this measure will, at the same time, have effect on the issue of "surplus prisoners in the prisons of BiH", which will amount to making a number of prison places available to the perpetrators sentenced to more than two years in prison. Furthermore, the idea of developing the policy on conditional release in BiH has been supported by the joint project of the Council of Europe and European Union titled "Efficient Prison Management in BiH".

REFERENCES

1. Atanacković, D. (1988). *Penologija*. Beograd: Naučna knjiga.
2. Čejović, B.M. (2002). *Krivično pravo - opšti dio*. Beograd: Službeni list SRJ.
3. Đorđević, M. i Đorđević, Đ. (2005). *Krivično pravo*. Beograd.
4. Đurđić, V. (2006). *Krivični postupak Srbije*. Niš.
5. Grubač, M. (2006). *Krivično procesno pravo*. Beograd: Union University, Faculty of Law.
6. Ignjatović Đ. (2006). *Pravo izvršenja krivičnih sankcija* (First edition), Beograd.
7. Ignjatović Đ. (2006). New arrangements under the Law on Execution of Criminal Sanctions and experiences achieved upon the latest application of the law. In "Nova rješenja u krivičnom zakonodavstvu i dosadašnja iskustva u njihovoj primjeni", Zlatibor.
8. Jovašević, D. (2000). *Komentar Zakona o izvršenju krivičnih sankcija sa pratećim propisima i sudskom praksom*. Beograd.
9. Jovašević, D. (2006) *Zakon o izvršenju krivičnih sankcija*. Beograd.
10. Jovašević, D. i Stevanović Z. (2007). *Osnovne karakteristike izvršnog krivičnog prava.* Beograd: Revija za kriminologiju i krivično pravo, (2).
11. Kupčević-Mlađenović, R. (1992). *Osnovi penologije*. Sarajevo: Svjetlost.
12. Marić, B. (2004). *Sistem izvršenja krivičnih sankcija u Republici Srbiji*. Beograd,
13. Milutinović, M. (1979/1988). *Penologija - nauka o izvršenju krivičnih sankcija i resocijalizaciji osuđenika*. Beograd: Savremena administracija
14. Novoselec, P. (2004). *Opšti dio krivičnog prava*. Zagreb.
15. Petrović, B. i Jovašević, D. (2006). *Izvršno krivično (kazneno) pravo*. Sarajevo.
16. Popović, J. (1969). *Sistem izvršenja kazni lišenja slobode*. Beograd.
17. Radoman, M. (2002). *Penologija*. Novi Sad.
18. Radulović, D. (2004). Krivično procesno pravo. Podgorica.
19. Soković, S. (2000). *Izvršenje krivičnih sankcija*. Beograd.
20. Stojanović, Z. (2001) *Krivično pravo - opšti dio*. Beograd: Službeni glasnik.
21. Špadijer-Džinić, J. (1973). *Zatvoreničko društvo*. Beograd: Institute of Criminological and Sociological Research.

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THE PARTICIPATION OF STAKEHOLDERS AND GENERAL PUBLIC IN THE LEGISLATION PROCESS (THE SITUATION IN THE REPUBLIC OF SERBIA AND A COMPARATIVE OVERVIEW)[1]

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Abstract: The paper focuses on the issue of participation of stakeholders and general public in the legislative process, bearing in mind the importance of consultations for the quality and transparency of this process and its end result. In connection wsith this, the paper presents an analysis of the legal framework and practices relating to the public debate in the legislative process.

In order to deal with the subject matter, the following issues have been addressed: the place of the public debates in the legislative process; the regulations covering this area; the relation between a public debate and methodological rules for drafting regulation; the relation between the public debate and e-government; institutions of importance for the public debate. The analysis of the situation in this area includes not only the Republic of Serbia, but also a number of other countries (Slovenia, Switzerland, and the United Kingdom).

Based on the analysis and the comparative practice in the relevant countries, recommendations have been defined for modification of the legal framework relating to the issue of participation of stakeholders and the public in the legislative process in the Republic of Serbia.

Keywords: the legislative process, draft, bill, the proponent of the law, public debate, public.

INTRODUCTION

The participation of stakeholders and the public has a significant influence on the quality of the legislative process in a democratic constitutional state.

In the process of passing laws and other general legal acts by the holders of the legislative and executive powers, it is necessary to undertake a number of activities which, in a way, represent certain stages of the said process. At the very beginning, there should be an idea, an initiative or a commitment to amend the existing regulation or to replace it by a new one. This is followed by the formulation of a working version of the draft. It can be made without any particular starting point, based either on an existing example among statutes in other countries or a previously drafted model offered by working groups or otherwise.

At this stage of the legislative process, the principle of transparency can be observed in different ways, which are certainly not prohibited but which are neither specifically regulated by law. Thus citizens, various associations, companies and all other interested parties can, at their own initiative or at the invitation of a public authority, open a debate on whether a missing statute should be adopted or whether an existing one should be abolished or amended.

In the absence of a firmer obligation based on the law, what is taken into account is the attitude of the public authority responsible for drafting future regulations, along with the reasons that lead to changes in the present conditions and the different situations for which it is possible and desirable to organise a public debate. Thus it is possible to undertake a public debate in the following cases:

1) regarding problems which are noticed in practice;

2) regarding the adoption or implementation of any plan documents (strategies, action plans);

3) regarding the implementation of any higher-ranking legal documents with which lower-ranking regulation are to be hierarchically aligned;

1 The paper has resulted from the research project entitled The Position and Role of Police in the Democratic State, realised by the Academy of Criminalistic and Police Studies in Belgrade 2012-2014.

4) regarding the adoption of the regulations that the public authority responsible for the preparation thereof has included in its annual work plan;

5) regarding the working version of a draft prepared by the working group prior to making the draft;

6) regarding the publication of the draft law;

7) regarding the harmonisation of Serbian legislation with EU law in some areas. [2]

The proposer of the statute has a significant influence on whether and at which stage of the legislative process a public debate will be organised. In the legal system of the Republic of Serbia, the authorised proposers can be the Government of Serbia, any member of parliament in the National Assembly of the Republic of Serbia, the Ombudsman (for matter within their jurisdiction), the Assembly of the AP of Vojvodina or 30,000 adult citizens of Serbia (popular initiative). There are no legal obstacles for any of these authorised proposers to organise a public debate before they propose the passing or amending of a law and the obligation to do so exists only in certain cases where the Government is the proposing party.

The paper focuses attention on the public debates preceding the bills being presented to the National Assembly by the Cabinet.

Before the draft law is made, there may - and in certain cases there must - be a public debate aimed at improving the working version and making the draft law. Working versions are published rarely, only in exceptional circumstances, when there is a need to have the opinion of certain authorities, experts or the general public. In the next phase, the draft becomes a bill, so that some other formal requirements should be met. The difference between the working version and the draft is that the draft is supported by an administrative authority (e.g. a ministry), which means that it is no longer just a text supported by the working group. The ministry presents the statute to the Government. The Government sets out a bill. The bill differs from the draft in that it is backed by a hierarchically superior authority. If a draft is to become a bill, in addition to political support, it is frequently necessary to obtain the opinion of other organs (e.g. the opinion of the Ministry of Finance concerning financial effects of a new regulation) or to make sure there is a rationale. The bill becomes a statute after having been adopted by the Assembly. In these two stages the text of the bill can be modified. In other words, it is possible to organise a public debate of a kind even during these two stages of the legislative process (between making the draft and defining the bill and between defining the bill and adopting the final formulation of the statute). This means that the public debates are part of a consultative process between the public and authorities in charge of preparing and passing regulations, regardless of the stage of the legislative process during which they take place. [3]

REGULATIONS PERTAINING TO PUBLIC DEBATES

The legal framework concerning the public debates in the preparation of laws is included in Article 77 of the Law on State Administration[4] which provides that a ministry "and a special organisation" shall be obliged to undertake a public debate when preparing a law which essentially changes the legal regime in any field or which provides for issues of particular relevance for public and that the "conduct of public debate in the preparation of a law shall be regulated in detail by the Rules of Procedure of the Government."

This provision is not sufficiently clear and precise and a number of questions may arise. In fact, the Act provides for the public debates only in cases where the statute is prepared by the state government authority and not by other authorised proposers. This deficiency results from the fact that provisions on the public debates are found it the statute that provides for the work of state government authorities and no other authorised proposers (the Ombudsman, the National Bank of Serbia, members of parliament, citizens who support a popular initiative). The public

2 For more detail, see: D. Milovanović, N. Nenadić, V. Todorić, „Studija o unapređenju zakonodavnog procesa u Republici Srbiji", Beograd, 2012, pp. 99-134.

3 For more detail, see: D. Milovanović, D. Vasiljević, „Unapređenje zakonodavnog procesa-sa osvrtom na pravo unutrašnjih poslova u Republici Srbiji", Pravni život, br.10/2013, godina LXII, knjiga 564, Beograd,2013, pp. 223-234.

4 Zakon o državnoj upravi, „Službeni glasnik RS", br.79/05; 101/07; 95/10.

debates are not required in the preparation of every statute, but only in some cases. The cases in which they are mandatory have not been precisely defined. In fact, there is no definition or a prescribed way in which to determine whether a statute substantially changes the legal regime in an area or whether the statute is to govern the issues of particular relevance for the public. Besides, the time and manner or manner of conducting the public debate have not been prescribed nor is there any instruction on how to deal with the results of the public debate (the received suggestions).

The Act envisages that conducting the public debate when preparing a new statute is more closely regulated by the Rules of Procedure of the Government. This solution opens up some dilemmas. It offers the possibility of the public debates to be completely regulated by the Rules of Procedure of the Government, but also a risk that such regulation may be designated as unconstitutional usurpation of legislative powers by the executive branch, especially if the right and obligations of the citizens, legal persons and other entities are arranged thereby.

Generally, an analysis of practical implementation of the relevant provisions of the Rules of Procedure of the Government[5], the following conclusions can be drawn:

1) The obligation to conduct a public debate is defined in a very general and imprecise way. There is no definition or a prescription concerning the way in which to establish is a statute significantly changes the legal regimen in any area or whether the statute provides for the issues of particular interest to the public.

2) Regardless of the fact that most regulations that are proposed meet at least one of the two general criteria for conducting a public debate, the percentage of cases in which the debates are organised is small.

3) Undertaking public debates, including the time and manner of performance, largely depend on the will of the subjects responsible for their organisation due to the imprecise and general legal provisions. This is why the public debate is often used as an instrument, selectively applied to a specific group of persons, and why it serves primarily as a justification for the proposed solutions. The debate is usually focused on the already formulated normative solution and it duration and the circle and number of participants may vary to a great extent.

4) Organisers of public debates rarely realise the programme of the public debates to the full extent, frequently on the grounds that there was not enough time. The public debates frequently boil down to placing a draft bill on the organiser's Internet page, opening a possibility for citizens to make comments or to organising a round table for participants by invitation.

5) One must not lose sight of the fact that the participation of stakeholders in the legislative process, alongside positive effects, may have some negative consequences – the imposition of particular interests. The public debates also imply such risks because the ones with highest stakes with respect to a certain regulation may be most active and try to represent it as the public interest. An even greater threat to the achievement of public interest is a covert influence of the stakeholders on the law-makers in the executive and legislative branches. This risk calls for legal regulations regarding the institute of lobbying.

6) Public participation is sometimes of insufficient quality or too broad, so this issue should be regulated so that all who wish should be given real possibility to send their suggestions and comments which will be as specific as possible in relation to the regulation which is being prepared. On the other hand, there is an impression that the confidence in the effectiveness of the public debate as a way to improve the contents of the documents which are to be adopted has been undermined.

The above mentioned Rules of the Procedure of the Government have been amended and extended with respect to the public debate so as to give more precise guidance on the criteria for mandatory public debates. Thus according to Article 41 of the Rules, the proposer is obliged to conduct a public debate when preparing a statute which significantly changes the regulation of an issue or when it deals with an issue of particular relevance for the public. The public debate can be conducted while preparing development strategies, regulations, and decisions.[6]

5 Poslovnik Vlade, „Službeni glasnik RS" br.52/10; 13/11.

6 It is deemed that the criteria relating to the obligation to undertake a public debate are met when preparing: a new system act; a new act, except when the competent committee decides otherwise when presented with the rationale by the proponent; an act on amending another act if it significantly changes provisions of the existing law, wherein the competent committee decides on the rationale by the proponent

The decision on whether to conduct a public debate is made by a competent committee, at the suggestion of the proponent, and the same applies to the decisions on the programme of the public debate and the time in which it is to be carried out. The public debate procedure starts by publishing a public invitation for participation in the public debate along with the programme[7] of the debate on the Internet page of the proponent and the portal of e-government. The public announcement contains information on the educational status and members of the working group that has prepared a draft or the proposed act subject to the public debate. The deadline for submission of initiatives, proposals, suggestions and comments in writing or electronically is at least 15 days from the date of the publication of the announcement. The public debate lasts at least 20 days.

If the proponent fails to conduct the public debate which he was obliged to do, the competent committee itself shall, upon considering the draft bill, determine the programme of the public debate and the time span within which it is conducted. If the proponent fails to perform the public debate in keeping with the programme defined by the competent committee, the committee will oblige them to conduct the public debate fully. The proponent is required to report on the conducted public debate on its web site and the e-government portal within 15 days from the completion of the public debate at the latest.

There are cases when the public debates related to the preparation of certain acts are governed by special regulations. An instance of this is the Regulation on the structure, methodology, and the manner of harmonizing development documents, the manner of conducting public debates, ways and deadlines for presenting the development documents for regional development to public insight, which was adopted in accordance with the Act on Regional Development.[8] This Regulation closely regulates the structure, methodology of producing, manner of harmonizing development documents, manner of conducting public debates, as well as terms and deadlines for presenting the development documents of regional development to the public. The provisions of this Regulation can, to a certain extent, help overcome the shortcomings of the legal framework for the implementation of the public debate in Serbia. In this context, the provisions which specify how long a public debate must last minimally and where it is to take place are of great benefit. Principles that are promoted in this regulation (partnership, information and transparency) are also useful. It is also a good solution that the documents for a public debate are to be published on the Internet within a specified period prior to the public debate. It is particularly important that this Regulation stipulates the obligation of the proposer of the act to consider/review the materials received in writing during the public debate and take positions regarding them.

Given the significance of the consultation process for the transparency and quality of the legislative process and its end result (regulations), in addition to other (organised) forms of participation of stakeholders, professional and general public, two institutions have been founded over the past few years in order to contribute to the above mentioned goals. These institutions are the Social-Economic Council and Office for Cooperation with Civil Society. [9]

The Social-Economic Council[10], within its jurisdiction, among other things, discusses the draft laws and regulations relevant to the economic and social status of employees and employers and gives an opinion on them. The opinion is submitted to the ministry responsible for a particular area which has prepared the draft law or any other regulation. The ministry is obliged to inform the Council on its views within 30 days of the receipt of the opinion. If the ministry does not accept the opinion, the Council may submit the opinion to the Cabinet.

about each specific case; the act on confirming an international treaty – only if the competent committee decides there should be a public debate when presented by a rationale by the Ministry of Foreign Affairs or the state administration body within whose jurisdiction the issues provided for in the international treaty fall.

7 The programme of the public debate must include: the draft or the bill subject to the public debate, along with a rationale and accompanying materials established by this Regulation; the deadline for conducting the public debate; important information concerning planned activities as part of the public debate (round tables, public discussions, the venues and time of these events, etc.); the manner in which suggestions, initiatives and comments are to be submitted, as well as other data relevant for the public debate.

8 Zakon o regionalnom razvoju, „Službeni glasnik RS“, br.51/09; 30/10.

9 For more detail, see: D. Milovanović, „Reforma javne uprave i analiza uticaja regulative“, Pravo i kulturne razlike, tom I, Pravni život, br.9/2006, Beograd 2006.

10 Zakon o socijalno-ekonomskom savetu, „Službeni glasnik RS“, br.125/04.

The role and importance of the Office is reflected in coordinating cooperation between the government institutions and civil society organisations in the process of creating and establishing clear standards and procedures for the involvement of the organisations of civil society at all levels of the decision-making process. In keeping with its mandate, the role of the Office in the processes of defining and implementing law is to provide mechanisms of cooperation that would allow the organisations of the civil society access to information from the bodies of state administration concerning laws and other regulations which are being prepared, as well as to allow the organisations of the civil society to submit their proposals and suggestions regarding the statues and regulations which are in the process of being developed.[11]

COMPARATIVE PRACTICE

Slovenia

There are numerous regulations and political documents in Slovenia which oblige the state administration to involve the public in passing laws and other legal acts. This makes a very good regulatory framework for public consultation on the draft legislation. [12] The public should be allowed continued participation, preferably through and information system, which contains the program of the Government on the preparation of draft legislation and texts in different stages of development and adoption.[13]

When involving the public, the following principles are to be observed:

- timeliness – the public (professional, interested or targeted public) is to be promptly informed and given reasonable time to take part (review of materials, preparation of proposals, suggestions and opinions);
- openness – enable the submission of comments, suggestions and opinions in an early stage of the preparation process;
- accessibility – to enable the accessibility of materials used in the preparation of decisions;
- response – to inform participants about the reasons for adopting or non-adopting of their comments, suggestions and opinion;
- transparency – to ensure the transparency of the procedure by making public the contents of regulations, levels and manners of decision-making, ways and deadlines for participation, as well as comments, suggestions, and opinions of all participants;
- monitoring – to ensure the transparency of the receipt and approval of comments and opinion, as well as the materials created in the process of participation, as well as their availability.

The documents also define the minimal recommendations which are to be observed in the legislative process:

- invitation for participation should be published in such a way that the public should be informed as generally as possible in order to ensure the participation of target groups and experts;
- the participation of the public in the preparation of regulations should last, as a rule, between 30 and 60 days, exceptions being draft regulations with which participation is not possible due to their nature,
- upon the completion of the process of participation of stakeholders and the public a report should on the participation should be made, depicting the influence of the solutions contained in the draft regulation.

The Rules on the Procedure of the Government elaborates on the public participation in the preparation of regulations. Cooperation with the public takes two forms: information and cooperation. The difference is in the purpose and results of the cooperation.

Notification implies the possibility to introduce the bills or new regulations to the public.

11 For more detail, see: D. Vasiljević, D.Milovanović, *A contribution to the question of professional development of civil servants in the Republic of Serbia*, Međunarodni naučni skup „Dani Arčibalda Rajsa“, Tematski zbornik radova međunarodnog značaja, Kriminalističko-policijska akademija, Beograd, 2013, pp. 43-54.

12 See: Zakon o intregritetu i sprečavanju korupcije – „Službeni list Republike Slovenije“, br. 69/11 – službeni pečišćen tekst.

13 See: Uredba o Pravno-informacionom sistemu, „Službeni list Republike Slovenije“, br. 65/06 i 95/11, http://www.pisps.si.

The public is informed about the regulations which are applied on the website of the Ministry of Justice and Public Administration, where the e-democracy portal has been established in order to allow the public to monitor the process of preparing legislation in all fields in one place. Individual government departments use their internet pages to notify the public of the regulation in the process of preparation.[14]

Cooperation implies public contribution to/in the process of creating regulation. It begins at an early stage where it helps identify problems and solutions, and in the process of adoption, it contributes to more specific suggestions.

Slovenia has established a specialised information system for monitoring the preparation of regulations (IT support for the legislative procedure), which follows each regulation from the moment it is entered in the programme of the Government, i.e. from the beginning of preparation, to its adoption and publication in the Official Gazette.

The relevant legislation in the Republic of Slovenia sets a good example of observing the public debates in the broader context of civil rights, such as the right to access to information, as well as in the context of using the Internet to provide greater transparency of the work of state authorities. The solutions contained therein can be useful as guidelines for improvements regarding this issue in the Republic of Serbia. [15]

Switzerland

Swiss law provides that at the federal levels every draft act that has is of particular significance should be submitted to the cantons, interested parties in the Parliament, union of municipalities, cities and mountain regions, economic associations, as well as other stakeholders, depending on what a statute applies to. Subjects that are not invited to join this consultation process may contribute to the debate by submitting comments and suggestions. The text of the draft shall be finalized only after the receipt of responses in the consultation process and their consideration. Parliament is informed not only about the suggestions that are adopted after having been discussed, but also about the suggestions that have not been accepted, giving reasons why they have not been accepted, and only then a decision is made whether a statue will be adopted or not.

The example of Switzerland is instructive for Serbia in as much as it envisages that the members of parliament in the Federal Assembly are, as a rule, acquainted with all suggestions given during the public debate. Thanks to this, if the executive authorities fail to take some good-quality suggestions into consideration during the preparation of the bill, there are increased chances that such suggestions will be adopted during the parliamentary procedure, based on the amendments of MPs.[16]

The United Kingdom

In the UK, there is a government-adopted Code of Practice on Consultations, which provides that consultations should be scheduled as early as possible when the Government is ready to offer to the public sufficient information so as to enable an effective and informed dialogue. The Code also provides for a minimum consultation period of twelve weeks, as well as for some other criteria, such as an appeal on officials to be responsible for maintaining effective consultations and to send relevant documents to as many addresses as possible. The Government decides on which issues to organise consultations depending on the circumstances of each particular case.[17] Regardless of whether it is required to do so or not, the Cabinet regularly conducts formal public consultations with stakeholders such as professional associations, voluntary organisations, pressure groups, etc. [18]

14 The obligation to publish a draft act on the Internet page of the government department is also provided for by the Law on Free Access to Information of Public Importance of 2003, and a new provision rules that all crucial documents explaining the reasons for adopting a regulation must also be published.

15 For more detail, see: D. Milovanović, J. Ničić, M. Davinić, „Stručno usavršavanje državnih službenika u Republici Srbiji“, Beograd, 2012, pp.155-180.

16 For more detail, see: D.Milovanović, N.Nenadić, V.Todorić, „Studija o unapređenju zakonodavnog procesa u Republici Srbiji“, Beograd 2012, pp. 130.

17 http://www.bis.gov.uk /files/file 47158.pdf

18 The following links can be useful links for detailed information on the legislation and practice in the

The UK practice can be of interest for Serbia in terms of the publication of documents announcing intentions of the Cabinet to propose a certain bill, offering relevant data on a legislative project before the outset of drafting, as well as publishing various legislative options which may be subject to further discussion. [19]

CONCLUSION

The paper offers an analysis of the legal framework and practice in relation to public debates in the legislative process, bearing in mind the importance of consultation for the quality and transparency of the said process and its end result. [20]

Based on the analysis and comparative practice of a number of relevant countries, it is possible to define some recommendations for changes to the legal framework pertaining to public debates in the Republic of Serbia. The most important ones include the following:

The institutionalisation of the public debate in the legal system;

Defining criteria for selecting and inviting participants in the public debate;

More specific criteria for conducting some forms of debate with the participation of the public representatives within Parliament (public hearings);

Based on the existing legal framework improvements should be introduced in practice in order to ensure the essential participation of stakeholders, professional and general public in the legislative process. In this way, acts would have increased legitimacy, better solutions would be adopted and their implementation would be facilitated.

During the legislative process, numerous complex relations between state authorities/bodies and other subjects are established.[21] The scope and type of relations and coordination between participants depend on the model of the system in power, status, role and jurisdiction of any specific body, the degree of (de)centralisation, as well as the stage of the legislative process. The quality of this process, and thus the statute itself, depends to a large extent on the way in which inter-institutional relations and coordination are legally regulated. Specifically, the issues of whether the adopted solutions will be realistic and feasible in practice and whether there will be harmony within the legal system largely depend on the selected model of horizontal and vertical inter-institutional cooperation within the state, that is, the public sector. In all of this, public debates must have their rightful place. [22]

REFERENCES

Books and papers

1. Kavran D., Javna uprava, Beograd, 2003.
2. Milovanović D., „Uklanjanje i pojednostavljenje propisa kao deo regulatorne reforme“, Pravo i međunarodne integracije, tom II, Pravni život, br.10/2008. Beograd, 2008.
3. Milovanović D., „Regulatorna reforma i stručno usavršavanje u javnoj upravi“, Pravni život, br. 10. Beograd, 2010.
4. Milovanović D., Nenadić N., Todorić V., „Studija o unapređenju zakonodavnog procesa u Republici Srbiji“, Beograd, 2012.
5. Milovanović D., Vasiljević D., „Unapređenje zakonodavnog procesa-sa osvrtom na pravo unutrašnjih poslova u Republici Srbiji“, Pravni život, br.10/2013, godina LXII, knjiga 564, Beograd, 2013.
6. Milovanović D., Ničić J., Davinić M., „Stručno usavršavanje državnih službenika u

UK: www.parliament.uk/about/how/laws; the website dedicated to the preparation of laws: www.direct.gov.uk/en/governmentcitizensandrights/ukgovernment/parliament/06-073671; the section of the Cabinet website focusing on consultations: http://www.cabinetoffise.gov.uk/content/cabinet-office-consultations.

19 For more detail, see: D. Protić, „Izazovi unapređenja kvaliteta nacionalnog zakonodavstva“, Izazovi evropskih integracija, br.3/2009.

20 For more detail, see: D. Milovanović, „Uklanjanje i pojednostavljenje propisa kao deo regulatorne reforme“, Pravo i međunarodne integracije, tom II, Pravni život, br.10/2008. Beograd, 2008.

21 For more detail, see: D.Kavran, Javna uprava, Beograd, 2003.

22 For more detail, see: D.Milovanović, „Regulatorna reforma i stručno usavršavanje u javnoj upravi“, Pravni život, br. 10. Beograd, 2010. pp. 245-261.

Republici Srbiji“, Beograd, 2012.
7. Milovanović D., „Reforma javne uprave i analiza uticaja regulative“, Pravo i kulturne razlike, tom I, Pravni život, br.9/2006, Beograd, 2006.
8. Protić D., „Izazovi unapređenja kvaliteta nacionalnog zakonodavstva“, Izazovi evropskih integracija, br.3/2009.
9. Vasiljević D., Milovanović D., *A contribution to the question of professional development of civil servants in the Republic of Serbia*, Međunarodni naučni skup „Dani Arčibalda Rajsa“, Tematski zbornik radova međunarodnog značaja, Kriminalističko-policijska akademija, Beograd, 2013.

Legislation

10. Zakon o državnoj upravi, „Službeni glasnik RS“, br.79/05; 101/07; 95/10.
11. Zakon o regionalnom razvoju, „Službeni glasnik RS“, br.51/09; 30/10.
12. Zakon o socijalno-ekonomskom savetu, „Službeni glasnik RS“, br.125/04.
13. Zakon o intregritetu i sprečavanju korupcije – „Službeni list Republike Slovenije“, br. 69/11 – službeni pečišćen tekst.
14. Uredba o Pravno-informacionom sistemu, „Službeni list Republike Slovenije“, br. 65/06 i 95/11, http://www.pisps.si.
15. Poslovnik Vlade, „Službeni glasnik RS“ br.52/10; 13/11.

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THE CHARACTERISTICS AND METHODS FOR PREVENTION OF CORRUPTION IN THE REPUBLIC OF MACEDONIA

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Abstract: The article analyzes the research results of the attitudes of citizens of the Republic of Macedonia about corruption, conducted on the state territory on a specimen of 1210 respondents. Specifically, the results show that most commonly used form of corruption is the bribery, followed by the triad of giving, receiving bribery and abuse of power with 13.7%. On the question which are the most pervasive forms of corruption, ratings range from 8,30 for bribery to the lowest 3,94 for abuse of power. Ratings of respondents on the question who receives bribe show that with highest rating, negative of course, with an average score of 8,30 is the court, followed by mayors with score of 7,53, then the administering authority (ministries) with a score of 7,53, the executive authority (Government) with a score of 7,46 and the Ministry of Interior with a score of 7,12.

Also subject of the analysis is and the prevention of corruption issues. In doing so it is estimated that an important role is played by the competent authorities and institutions. Citizens evaluate the obligation of state institutions to prevent corruption with a score of 4,76. Then comes the rating of 4.73 for detection, especially for reporting corruptive acts from citizens whose identity known. A high score of 4.65 is given for the method of detecting corruption by inspection of the governing bodies, and as regards of the measure, especially rated are the tactical-operational measures and investigative actions by law enforcement authorities, with a score of 4,54.

Keywords: corruption, state, suppression of corruption, prevention of corruption, transition and corruption.

INTRODUCTION

Why is the issue of corruption actualized? The answer to this question is multilayered[1*]. Dealing with the problem of corruption is guided by the necessity to see what are citizens perceptions about the degree of corruption and its suppression, as well as the loud EU referrals for dealing with the corruption. In this sense, the interest of the countries in transition for efficient prevention, detection and suppression of corruption is important. It is not an isolated phenomenon, or only their characteristic. Every day in the world is published information for international corruption scandals, involvement of politicians, leaders of the executive and administrative functions of highest ranking in individual countries. The fight against organized crime and corruption recently has been placed high on the agenda of Member States of the European Union, where R. Macedonia aspires to be a member.

The campaign for tackling corruption is increasingly present in the activities of international organizations such as the UN, Council of Europe, The Organization for European Cooperation and Development, the World Bank and European Bank for Reconstruction and Development.

When we add to this and the new challenges of privatization, illegal enrichment, denationalization, direct looting of public funds, it displays the bigger and clearer image of the unstable transitional societies[2]. Reduced efficiency of the institutions to detect, prosecute

1 * In this work are presented the results of the research "Citizens opinion about the corruption in Republic of Macedonia" at the Faculty of Security in Skopje - conducted from 8th to 18th January 2013 by the research team of Cane Mojanoski, Ph.D., Marina Malis Sazdovska, Ph.D., Marjan Nikolovski, Ph.D., and Katerina Krstevska, Ph.D.

2 In Republic of Macedonia are conducted other researches about corruption in the country. For example, the Coalition All for Fair Trials implemented research for judicial cases related to corruption in the country, and obtained relevant data regarding the crimes of corruption in the country. In addition to the type of crimes that are committed in the country the data are following: abuse of authority and authorization represented 74% of all crimes in the country, receiving bribe 4%, fraud 13% etc. The results of our study

and punish the corruption can be added to this and then, the phenomenon of corruption and its total circulation is not something surprising. In addition, in the society is created an impression that corruption is important – it is not fashion hit because it is dangerous – it is an indicator that someone is "successful" and has the ability to "to take the advantages". For this situation Durkheim says that experiencing such a period when "crime is normal because a society that is free from crime is not possible ... because in a particular society to stop performing actions that are deemed criminal, they will need to become, feelings that offend us ... it is needed the community to feel them more alive. But if this feeling becomes so strong ... violations will be subject to a strong conviction that will contribute some of them from simple moral mistakes to become crimes"[3]. Having no idea to get into the debate about the causes of corruption can be concluded that it has devastating consequences, and it is the erosion of trust in institutions[4].

Research Method

In the research the following methods are applied: analytical-synthetic, comparative, statistical and dogmatic method. For the purposes of the survey are created: **The basis for conversation:** "The opinion of citizens about corruption" and written questionnaire: The Corruption in R. Macedonia. Integral part of the toolkit is: The Polling Diary, Analytical table for data processing, The Code of Passwords and The Guideline on the application of the Basis for conversation and ensuring correspondent.

The basis for conversation is aimed at examining the attitudes of citizens and **The Written Questionnaire** was distributed to the employees in the institutions that deal more directly (or interact) with corruption (Ministry of Interior, Customs Administration, Courts, Public Prosecution, media and nongovernmental organizations).

The basis for conversation and The Written Questionnaire are designed specifically for this research in the form of socio-demographic survey, designed and structured in the form of a questionnaire, which included demographic characteristics of respondents and a certain number of "batteries" questions through which is made the ranking of certain manifestations of corruption or is determined the extent of corruption.

We can say that the method of data collecting is conducted by using a structured interview. Let us recall. When it comes to the **structured interview**, in fact, all candidates are asked the same questions, formulated according to the specific situation. Structured interview strives to create as more objective terms as possible: all candidates are evaluated according to the same criteria and all are given equal time for presenting.

The form of the issues is basically closed and consists of constructing the scales of the degree of corruption, for example, the selection of variations for the issues related to lack of knowledge, experiences related to corruption or the presentation of forms to fight against corruption.

In the instruments were embedded evaluation scales (from 1 to 10 or 1 to 12), about the degree of corruption in certain professions or institutions and were offered forms for ranking the forms through which corruption is usually manifested.

A code of passwords was developed for data processing and a model for computer processing in the Excel software package. Data processing (encrypting and inserting into digital machine - the computer) was task of the students at the Faculty of Security. The processing and the statistical calculations of the conducted research is in the SPSS statistical software package.

The research took place at a time when in the society was debating more emphatically about the happenings in the Parliament concerning the budget adoption and the clear difference in the attitudes of the political parties participants in political life.

suggest that the abuse of position and powers is the most common form of corruption with 33%, which compared to the previous survey where the percentage is 74% is dramatically lower. Furthermore, 28.5% of the respondents think that receiving bribery is the most common form of corruption, but according the research conducted by the Coalition that accounted for only 4%. See: Monitoring Program of court cases related to corruption in the country, Coalition All for Fair Trials, Skopje, 2008, p.20

3 Emil Dirkem: *O normalnosti zločina*, Talcot Parsons & all.: *Teorije o društvu*; Vuk Karadžić, Beograd, 1969, p. 827; J.Kregar, Deformation of Organizational Principles; D.V.Trang, Corruption and Democracy, D.v.Trang (ed), COLPI, Budimpešta, 1994, p.47-61

4 Josip Kregar: *Korupcija u pravosuđu*; p. 2-3; See: *www.pravo.hr/_download/repository/korupcijasudstvo.cg.doc [26.04.2011]*

Sample-respondents

It is essential to avoid bias when determining the sample. It is provided through the use of randomness in the selection. When we use the term "coincidence", mainly, we have on mind that it is a carefully planned activity, and in the statistical mass is given equal opportunity to every unit to be elected.

In the research is used a multiple stages sample. The multiple stages sample is type of stratification sample. It is applied when the population is large, and to make a research we do not have much time and money. For example, we want to determine citizen's opinion about particular action of the police. We choose a few places at random, than a number of inhabited units in them, and the interlocutors will be chosen randomly.

In the applied researches undertaken at universities, prisons, organized communities (police station, unit, department) less attention is paid to the problem of the sample which is understandable, given that this research, in particular the small and of action (in the action studies we talk about participants in the survey, rather than samples in the research), whose aim is primarily not to lay down the laws and legalities in safety and asphaliology (they usually are the result of the fundamental researches), but to make them applicable in practice. There are many problems in the realization depending on the environment in which it is conducted (new models of learning at the faculties, new instructional settings etc., in prison environments new rules and order within the institution, new models of problem-solving in the administrative bodies) which first should be checked (monitored and studied) on small number of participants, to a limited number of procedures and at a limited content etc., prior to be "extended" to all participants, curricula, variables and procedures that apply such research[5].

The sample of institutions (specific focus groups) was constructed in a way that included the number of holders of the professional obligations of the employees in the Ministry of Interior in the Organized Crime Department*), the Customs Administration - employees who are directly involved to prevent the corruption, prosecution - the people who deal with the fight against corruption and Primary Court Skopje II.

Respondents were chosen in a way that firstly was formed a core in each municipality, city or rural township. In each core was carried out visit to every 5-th household in the individual habitats, and in every 20-th household in collective dwellings. If on the day of the visit nobody is present or the respondent refuses to cooperate, subject of interest is the next dwelling. Guidelines are a fixed term, thus, in a case anybody refuses, the next choice is the 5-th dwelling.

The selection of respondents is made on the principle the most recent birthday of a family member. A structured interview is applied (face to face).

The regional structure of the respondents indicates that it is basically accomplished in 7 of the 8 plan regions of the R. Macedonia. The number of respondents was slightly lower in the Southwest Region because in the implementation the team met with the inability to hire sufficient number of contributors, but also because some contributors, particularly from Kicevo and Debar, did not complete the fieldwork, which objectively reduced the specificities of the territorial distribution. From regional point of view, the distribution of the respondents is as follows:

Table N. 1 Distribution of the respondents by Macedonia's planning regions

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Skopje plan region	248	20,5	20,5	20,5
	Pelagonia plan region	168	13,9	13,9	34,4
	Northeast plan region	190	15,7	15,7	50,1
	Polog plan region	102	8,4	8,4	58,5
	Vardar plan region	127	10,5	10,5	69,0
	East plan region	154	12,7	12,7	81,7
	Southeast plan region	165	13,6	13,6	95,4
	Southwest plan region	56	4,6	4,6	100,0
	Total	**1210**	**100,0**	**100,0**	

5 Цане Т. Мојаноски: *Методологија на безбедносните науки – аналитички постпки*; Книга III, Скопје, 2013; p.254-264;

According to the type of the neighborhood 943 or 77,9% live in a city and 267 or 22,1% live in a village.

Regarding the gender, the study provided relatively high presence of men and women respondents.

Graph N. 1 Respondents by gender

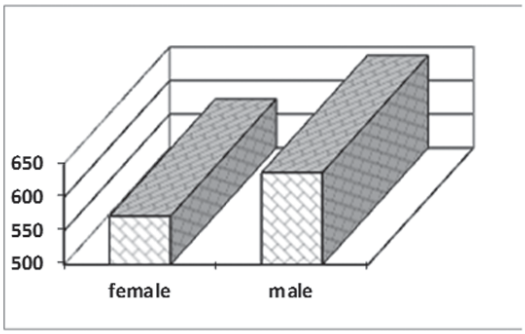

Table N. 2 Respondents by age

		f	%
Valid	up to 20 years	85	7,0
	from 21 to 30 years	349	28,8
	from 31 to 40 years	215	17,8
	from 41 to 50 years	291	24,0
	from 51 to 60 years	177	14,6
	from 61 to 70 years	75	6,2
	from 71 to 80 years	18	1,5
	Total	**1210**	**100,0**

Results and discussion

In the survey are covered respondents aged between 18-78 years old. research corruption is observed as a negative social phenomenon. It can be said that it occurred when the state emerged as an institution. Corruption is present from ancient times onwards. Corruption as a socially negative phenomenon was defined even in the Roman law (Lex Julija Reputandae). The crime of corruption is defined as giving, receiving or claim benefits intended to influence the officer regarding his work. Aristotle, Machiavelli and Montesquieu concluded that corruption is a sign of moral values decay in the society. Therefore, corruption is considered immoral and harmful phenomenon in the society because holders of social functions must advocate common, not their own, private interests. Corruption in the modern developed state is not understood only as moral damages, but also as a reason for the inefficiency of the state. The most important forms of corruption are giving and receiving bribery, nepotism - abuse of power (position) for private purposes. Those values - especially the success at any cost - acted as an incentive to spread corrupt practices. The term corruption in this sense means rottenness, blackmail, perversion, inclined to corruption, exploitation of the officers, moral rottenness[6].

In this part of the analysis we will focus on battery questions that checked, what is knowledge and from which sources citizens mostly find out about corruption and corruptive content in the society. Therefore, retain to the distribution of the question: “In my opinion corruption is:”, and the respondent can choose more than one answer.

6 The data also show that there is some resistance to bribery and Macedonian citizens do not always approve of bribery in order to facilitate or accelerate certain administrative procedures: appropriately on every two citizens who pay bribery there is one that refuses to do so by request of the public official. On the other hand, only an insignificant number of persons who give bribery (less than 1%) report their experience to the authorities. There are numerous reasons for this: some people do not consider the actual bribery to be criminal act, in part because there is a sense that bribery is simply common practice (13%) and also when appreciation for services rendered is expressed, it is actually perceived as positive practice (13%). Citizens do not report bribery because it can be beneficial for both parties involved (17%), and because they believe that reporting is a vain attempt because nothing will be undertaken by the authorities and nobody worries (38%). See: Corruption in R. Macedonia, State Statistical Office, UNDOC, 2011, p.4;

Table N.3 *In my opinion corruption is*:

(Multiple answers available)

	f	%	*Cumulative %*
(1) Giving bribery	66	5,5	5,5
(2) Receiving bribery	156	12,9	18,3
(3) Abuse of authority	165	13,6	32,0
(4) Illegal mediation	67	5,5	37,5
(5) Other	4	,3	37,9
(1 and 2) Giving and receiving bribery	220	18,2	56,0
(1 and 3) Giving bribery and abuse of authority	8	,7	56,7
(1 and 4) Giving bribery and illegal mediation	2	,2	56,9
(2 and 3) Receiving bribery and abuse of authority	53	4,4	61,2
(2 and 4) Receiving bribery and illegal mediation	6	,5	61,7
(3 and 4) Abuse of authority and illegal mediation	17	1,4	63,1
(4 and 5) Illegal mediation and и other	1	,1	63,2
(1,2 and 3) Giving and receiving bribery and abuse of authority	166	13,7	76,9
(1,2 and 4) Giving and receiving bribery and illegal mediation	34	2,8	79,8
(1,2 and 5) Giving and receiving bribery and other	1	,1	79,8
(1,3 and 4) Giving bribery, abuse of authority and illegal mediation	3	,2	80,1
(2,3 and 4) Receiving bribery, abuse of authority and illegal mediation	13	1,1	81,2
(3,4 and 5) Abuse of authority, illegal mediation and other	1	,1	81,2
(1,2,3 and 4) Together	227	18,8	100,0
Total	**1210**	**100,0**	

The results suggest that in the perceptions of citizens of R. Macedonia, dominates consciousness and conviction that all of the presented are forms of corruption, but giving and receiving bribery is the most frequent form of corruption, followed by the triad giving, receiving bribery and abuse of authority with 13,7%, and when it will be added to this that 13,6 % believe that corruption is abuse of authority, then can be said with certainty that among the respondents in R. Macedonia at the beginning of 2013, dominated awareness that abuse of authority is most spread and is the source of corruption and corruptive behaviors. It is an indicator that certain forms and instruments of control are absent or that legal mechanisms insufficiently fulfill their control function. Namely, the performing of authority or the execution of certain administrative assignments is experienced and practiced as a personal property. Answer to this attitude may be found and in the legacy associated with understanding of authority and its execution.

What are the attitudes of the respondents according their education? That is, whether the level of education affects lower exposure to the risk to give bribe. The results are as follows:

Table N.4 Have you ever been in a situation (or do you have personal experience) in which you have been exposed to the risk of corruption (TO GIVE A BRIBERY)? – ranking according to the professional education

		P.III.12 III.12. Have you ever been in a situation (or do you have personal experience) in which you have been exposed to the risk of corruption (TO GIVE A BRIBERY)? (Circle one response)							
		1 (1) Yes		2 (2) No		3 (3) I do not want to declare		Total	
		f	*%*	*f*	*%*	*f*	*%*	*f*	*%*
P.I.5 5. Professional education:	1 No education	4	1,13	3	0,45	1	0,57	8	0,67
	2 Elementary school	27	7,61	54	8,05	27	15,43	108	8,99
	3 Middle high school	16	4,51	32	4,77	11	6,29	59	4,91
	4 High school	194	54,65	346	51,56	88	50,29	628	52,29
	5 College (five semesters)	28	7,89	51	7,60	7	4,00	86	7,16
	6 Bachelor's Degree	73	20,56	166	24,74	33	18,86	272	22,65
	7 Master of Science	13	3,66	18	2,68	8	4,57	39	3,25
	8 Ph.D.	0	0,00	1	0,15	0	0,00	1	0,08
Total		**355**	**100,0**	**671**	**100,00**	**175**	**100,0**	**1201**	**100,00**

The overview suggests that according to the level of education most exposed to risk of bribery were the respondents with high school education 54,65%, followed by those with Bachelor's degree with 20,56%, and then follow the other groups. If we ask whether the exposure to the risk to give bribery is in relation with the level of education, then we can calculate the χ^2 ratio, i.e. it is a synthetic indicator of whether there is a relation between these two variables.

Chi-Square Tests

	Value	*df*	*Asymp. Sig. (2-sided)*
Pearson Chi-Square	**21,076[a]**	**14**	**,100**
Likelihood Ratio	20,330	14	,120
Linear-by-Linear Association	1,448	1	,229
N of Valid Cases	1201		

a. 6 cells (25,0%) have expected count less than 5. The minimum expected count is ,15.

If we look at results of The table **Chi-Square Tests**, will be concluded that, **Pearson Chi-Square** equals 21,076[a], and that the p value (Sig.0,1) is higher than 0,05, i.e. from 0,001. If we look in the theoretical distribution χ^2, distribution for 14 degrees of freedom and safety interval

of 0,05 will determine that it is 23,6848 and for the safety interval of 0,01 this value is 29,1413. We can conclude that there is no difference in the proportions of the respondent's level of education and that it does not affect whether the respondent was or was not exposed to the risk to give bribery.

Symmetric Measures

		Value	Approx. Sig.
Nominal by Nominal	Phi	,132	,100
	Cramer's V	,094	,100
	Contingency Coefficient	,131	,100
N of Valid Cases		1201	

Testing the significance of the χ^2 test is checked by Cramer's V coefficient which amounts to 0,094. The significance is checked and through the value of the coefficient of contingency - Contingency Coefficient (Ck = 0,131). This value of 13,09 % indicates that the intensity of the relation between the two variables is low, and that the strength of the relation is not very significant. Therefore we can infer that there is no correlation between the level of education and the possibility of exposure to the risk of corruption, or to the risk to give bribery, and this relation is not particularly strong and significant. It means that both, and the educated and the uneducated are at risk of bribery to complete an obligation.

The issue that will vary on whether there are differences in the exposure of respondents men and respondents women to the corruption risk to give bribery? If we look at the UNDOC research results, corruption is not unknown to women in R. Macedonia, but they have approached it in a little different manner than their male counterparts. For them it is more likely that they would give bribe in the form of food and drinks, while men more frequently give money. Bribery in the form of money represents nearly half (45%) "of all known forms of bribery" in this research, "although this type of corruption is significant a bit, the sums paid are far from trivial: the average bribery paid is 28,813, or approximately 470 EUR"[7].

The 2013 research results have certain characteristics. So, if we look at the distribution of men and women respondents and their responses to the question, then we can conclude that the 131 examinees or 36,69 % responded positively that they were exposed at risk to give bribery. And 226 or 63,31 % of the men respondents responded positively. The distribution illustrates that men unlike women, are significantly more exposed at the risk to give bribery. The explanation can be directed towards the position that men usually are in a situation to resolve issues related to institutions and services.

Review N.1 *Ranking by region - respondent's exposure to give bribery*

(1 highest 8 lowest)

Rank	In cash	Money on account	Donation	Services of different nature	Other	Total
1	Skopje	Skopje	Eastern	Skopje	Northeastern	Northeastern
2	Northeastern	Vardar	Vardar	Northeastern	Southeastern	Skopje
3	Southeastern	Pelagonian	Southeastern	Vardar	Skopje	Southeastern
4	Pelagonian	Northeastern	Skopje	Eastern	Vardar	Vardar
5	Polog	Southeastern	Southwestern	Pelagonian	Polog	Pelagonian
6	Eastern	Eastern	Polog	Southeastern	Eastern	Eastern
7	Vardar	Southwestern	Northeastern	Polog	Pelagonian	Polog
8	Southwestern	Polog	Pelagonian	Southwestern	Southwestern	Southwestern

7 See: Corruption in R. Macedonia, State Statistical Office , UNDOC,... p. 3-4;

The distribution of the risk exposure shows that respondents from Skopje region in three forms are on the first place (money in cash, money on account and services of different nature), followed by East region in giving bribery - donation and Northeast region to the answer "other". The second on the rank is Northeast region in two forms (money in cash and services of different nature) and Vardar region in two forms (money on account and donation)[8]. In the overall ranking leads the Northeast region, followed by Skopje region and third on the rank is the Southeast Region. The regional distribution shows that there is a relation between the intensity of the link and the form of the bribery[9].

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	89,912[a]	28	,000
Likelihood Ratio	85,906	28	,000
Linear-by-Linear Association	,076	1	,783
N of Valid Cases	466		

a. 13 cells (32,5%) have expected count less than 5. The minimum expected count is ,74.

From the data in the Table **Chi-Square Tests**, we can conclude that the value of χ^2 (Pearson Chi-Square) is 89,912[a]. To determine the value of this indicator we will look at the theoretical distribution of the degree of freedom of 0,05 and 0,01. Although we can make conclusion on the basis of the value of p (Sig. = 0,0001). It is less than 0,05 which leads to the conclusion that we can accept the position that between these two variables, there is a certain relation. At this point and the theoretical values about the distribution of the degree of freedom of 28 and safety interval of 0,05 it is 41,3372 and for the confidence interval of 0,01 amounts 48,2782. Empirical value of χ^2 test in both cases is higher than the value that is sufficient to accept the previously mentioned statement. Moreover, what is the impact and whether is it important. An indicator which indicates the strength of the relation is the coefficient of contingency. In this case it amounts to (Ck = 0,4022) 40,22%, i.e. it can be concluded that there is moderate intensity relation between the two defined variables.

From that aspect is particularly interesting and the distribution of institutions and activities that are mostly corrupted. (See Table N.5):

8 The use of such services may be subject to examination in doctoral thesis, obtaining a new passport or driver's license and according to the results of this survey a significant part of the services are questionable. Although there is considerable variation between regions in R. Macedonia, on average, 10.8% of the population aged 18 to 64 were exposed - directly or through a member of their household - with experience on bribery of a public official in the last 12 months before the Survey. When we focus on direct bribery experience, the percentage amounts to 6,2% of those citizens who have had contact with public administration for the same time period, and of those who gave bribery at least once they did it every 2 months. The highest prevalence on bribery is observed in the Southeast, Vardar and Skopje regions, while in other regions it is below the national average. Ibidem... p.4;

9 Necessity to reduce waiting time and get better treatment probably explains why the physicians are public servants who mostly receive bribery in R. Macedonia. More than half (58%) paid bribery to physicians, more than a third to police officers (35%), while 17% to the cadastral officers and the same percentage to professors. The latter is mainly paid for getting better grades and test scores. Ibidem... p.5;

Table N.5: Evaluate the level of corruption:

(citizens)

	Evaluated:	Grade:
1.	Customs and the customs officials	8,18
2.	Political leaders	8,06
3.	Political parties	8,04
4.	Judges	7,97
5.	Holders of state (administrative) functions	7,88
6.	Inspection authorities	7,60
7.	State employees	7,59
8.	Public prosecutors	7,27
9.	Physicians and health professionals	7,23
10.	University professors	7,12
11.	Policemen and police officers	7,02
12.	Sale of the state land	6,96
13.	In everyday situations of the citizens	6,60
14.	Denationalization authorities	6,53
15.	Journalists	5,96
16.	Private entrepreneurs	5,60
17.	Nongovernmental organizations	5,16

(expert audience)

	Evaluated:	Grade:
1.	Judges	7,35
2.	Political parties	6,97
3.	Physicians and health professionals	6,76
4.	Political leaders	6,54
5	Holders of state (administrative) functions	6,53
6.	Inspection authorities	6,49
7.	Journalists	6,46
8.	Public prosecutors	6,38
9.	Sale of the state land	6,29
10.	University professors	6,26
11.	Denationalization authorities	6,13
12.	In everyday situations of the citizens	5,95
13.	Customs and the customs officials	5,80
14.	Nongovernmental organizations	5,74
15.	Private entrepreneurs	5,56
16.	State employees	5,54
17.	Policemen and police officers	5,38

In the table N.5 are presented two groups of participants: the citizens and expert audience. On a graphic scale from 1 to 10 they evaluated the degree of corruption of a certain institution or profession. In this assessment 1 means that there is no corruption, and the grade 10 means highest level of corruption. Evaluations of the extent of the corruption are weighted medium sizes (weights are the values from 1 to 10). It may be noted that the order of the degree of corruption for both populations differ. According citizens, the 10 most corrupt institutions or activities are as follows: a) Customs and the customs officials, b) Political leaders, c) Political parties, d) Judges, e) Holders of state (administrative) functions, f) Inspection authorities, g) State employees, h) Public prosecutors, i) Physicians and health professionals and j) University professors. According to the expert audience, the 10 most corrupted institutions or activities are as follows: a) Judges, b) Political parties, c) Physicians and health professionals, d) Political leaders, e) Holders of state (administrative) functions, f) Inspection authorities, g) Journalists, h) Public prosecutors, i) Sale of the state land and j) University professors.

From the reviews it can be concluded that the order of corruption of these two groups respondents overlap in the grades and in the order of: holders of state (administrative) functions in fifth place, followed by the inspection authorities in the sixth and university professors at tenth.

Table N.6. *If you answered YES to which risk were you exposed (what did you give)?*

		Citizens:			Expert public:		
		f	%	*Valid %*	*f*	%	*Valid %*
Valid	1. Money in cash	185	15,3	39,7	12	12,4	46,15
	2. Money on account	42	3,5	9,0	1	1,0	3,85
	3. Donation	23	1,9	4,9	3	3,1	11,54
	4. Services of different nature	103	8,5	22,1	8	8,2	30,77
	5. Other	113	9,3	24,2	2	2,0	7,69
	Total	**466**	**38,5**	**100,0**	**26**	**26,8**	**100,0**
Missing	System	744	61,5		71	73,2	
Total		1210	100,0		97	100,0	

The distribution offered indicates that more than one third, that is over 38,5% stated that they were in a situation to give bribery. In such a situation have been 26,28% and persons employed in state institutions. Of those who have been in a position to give bribery 39,7% of the respondents citizens or 46,15% of the employees in the institutions could pay the money in cash, 4,9% of the respondents made donation and for the employees that value is 11,54% of the respondents. Second group of risk is those who responded that were exposed to the risk of paying for services of different nature[10]. Of the citizens who participated, the frequency is 22,1%, while something else gave 24,1%. And of the group of respondents employed in state institutions, or as we define as expert audience 11,54 responded that they were in a situation to pay donation, and 30,77% to provide services of different nature[11].

As far as the perceptions of citizens about the way for unveiling corruption, we can conclude that the answers to these questions are particularly layered. So, when we talk about reduction of the level of corruption in the country, the emphasis is placed on prevention or prevention of committing crimes in the area of corruption. Among other issues is the question asked: ***In your opinion, how corruption can be DETECTED***? (Rate answers from 1 to 7). With one is marked the response that has least impact on the prevention of corruption while with 7 is marked which affects most on the prevention of corruption).

Table N.7 Range of responses to the question: In your opinion, how can be DETECTED (uncovered) corruption?

			average
4. work with the competent authorities and institutions that deal with fighting corruption	397	813	**4,76**
6. with reporting of corruption acts (crimes) by the individual (the citizen) with known identity	439	771	**4,73**
5. inspection supervision by the administrative authorities	440	771	**4,65**
3. with operational and tactical measures and investigative activities of the law enforcement bodies	275	747	**4,54**
2. special investigative measures for detecting corruption	550	661	**4,29**
1. by using media	647	563	**3,84**
7. with reporting of corruption acts (crimes) by the individual (the citizen) anonymously	648	563	**3,81**

10 According to the UNDOC and State Statistical Office (2011) p.17; in R. Macedonia "45% of bribes are paid in cash and 25% in the form of food and beverages. Significantly lower percentages are paid in other goods (9%), exchange services (9%) and valuables (5%). Much of the bribe is in a form that can be interpreted as an exchange - either explicit or implicit - between two parties in which each gives and receives something in exchange. It should be emphasized that in many cases both sides are in the same position, one of them (the public official) is generally in a stronger position in the negotiations.

11 Саша Б. Бован: *Истраживање* .... цит. дело. p.87-90;

From the analysis of the results, we can conclude that, in the opinion of the citizens, to effectively prevent corruption the role of the authorities and institutions whose primary competence is dealing with corruption is important, and the best way for detecting corruption is by working of the competent authorities and institutions dealing with fight against corruption, ranking them with 4,76 from 7 as the highest possible. Unveiling corruption with reporting of corruption acts (crimes) by the individual (the citizen) with known identity is important as well, with assessment of 4,73, and high score of 4,65 is given to the way of unveiling corruption by administrative inspection of supervision authorities. With 4,54 are evaluated the operational and tactical measures and investigative activities of the bodies who enforce the law. Of course, today is inconceivable the detection of sophisticated crime in the area of corruption by using conventional forensic methods and tools, from that aspect of particular importance are the changes in the Criminal Procedure Law and fulfilling the legal requirements for use of special investigative measures. Detecting corruption with special investigative measures is rated 4,29, no less important is the possibility of detection of corruption by using media which possibility is evaluated with 3,84, a percentage more than half of the respondents. Anonymously reported has least effects on the function to detect in this incrimination and also for reporting of corruptive acts (crimes) of the individual (the citizen) which is graded anonymously with 3,81 that is close to half of the respondents.

Illustrative is and the data of the State Statistical Office. Thus it can be concluded (see Table N.8) that 86,14% of the totally reported through the Ministry of Interior are adults.

Table N. 8. Reported adults regarding the submitter of criminal complaint

	Total			%		
	Total	immediate	by Ministry of Internal Affairs	Total	immediate	by Ministry of Internal Affairs
Total	**31860**	**4245**	**27615**	**100,00**	**100,00**	**100,00**
Damaged citizen	1746	1651	95	5,48	38,89	0,34
Other citizen	77	72	5	0,24	1,70	0,02
Damaged business entity	1759	1731	28	5,52	40,78	0,10
Inspection	81	73	8	0,25	1,72	0,03
MOI	27445	0	27445	86,14	0,00	99,38
Other administrative authority	306	277	29	0,96	6,53	0,11
Direct finding of the public prosecutor	91	91	0	0,29	2,14	0,00
Other	355	350	5	1,11	8,24	0,02

Source: State statitial office of th Republic of Macedonia, 2013, p. 20

The data indicate that 40,78% of directly reported adults are by the injured business entity, and then 38,89% are by the damaged citizens.

Research has shown is visible impact of the media in detecting corruptive crimes. The question asked is about objective journalism in the countries with high corruption. If the government and the institutions are involved in controlling of the media (later we will see and a huge percentage of corrupted politicians and public servants), it means weakening the power of the media in corruptive crimes in which are involved powerful individuals from the politics or from high positions in state institutions. It means that one of the reasons for reducing the effectiveness of the fight against corruption is the vast influence of the state apparatus on the media objectivity as strong tool for initiating and resolving the corruptive crimes.

Asked whether there is a correlation between attitudes, or whether the structure of the attitudes is linked regarding the detection of corruption, we chose to test the normal distribution of variables.

Table N.9 Tests of Normality

	Kolmogorov-Smirnov[a]		
	Statistic	df	Sig.
II.9.1. by reporting corruptive acts (crimes) by the individual (citizen) with known identity	,151	1210	,000
II.9.2. by anonymously reporting of corruptive acts (crimes) by the individual (citizen)	,149	1210	,000
II.9.3. inspection by the administrative authorities	,133	1210	,000
II.9.4. working by the authorities and institutions that deal with combating corruption	,149	1210	,000
II.9.5. by operational and tactical measures and investigation of the enforcement bodies	,165	1210	,000
II.9.6. special investigative measures to detect corruption	,180	1210	,000
II.9.7. by using media	,156	1210	,000

An important indicator is the Kolmogoro-Smirnov test. It points that all variables have a ratio of 0,133 to 0,180. The level of significance sig. is less than 0,0001 and indicates that we should reject the null hypothesis or accept the alternative hypothesis, i.e. that are not normally distributed.

Table N.10 Spearman's coefficient of correlation

			P.II.9.1	P.II.9.2	P.II.9.3	P.II.9.4	P.II.9.5	P.II.9.6	P.II.9.7
Spearman's rho	P.II.9.1	Correlation Coefficient	1,000	,293**	,096**	(,057)*	(,059)*	(,115)**	(,088)**
		Sig. (2-tailed)	.	,000	,001	,048	,041	,000	,002
		N	1210	1210	1210	1210	1210	1210	1210
	P.II.9.2	Correlation Coefficient	,293**	1,000	,177**	(,024)	(,075)**	(,126)**	(,043)
		Sig. (2-tailed)	,000	.	,000	,407	,009	,000	,139
		N	1210	1210	1210	1210	1210	1210	1210
	P.II.9.3	Correlation Coefficient	,096**	,177**	1,000	,192**	,088**	(,067)*	(,070)*
		Sig. (2-tailed)	,001	,000	.	,000	,002	,020	,015
		N	1210	1210	1210	1210	1210	1210	1210
	P.II.9.4	Correlation Coefficient	(,057)*	(,024)	,192**	1,000	,236**	,157**	,055
		Sig. (2-tailed)	,048	,407	,000	.	,000	,000	,055
		N	1210	1210	1210	1210	1210	1210	1210
	P.II.9.5	Correlation Coefficient	(,059)*	(,075)**	,088**	,236**	1,000	**,403****	,029
		Sig. (2-tailed)	,041	,009	,002	,000	.	,000	,312
		N	1210	1210	1210	1210	1210	1210	1210
	P.II.9.6	Correlation Coefficient	(,115)**	(,126)**	(,067)*	,157**	**,403****	1,000	,199**
		Sig. (2-tailed)	,000	,000	,020	,000	,000	.	,000
		N	1210	1210	1210	1210	1210	1210	1210
	P.II.9.7	Correlation Coefficient	(,088)**	(,043)	(,070)*	,055	,029	**,199****	1,000
		Sig. (2-tailed)	,002	,139	,015	,055	,312	,000	.
		N	1210	1210	1210	1210	1210	1210	1210

**. Correlation is significant at the 0.01 level (2-tailed).

*. Correlation is significant at the 0.05 level (2-tailed).

Therefore in further computation we chose that certain significant relation exists between the variables "II.9.6. with special investigative measures to detect corruption" and "II.9.5. with operational and tactical measures and investigation of the bodies who enforce the law" where the correlation coefficient equals 0,403. If you look at the level of determination it amounts to 0,1624 or 16,24%. This situation indicates that the coefficient of alienation is 0,8376, or 83,76%.

An important part of the criminal reports for corruptive crimes are rejected as unfounded at a later stage, as a lack of evidence or to carry out their reformulation. Enormous difficulties law enforcement authorities have regarding the evidence procedure. Especially important is how

citizens think about proving this type of crime. In the conducted research was placed a question: *In your opinion, how can corruption be PROVED*?

*Table N.11 In your opinion, how can corruption be PROVED***?**

(Rank as shown: 1 - at least, 5 - most. In each row round one number. There can be only one rounded number in any row.)

Rank	II.10.1	II.10.2	II.10.3	II.10.4	II.10.5	Total Rankings	Average
1	349	73	170	86	218	896	**0,74**
2	234	191	239	176	146	986	**0,81**
3	219	267	350	166	182	1184	**0,98**
4	187	327	271	271	279	1335	**1,10**
5	221	352	180	511	385	1649	**1,36**
	1210	1210	1210	1210	1210		
At least	693	398	584	345	455		
The most	518	813	626	865	755		
Average	**2,75**	**3,57**	**3,04**	**1,00**	**3,39**		

Structure

Rank	**II.10.1**	**II.10.2**	**II.10.3**	**II.10.4**	**II.10.5**
1	28,84	6,03	14,05	7,11	18,02
2	19,34	15,79	19,75	14,55	12,07
3	18,10	22,07	28,93	13,72	15,04
4	15,45	27,02	22,40	22,40	23,06
5	18,26	29,09	14,88	42,23	31,82
Total	**100,00**	**100,00**	**100,00**	**100,00**	**100,00**
At least	57,23	32,85	48,26	28,51	37,60
The most	42,77	67,15	51,74	71,49	62,40
Total	**100,00**	**100,00**	**100,00**	**100,00**	**100,00**
Average	**2,75**	**3,57**	**3,04**	**1,00**	**3,39**

Legend:

II.10.1. the testimony of an individual (the citizen)

II.10.2. by collecting material evidence

II.10.3. by collecting indirect material and intangible evidence

II.10.4. organizing ambushes (catching on work)

II.10.5. with special investigatory measures

From the distribution offered it can be concluded that according to the perceptions of citizens least applied measure is the collection of material evidence by testimony of an individual (the citizen) with grade of 2,75, while the lowest average score of 1,00 is about organizing ambushes (capture on work). The highest score of 3,57 is for collecting material evidence.

Difficulties in resolving this type of crime come from the fact that the citizen does not want to report the crime. If he reports the crime, he will not be able to get the service that was promised for compensation, and also is present fear about the consequences that can be expected in the next period given the fact that the people who are reported have a particular status and power to influence in the institutions.

CONCLUSION

Corruption definitely is a society phenomenon for which exists a dominant opinion of its existence, spreading and incorporation into the system. The debate about corruption as occurrence in the institutions is required to find forms whose aim is to limit, prevent and overcome the corruption. Meanwhile, it is important to search for answer why occurs mass feeling that the corruption exists.

Corruption is a phenomenon in modern societies, especially in states in transition. That does not mean it did not exist earlier but it is a fact that changed the norms and standards, while the previous norms and standards have become unacceptable. In the period before the transition system many brakes against personal enrichment had existed, also against the weak concentration of political power. Moreover, the service changed for impact, instead for money. In fact, the motive was not money directly, but fear (threat) or a desire to have more power, which secured progression to the social scale. In the new society things are changing. Aspirations are growing and the money become the means for their attainment. It is a time when concomitant explosion of material aspirations, on one hand, and the erosion of values and norms on the other hand become serious, so can be said and dangerous combination.

Exposure to the risk of corruption by region shows that respondents from Skopje region are ranked in the first place in four forms (money in cash, cash on account and services of different nature), and the Regional distribution shows that there is intensity link between the risk of corruption and the form of bribery.

Analysis of the responses of citizens and institutions about the corruption research results (maximum - minimum) is according to the following scale: 1. Customs, 2. Political leaders, 3. Political parties, 4. Judges, while according to surveyed employees in the institutions most corrupted are: 1. Judges, 2. Political parties, 3. Doctors, 4. Political leaders. It can be concluded that the order of corruption of these two groups overlap in subjects and grades for: holders of state (administrative) functions in fifth place, followed by the inspection authorities of the sixth and university professors of the tenth place.

Regarding the measures that are applied to prevent corruption citizens consider repressive measures provide a significant contribution in the fight against corruption. Even respondents give priority to the application of repressive measures in relation to preventive measures, which suggests that prevention is not regarded as an important measure to prevent corruption, but in the fight against negative social phenomena including corruption should be used repression and punishment.

REFERENCES

1. Berger P.L., Luckman T.: *The Social Construction of Reality*, Penguin Books, London, 1985, p.32.
2. Dirkem Emil: *O normalnosti zločina*, kaj Talcot Parsons & all.: *Teorije o društvu*, Vuk Karadžić, Beograd, 1969, p.827;
3. Kregar J.: *Deformation of Organizational Principles*, во D.V.Trang, Corruption and Democracy, D.v.Trang (ed), COLPI, Budimpešta, 1994, p.47-61
4. Kregar Josip: *Korupcija u pravosuđu*; p.2-3; See: *www.pravo.hr/_download/repository/korupcijasudstvo.cg.doc [26.04.2011];*
5. Pešić Vesna: *Partijska država kao uzrok korupcije u Srbiji*, p.2; See: pescanik.net/wp-content/PDF/partijska_drzava.pdf [accessed 12.10.2012];
6. Tanzi Vito: "*Corruption Around the World: Causes, Consqeuences, Scope and Cures*", International Monetary Fund Working Papers WP/98/63, (1998), (Internet) available at: http://www.imf.org/external/pubs/ft/wp/ wp9863.pdf [accessed 3.11.2013].
7. See: *www.transparentnost.org.rs/.../ALAC-...[accessed 8.02.2013];*
8. Вујаклија Милан: *Лексикон страних речи и израза*, Просвета, Београд, 1996/97; p.456;

9. Лабовиќ Миодраг: *Власта корумпира*; Гама, Скопје, 2006, p.46-70;
10. Лабовиќ, М. / Николовски, М.: *Организиран криминал и корупција*, Факултет за безбедност, Скопје, 2010, p.194.
11. Мојаноски Цане Т.,: *Методологија на безбедносните науки – аналитички постапки*, Книга III, Скопје, 2013, p.412;
12. НАЈДОБРИ ПРАКТИКИ ВО БОРБАТА ПРОТИВ КОРУПЦИЈАТА; p. 43-49; http://www.osce.org/mk/hcnm/32235 [26.07.2011];
13. Ширилова Велика: *Голем лексикон на странски зборови,* Топер, Скопје, 2001, p.511;

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INSTITUTIONAL AND NORMATIVE BASIS OF TAX EVASION IN SERBIA

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Abstract: In the domain of efforts to secure a much needed fiscal stability, the phenomenon of tax evasion is one of the fundamental challenges that creators and implementers of domestic fiscal policy are facing with. Determining the reasons why evasion tendencies in our country are extremely emphasized, requires an analysis of the complex structure of the institutional, economic and regulatory assumptions that leave the free space for expansion of this negative phenomenon. Creating and manifestation of these assumptions is in a basis of a triangle: taxpayer-assessor-legislator. These are the fields which will be given special attention in this work. Although the decision to tax evasion is always associated with behavior of the tax debtor, the degree to which tax morale can be "provoked" depends on the quality of the relationship of the debtor with tax administration, as well as the opportunities that tax legislation provides to evasion behavior. In order to show how the exploitation of lack of normative domestic tax system to avoid paying taxes, we particularly emphasized mode of taxation of income from self-employment, or more precisely - the so-called concept of lump-sum taxation, but for its apparent problematic has not yet been found an adequate solution.

Keywords: evasion, tax morale, lump-sum taxation, responsibility.

INTRODUCTION

The right of states based on their imperium to constitute an obligation of compulsory duties on different entities that may reach their fiscal sovereignty, presents the real basis of a functional existence of social-political community. However, forcing individuals as members of society to fulfill their obligations will contribute to the achievement of these often abstract and completely undiscovered general interest. It has always been followed by the problems whose essential features remained immune to the time passing. The existence of forced character of taxes, as the main instrument of fiscal systems, presents a priori "distrust" of the state, as a tax creditor, into the tax debtor's willingness to pay taxes and to see that obligation as a benefit which indirectly affects their own interests. Except through the elements of force, the institutionalization of this initial doubt is also visible in a variety of other components and solutions of tax policy, in both fields, substantive and procedural tax law.

A risk of tax evasion, which is always presented, requires continuous improvement of essential, organizational and institutional structural basis of the tax system, so in the absence of the possibility of its absolute resolve, the extent of this problem can be minimized. The general assessment of the fairness degree of a specific tax system is of vital importance in terms of "moral demotivation" of individual tax debtors in respect of resorting to illegitimate and illegal evasion behavior. It is very clear that there are tendencies of deviation of the primary theoretical axioms that indicate the need for taxation according to economic strength of the bearers of the tax burden, extensively contributing to the spread of the destructive effects of tax evasion. The fact of the existence of different tax- treatment of people who are carriers of the same economic forces (deviation from horizontal tax equity) and/or determining an identical tax burden for those whose economic strength differ (deviation from vertical tax equity)[1], are essentially moral justification of evasion behavior in the psychological sphere of those taxpayers who see themselves as "victims" of this, basically unjust system. This behavior of taxpayers whose economic substance is affected more than it is required by the principle of tax equity, may be positively legitimized by those taxpayers who, although subjects to the same unjust regime, do not tend to avoid the payment of established charges.

1 For more details, look at: Popović, D., *Poresko pravo*, Belgrade 2010, p. 34.

We should not overlook the fact that, even in situation where there are achieved efforts for tax system to be set to healthy and fair basis, taxpayers often perceive the state as an abstract construct and connected to this way of thinking, tax evasion cannot cause specific individualized damage, nor such behavior could be attributed to characteristics of unfairness.[2] On the other hand, the collectivization of behavior to avoid paying taxes when tax system is full of essential unfairness, is a problem to which cannot be reached by a single mechanism of restraint and its solution can be achieved through a process of fair re-designing of tax policy . This way, by structuring the tax system on equitable grounds, motivational bases of the phenomenon of tax evasion will be released by the institutional and normative impulses that provoke systemic evasion behavior of tax debtors. On the other hand, macro-economic, psychological and criminological impulses of tax evasion, may exogenously induce undesirable behavior of taxpayers, even when the holders of tax policy support the system constituted in compliance with the principle of tax fairness.

When we talk about the domestic situation, the way the tax system is structured in our country is a sort of institutional "guarantee" of survival of tax evasion within the corpus of the most burning tax legal problems. In support of this conclusion is the fact of the cumulative presence of endogenous assumptions (concerning the characteristics of the domestic tax system) and exogenous factors that encourage commitment taxpayers to avoid paying taxes. Through the exploitation of the weaknesses of many solutions of material tax law and the fact that the control mechanisms of the tax administration are far from perfect, many actors in the economy and out of it, manage by avoiding paying taxes, to maintain their economic power from tax collections to the extent prescribed by the tax laws. Affirmed methods and techniques of abstract (legal) formulation of tax rates, tax bases and instruments of tax benefits have unfavorable impact on many forms of taxation in already exaggerated trends in tax evasion. Domestic income tax systems for individuals and corporations represent illustrative ground for suspicious intention of tax policy makers to tax evasion become reduced to fiscally sustainable level.

TAX MORALE AS A DETERMINANT OF TAX EVASION

When we talk about the fact that in modern states 80-90% of public expenses is covered from taxes, as the main fiscal instruments, so dedication to modalities of encouraging tax morale with people who are called upon to bear the tax burden, should be a subject of continuing concern of tax policy. Identification and implementation of a model of tax policy is always a product of the interaction of various factors, some of the most important are: the dominant political ideas (in terms of the concept of fairness, efficiency and growth), the dominant socio-economic interests (of capital, labor, ethnic groups, rich, poor) and, finally, institutional factors of political and economic nature (democracy, decentralization, freedom of markets, protectionism, budgeting, etc...)[3]. The scope of distinguished and engaged interests in creating a tax environment is in direct proportion to the full realization of the potential effects of tax morale of taxpayers.

Decisions of taxpayers that their tax legal obligations are conscientiously executed or, on the other hand, to behave in the way that leads to the tax evasion, have extremely diverse and complex motivational basis. The set of all these motives which are the basis of the decision-making taxpayers to pay the tax or to avoid it, are the main determinants of the phenomenon of tax morale. Conventional explications of tax evasion are mostly based on so-called "Model of the expected use" (*expected utility model*), which starts from the assumption that the considerations of financial nature are solitary initiators of tax evasion and that taxpayers are able to relatively accurately estimate the probability that their misbehavior will be a subject involved by control mechanisms.[4] Over the time, by development of certain psychological theories, among which the most important are theoretical concepts about the judgment of taxpayer under conditions of uncertainty, but there also were the arguments for different conclusions. Accordingly in these theories, moral sentiments, especially guilt and shame due to the decision of tax evasion are

2 Anđelković, M., *Poresko pravo – teorijski aspekti i poreske reforme*, Nis, 1999, p. 138.
3 Bird, M., „Tax Effort in Developing Countries and High Income Countries: The Impact of Corruption, Voice and Accountability", *Economic analysis & Policy, Vol. 38, No. 1*, March 2008, pp. 5-57.
4 Erard, B. i Feinstein, J.S., „The role of moral sentiments and audit perceptions in tax compliance", *Public Finance 49/1994*, pp. 70-71.

labeled as powerful initiators of taxpayers`behaviour, aimed at reducing the perceived benefits of the "cheating" the tax administration. Despite the expected utility model, the psychological theories deny the assumption about the ability of taxpayers to properly evaluate the risks of their decisions, noting to their tendency to overestimate control mechanisms, primarily due to the effects of psychological factors. [5]

As noted above, the evaluation of the risk of disclosure of tax evasion emphasizes one of the key elements in the process of making the taxpayers to pay the tax.[6] In this case the trigger for making the decision about tax evasion is based on the ratio, which is at the same time a basis for so called "economics of crime" which assumes technical identification of the relationship of marginal benefits and marginal costs of prohibited behavior. Beside the subject of making decisions, which is certainly debatable, all other aspects of decision-making are based on principles that are applied in the legal flows of economic activity. This understanding marginalizes the influence of social factors, for example, ethical standards and moral feelings of taxpayers to generate tax evasion, giving arguments that moral and other social determinants of the decision may have an impact only in cases where the level at which they manifest is "unrealistic" tall.[7] However, if the risk of disclosure of unauthorized behavior is treated like the only initiator of tax evasion, then it follows that the elaboration of administrative tax apparatus and training methods of tax audits could completely eliminate the risk of tax evasion, by maximizing the risk of disclosure. However, this is not the case and it is necessary to accept the fact that the project of overall encouraging tax payers had to be realized on the base of studying and other numerous determinants in the structure of their decision making, with particular refers to the psychological component of decision making.[8] There should be paid attention to the fact of the absence of a superior mechanism of analysis with those entities that shape the characteristics of the tax system in terms of a complete review and acceptance of all the complex determinants that are considered to be the basis of the phenomenon of tax evasion, thinking about its interdisciplinary character. However, contrary to the aspirations that the mentioned motivational impulses should be investigated, orthodox understandings of the nature of the tax-employment does not leave much space for the discussions about the "decisions" of taxpayers in terms of payment, or tax evasion. The strict affirmation of the fact that tax is the duty and its payment is based on the mechanism of the enforcement, so, emphasizing of the mandatory nature of tax benefits, and its consideration by the tax payers about something that should be their legal obligation is analytically marginalized. The rigidity of these concepts as a result usually has the construction of the tax system on unfair grounds and inflexible character of subordinate relationship between the tax administration and taxpayers. In the spirit of this course , tax morale is seen as external manifestation of this phenomenon , embodied in the presence (or absence) of the willingness to pay taxes at the individual level, and, consequently, to activate the mechanisms of enforcement in the case when expressed will is different from imperative will of the legislature about payment obligations. This character of the relationship between tax authorities and taxpayers works extremely discouraging in the field of affirmation of tax morale. Gradually redefining attitudes of superiority mechanisms of enforcement as key holders of tax collection, was performed, first anxiously and then more with the appreciation of both the objective and subjective components in the structure of the tax morale of taxpayers. It is necessary to affect on the level of motivational basis of taxpayers decisions, by correcting the factors that affect the taxpayers in the sense that they are taken away from the decision of paying taxes. Abstract aspirations in the field of objective determinants of the structure of the tax morale are connected to the design of the tax system on the fair grounds, where the level of tax burden will be properly accommodated to the taxpayer's income. Because, while avoiding paying taxes, regardless of the reasons, in each case is attributed to "blame" taxpayers, "avoiding" of paying taxes according to economic strength are the sole responsibility of the creator of the tax policy.

5 *Ibidem*, p. 71.
6 Allingham, M.G., Sandmo, A., „Income tax evasion: a theoretical analysis", *Journal of Public Economics 1/1972*, pp. 323–338.
7 Bernasconi, M., „Tax evasion and orders of risk aversion", *Journal of Public Economics, 67/1998*, p. 133.
8 Anđelković, M., „Uticaj poreskog morala na poštovanje poreskih propisa ", *Правни живот, No. 10/2012*, p. 934.

On the other hand, the fairness of the distribution of the tax burden at the level of the taxpayer is based on subjective perception, which can often be different from the normative and theoretical concepts of fairness. The individual taxpayer, will relatively easy understand the benefits of progressive compared to the proportional system of income taxation, but it probably will not be the case with an understanding of theoretical explanations of unfair regressive effects of consumption taxes (the fact that the VAT rate is proportional, with an average consumers would likely result in "delusion of equality"). However, material tax law can never reach a subjective fairness performances of taxpayers, the imperative of encouraging tax ethics will be provided through the determination of all constituent elements of the tax (the tax structures, tax base, rates and exemptions), on the base of objective fairness.

INSTITUTIONAL ASPECTS OF SOLVING THE PROBLEM OF TAX EVASION

Creating an "army" of taxpayers with a developed sense that by tax evasion they are not really fooling the tax creditor, but themselves, [9] and thus they act contrary to their own interests, is not limited to the task of building the substantive fairness of the tax legislation. Based on these efforts we find as very important the support for procedural tax law or the rules which are important for tax procedure and tax administration. Inadequate and strained relationship of the tax administration to taxpayers does not have a good result - the tax debtor will develop the attitude that his own money is used to finance his own oppression and it will be difficult to change it. Of course, the basic institutional support for the fight against tax evasion, is not limited to the institutions and bodies that directly take part in normal functioning of the collection of taxes, but requires a much wider social action.

The same treatment of taxpayers who are in the same legal position, is a basic precondition for encouraging tax morale of the tax administration , since in its absence, the intent of the tax authorities to build a partnership with taxpayers would be rated as insincere . The forms of realization of the relationship between tax administrations and taxpayers should be designed in a manner that leads to controlled "melting" of the feeling of inferiority in the tax debtor, which, if presented in the most rigid form, can lead to almost unfriendly attitude for the tasks and functions of tax administration.

Sincere appeal to the tax morale of taxpayers should be stimulated by using a wider range of solutions within the instruments of procedural tax law, in order to proclaim and to reach the goal of "dosed melting of subordination". Of course, it is a concept that does not imply a general approach to correcting the problem of tax evasion, since the taxpayers who do not pay taxes can be distinguished in several categories. One of the categories includes taxpayers whose decisions about the non-payment of taxes are "immune" to all the efforts of the tax administration to make a better relationship with tax debtors. [10] Strict attitude to the obligation of paying the tax means almost fully absence of evaluation of the risk of exposure for these tax debtors. In this case, the "helping hand" of the tax administration will not result in the desired effects and the full implementation of the instruments of force articulates as the only possible solution.

In countries where the turbulent character of the political-economic processes necessarily reflect the frequent changes often confused solutions of the tax law (as it is the case in Republic of Serbia), than relative disorientation of taxpayers is expressed when the tax legal requirements are placed upon them. For this category of taxpayers, the lack of information and confusion with a complex system of regulations may result in non-payment of tax, although their primary will is to fulfill the duties. In such cases, by the activation of the tax administrative apparatus it is possible to significantly reduce the effects of the causes of tax evasion. Helpfulness of the tax administration in terms of helping to taxpayers not so well informed, should be deprived from all negative bureaucratic expressions connected to administrative bodies , in order to make the level of " fruitful servility " closer to the one who is associated with the service providers

9 For more details look at: Slemrod, J., „Cheating Ourselves: The Economics of Tax Evasion", *Journal of Economic Perspectives, Vol. 21, No. 1*, pp. 25-48.

10 Reaching for illustrative analogy in the field of criminology, we can conclude that the effort for encouraging the tax morale of taxpayers who are in this category, are equally difficult, the same as the aspirations for a successful re-socialization of professional criminals.

in the private sector . Situations in which the lack of information and misunderstanding of tax regulations result in non-payment of taxes or in wrong application of normative solutions, represents a marginal problem in countries with traditionally affirmed institutional support to tax debtors.

Preliminary consideration of the modalities of encouraging tax ethics, go even so far that they begin to openly promote the ideas of mediation, as a way of resolving "disputes" between the tax administration and the taxpayer without conflict. [11] Mediation, as a concept of peaceful settlement of disputes, is basically related to the sphere of civil right and always includes the existence of a third, peacekeeping side, which will as a mediator, contribute to the positive outcome of the mediation. We believe that mediation, in its original meaning, could not functionally be added to rather inflexible substance of tax and legal issues. The introduction of the "classical" mediators in the conflict and pre-conflict relationship between the tax and the tax debtor's creditors, is almost unthinkable in a time when the organizational model of tax collection is organized according to the principle of deconcentration. The use of information technology and internet service in the function of informing and encouraging tax compliance of taxpayers , from both sides, the tax administration , and other subjects in non-institutional support , is often marked as a form of mediation , although there is a lack of formal institutional features of the concept.[12] On the other hand, in countries where the tax system is based on fragile basis, insisting on "mediation" in tax matters without criterion may indicate a systemic weaknesses collection mechanism, which, consequently, may increase the number of tax evasion.

When it comes to national circumstances, in spite of a solid normative basis of tax procedural law to encourage the tax payers had mostly been in absent of the practical results of the previous period. However, we should not lose out of our sight the existence of a starter handicap of Tax Administration's efforts to increase tax compliance of the debtor, which is embodied in the fact that the domestic tax system could not be assessed as generally fair. Therefore, as humanity and kindness of nurse is not much help to the patient which is prescribed the wrong treatment, nor helpfulness and servility tax administrator in the service of an unfair tax system, can significantly reduce the problem of tax evasion.

New trends in functioning of the Tax Administration, show signs of appreciation of the importance of the phenomenon of tax morale (and tax compliance) in order to increase tax collection. Law on Tax Procedure and Tax Administration[13] established numerous taxpayers rights : the right to request that the Tax Authority treat him with respect, the right to free information regarding the tax regulations from which derives its tax obligations , the right to respect the privacy, the right to require the access to information on the assessment and collection of taxes that are stored by the Tax Administration (and to request correction of inaccurate data), the right to pursue legal remedies in the tax procedure and many others. [14] The scope of full understanding and appreciation of these established rights, is much higher than it is assumed in practice by the tax administration and the taxpayers themselves. If, for example, we analyze the right of the taxpayer to be treated with respect, we conclude that almost all other aspects of are involved in this one. The respected taxpayer will exist only in case of absolute dedication of Tax Administration to all rights guaranteed by the Law. Otherwise , these rights will represent only a non-functioning " decoration "of inflexible relationship of subordination of taxpayers to the tax administration, which fails when creating a safe ground for encouraging tax compliance.

The document, called the *Corporate Strategy 2013-2018* sets a framework for the future development of tax administration to modernize the organizational structure and the services provided by the Tax Administration provides to citizens.[15] The name of this document , and the fact that it is using the phrase " doing business with the Tax Administration " , indicates

11 Aleksić, D., „Medijacija u poreskoj oblasti ", *Pravni život, No. 12/2012*, pp. 165-174.

12 The Kingdom of Denmark is an example of a country where practicing the alternative ways of processing the relationship between the tax administration and the taxpayer, it is often seen as a form of "mediation" in tax matters.

13 („Sl. glasnik RS", No. 80/2002, 84/2002, 23/2003, 70/2003, 55/2004, 61/2005, 85/2005, 62/2006, 63/2006, 61/2007, 20/2009, 72/2009, 53/2010, 101/2011, 2/2012, 93/2012, 47/2013 и 108/2013). *Hereinafter referred to as ZPPPA.*

14 Look at: article 24. ZPPPA.

15 The Ministry of Finances and Economy of Republic of Serbia, Tax Administration, *Corporate Strategy 2013-2018*, June 2013, pp. 1-10.

a considerable turnover in relation to the current understanding of the relationship tax debtor – tax creditor. Thus, as the success of a corporation depends on the loyalty of consumers to the goods and services contained in its offer, so that the functionality and mission of the Tax Administration should be based on building partnerships with taxpayers. When it comes to the general goals promoted by the Strategy, the top priorities are: the establishment of voluntary tax payment, the establishment and development of tax morale, developing partnership with the taxpayers, eliminating administrative barriers and simplify procedures. Consistent respect of these goals will result in reshaping the tax administration in a client-oriented institution, which, as such, will have a greater chance to increase the payment of public revenue and maintenance the stability of public finances.

TAX EVASION IN THE DOMESTIC SYSTEM OF INCOME TAXATION

The way Republic of Serbia has established a system of personal income tax, provokes numerous motives, which, complemented with visible anomalies of economic environment are in the basis of the decision on tax evasion.

The report called *Gray economy in Serbia: New findings and recommendations for reform*, among the other things, studiously analyzes the many consequences of the imperfections of the domestic tax system, with rough evaluation of their impact on maintaining and increasing the burden of the grey economy.[16] This research points to the fact that the tax gap, the difference between the tax that would be charged in the case that all taxpayers in a given period regularly pay their bills and taxes and really charged tax, oscillates in the range of about 10% of GDP. [17] In the Abstract of tax gap, a gap in the personal income tax and the fee for compulsory social insurance participates with 50%, which is 5% of GDP.[18] Considering these data, it is not difficult to conclude that in the current grey economy, huge economic substance is emitted, which resists to the principle of facticity of taxes and the reach of the mechanism for tax charging, where on the height of the tax gap, beside the other factors (such as the tax debt write-off that is often based on arbitrary and selecting approach), the dominant influence have decisions of debtor aimed at tax evasion.

Trends of hidden political tolerance towards the concept of the informal economy, have destructive effect on tax morale of citizens, at least in two dimensions. On one hand, those who have a longer period of realization of their economic activities and who managed to survive under the shadow of grey economy eluding the institutional framework, in that "success" recognize weakness, indecision and timidity of the state to change this situation, so on this basis they will remain relaxed in the determination to avoid paying taxes. On the other hand, the cost of buying social peace by confronting the problem of insufficient grey economy, will be put up with those citizens and businesses who are loyal to the tax system, but, on the basis of non-acceptance of this unfair position, at any time it could be expected for them to decide to enter into the area of the gray economy.

Basically particular (analytical) system of income taxation applicable in our country, in spite of the global fiscal decoration in the form of complementary annual income tax system is a solution that initially provokes negative effects on tax morale of taxpayers. Starting disadvantage of this system is related to the fact that the taxation of individual income does not acknowledge the diversity of economic forces of taxpayers, where those entities that generate higher income are the subject to a privileged tax treatment, which could not exist in terms of the long-awaited progressive income taxation.

General determination of the analytical system of taxation, which we assess as generally bad and unfair solution, is not obliging the tax policy creators to develop the concept of blunt "blade" of its unfairness. However, we believe that on domestic basis it is achieved exactly

16 Krstic, G., Schneider, F, Arandarenko, M. Arsić, M. Radulović, B. Randjelović, S. Janković, I., *Siva ekonomija u Srbiji: novi nalazi i preporuke za reforme,* USAID and Fund for the development of economic science, Belgrade 2013, pp. 1-142.

17 *Ibidem*, p. 7.

18 On the other hand, the tax on added value, as the most generous fiscal instrument, the tax gap is halved, and it is about 2.5% of GDP.

the opposite, for example, the so-called modus of illustrative evidence of lump sum taxation of income from independent activities. Lump sum taxation of domestic income tax system has always been a ground for different types of abuse aimed at tax evasion, which systemically smashed the illusion that by appealing to the tax morale in this area, it could significantly increase tax charging. Individual taxpayers, as holders of significant economic forces, are put in a privileged position by the particular system; but it is possible, by the "infiltration" of lump sum tax model to strengthen their beneficiary status.

Provisory of lump-sum taxation is based on two facts. The first concerns the way how the tax administration sees the presence of legal preconditions for lump sum taxation. The existence of the impossibility of keeping business books or difficulty in performing activities due to keeping them is not a subject of careful checking, because the only reference to the existence of those circumstances in practice proves to be enough "argument" for the request for lump sum taxation and its acceptation. [19] The second fact concerns the organizational and technical inferiority, and often lack of interest of the tax administration, in cases of self-will of certain categories of taxpayers in the recording of turnover, allowing them to be on the ground of obvious abuse and to remain within the legal traffic census for lump sum taxation. Determination of tax policy makers to generate unfairness of this kind, will contribute to a further erosion of tax ethics and encourage thinking about tax evasion by those taxpayers who see themselves as "victims" of selectivity of the legislator. Since this problem was particularly presented among members of so-called "freelancers", May novels in tax legislation made some changes and deprived follows from the lump sum taxation: entities that provide accounting services, revision services, advertising, market research and tax consultants. [20]Although this solution has a positive evaluation, its selectivity is expressed in the fact that lawyers, as members of one of the most liberal professions, again resisted the urge to be treated in the same way.[21]

CONCLUSION

The phenomenon of tax evasion is complex in that extent that its complexity increasingly requires the abandonment of the conventional one-dimensional approach to its resolution. Improvement for increasing of tax compliance or tax morale of taxpayers is given as a priority task of tax administration.

When it comes to domestic circumstances, we are forced to conclude that the lack of respect for the principles of fairness in taxation, as well as unsafe approach to the exploitation of institutional mechanisms to limit tax evasion is not a favorable starting point for the project of encouraging the voluntary payment of taxes by appealing to the tax morale of taxpayers. However, as a positive step, we could assess the recent positive trends in functional aspects of tax administration, where, there is increasingly, recognized the need of true redesigning the way of communication with taxpayers, with the aim of developing partnership relations. Such aspirations are preliminary based in a document called *Corporate Strategy 2013-2018*, with the establishment of tax morale and encouraging voluntary tax payments are the priority positions within the targets set by the Strategy. In the period that follows, it remains to be seen how much will strategic efforts be covered by the the practical aspects of the modernization of the tax administration.

On the other hand, institutional improvements, reflected in a modernized approach to tax administration in relation to the taxpayers, cannot achieve the full results in the field of tax morale, as long as the tax administration is in the service of application of unfair decisions of substantive tax law. In this sense, the most illustrative example is the determination of the legislature for further application of essential particular (analytical) income tax models, whose theoretical unfairness is further "decorated" by the other elements, as it is the case with the so-called dysfunctional regime of lump-sum taxation. Cumulative presence of objective unfairness in the system of income tax and individual impression of certain categories of taxpayers who are

19 Stojanović P. and Lapcević, M., "Kvalitativni aspekti majskih promena poreskog zakonodavstva", *Pravni život, No. 11/2013*, p. 37.
20 The Law on Personal Income Tax, ("Sl. glasnik RS", No. 24/01...48/2013), article 40.
21 Stojanović, P. and Lapcević, M., *op. cit*., p. 38.

presented as "victims" of selective and tentative treatment can only result in further expansion of the problem of tax evasion and weakening of the tax morale.

REFERENCES

1. Allingham, M.G., Sandmo, A., „Income tax evasion: a theoretical analysis", *Journal of Public Economics 1/1972*, pp. 323–338.
2. Anđelković, M., *Poresko pravo – teorijski aspekti i poreske reforme*, Nis 1999.
3. Anđelković, M., „Uticaj poreskog morala na poštovanje poreskih propisa", *Pravni život, No. 10/2012*, pp. 931-943.
4. Aleksić, D., „Medijacija u poreskoj oblasti", *Pravni život, No.12/2012*, pp. 165-174.
5. Bernasconi, M., „Tax evasion and orders of risk aversion", *Journal of Public Economics, 67/1998*, pp. 123-134.
6. Bird, M., „Tax Effort in Developing Countries and High Income Countries: The Impact of Corruption, Voice and Accountability", *Economic analysis & Policy, Vol. 38, No. 1*, March 2008, pp. 5-57.
7. Erard, B. i Feinstein, J.S., „The role of moral sentiments and audit perceptions in tax compliance", *Public Finance 49/1994*, pp. 70-89.
8. Krstić, G., Schneider, F., Arandarenko, M., Arsić, M., Radulović, B., Ranđelović, S., Janković, I., *Siva ekonomija u Srbiji: novi nalazi ipreporuke za reforme*, USAID и Фонд за развој економске науке, Belgrade 2013, pp. 1-142.
9. The Ministry of Finances and Economy of Republic of Serbia, Tax Administration, *Corporate Strategy 2013-2018*, June 2013, pp. 1-10.
10. Popović, D., *Poresko pravo*, Belgrade 2010.
11. Slemrod, J., „Cheating Ourselves: The Economics of Tax Evasion", *Journal of Economic Perspectives, Vol. 21, No. 1*, pp. 25-48.
12. Stojanović, P. and Lapčević M., „Kvalitativni aspekti majskih promena poreskog zakonodavstva", *Pravni život, No. 11/2013*, pp. 33-44.
13. The Law on Personal Income Tax („Sl. glasnik RS", No. 24/01,...48/2013).
14. The Law on Tax Procedure and Tax Administration („Sl. glasnik RS", No. 80/2002,...108/2013).

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LIMITATION OF PERSONAL FREEDOM BY POLICE DETENTION – IMPLEMENTATION OF INTERNATIONAL STANDARDS

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Abstract*:* The right of personal freedom is one of the most important right from the set of basic human rights and freedoms, contained in the most important acts of international legal character, and the constitutions of states based on the rule of law. This right is directly related to the very human existence, and, therefore, it is necessary to make its legal articulation. Personal freedom means the right to security of the citizen, that he will not be arrested and detained in prison by the state authorities, as well as the right to be free to move and inhabit. However, from the very nature of Criminal Law protection of social values, arises the need to limit the right to personal freedom in exceptional circumstances, including the detention of the suspect. Keeping the suspect is a measure of procedural compulsion, by which, through the police decision, detained prison is temporarily imprisoned, for gathering information and hearing. The basic principles of humanity require that the detained suspect retains all the rights, derived from the principle of personal liberty. The authors of the paper deal with an analysis of national legislation, with regard to detain a suspect, according to the Criminal Procedure Code from 2011. In the paper the achieved international standards, through the presentation of comparative law legislation, and the relevant jurisprudence of the European Court of Human Rights were also presented.

Keywords: personal freedom; detention; suspected; police; procedural compulsion

INTRODUCTORY REMARKS

The right to liberty is one of the most important rights in the catalog of basic human rights and freedoms, contained in the most important international legal acts, and the constitutions of the states, which are based on the rule of law. This is due to the fact that the right to liberty, by the right to life, is the most important human right. This right is directly related to the very human existence and, therefore, its legal articulation seems necessary.

Personal freedom means the right of citizens to safety, they will not be arrested by government authorities, and detained in prison, as well as the right to move freely and to inhabit.[1] However, from the very nature of the criminal protection of social values arises a need to limit the right of personal freedom, in exceptional situations. The effectiveness of illegal behavior sanctioning, that violates criminal law norms, requires the existence of legal options for restricting the freedom of movement of suspected persons for committing criminal offenses, even if the right to freedom of movement is the quintessence of personal freedom. Restrictions of movement freedom of, by apprehension of the suspect and his detention in prison conditions, sometimes appears as an imperative of institutionalized social reaction success against persons suspected for committing criminal offenses.

Civilized standards, contained in the most important international legal acts and constitutions of democratic states, require that personal freedom can be restricted only for the purpose of criminal proceedings, under strictly defined conditions. Restriction of personal freedom by detention of suspects is possible, primarily, by a court decision. However, from the legal position of the police, as the first link in the chain of social reaction to unlawful conduct, it seems logical power of this governing body of the short-term detention of a suspect in prison conditions, prior to its implementation of the judicial authorities. Sometimes it seems necessary and temporary restriction of movement of persons, who were found at the crime scene, as well as potential witnesses in the upcoming criminal proceedings.

1 Momcilo Grubac, Procedural and legal guarantees of personal liberty of citizens, Legal life, 1998, no. 9, p. 463.

Basic principles of human rights protection requires a strict legality of the police conduct in limiting the personal freedom of individuals, which are relevant for the initiation of criminal proceedings, as well as to build its factual construction. Therefore, the international law, constitutional law, comparative law and the positive dimension of limiting personal freedoms of citizens by the repressive actions of the police authorities, undertaken prior to the implementation of the suspect judiciary was analyzed.

INTERNATIONAL GUARANTIES OF RIGHT TO LIBERTY PROTECTION

Due to the general globalization of international relations, human rights become subject to supranational regulation. By the international legal instruments, in the field of human rights, standardization of law has been carried out, which at the present level of the development of civilization, are indicators of the democratic legitimacy of each state. In order to prevent the negative illegal and arbitrary behavior of government agencies, the in the international documents, among others, the rights of persons deprived of their liberty are provided.

In Universal Declaration on Human Rights, the right to life, liberty and security, as well as the prohibition of torture and other inhumane treatment, and the right to protection from unauthorized deprivation of liberty are proclaimed (Article 3, 5 and 9). Guarantees for the exercise of the rights of persons deprived of their liberty are also contained in the *International Pact on Civil and Political Rights.* According to this international document, the grounds and procedures for deprivation of liberty can only be prescribed by law (Article 9), and the deprivation of liberty caused by non-fulfillment of contractual obligations is explicitly prohibited (Art. 11).

In The European Convention for the Protection of Human Rights and Fundamental Freedoms provided that «everyone has the right to liberty and security of person" No one shall be deprived of his liberty except «in the following cases and in accordance with the procedure prescribed by law». Restriction of liberty and security of person is possible in cases of lawful deprivation of libety, after conviction by a competent court; the lawful arrest or detention of a person for non-compliance with the lawful order of a court, or with a view to ensuring the fulfillment of any obligation prescribed by law; the lawful arrest or detention of a person, for the purpose of bringing to the competent legal authority on reasonable suspicion that the person has committed a criminal offense, or when it is reasonably considered necessary to prevent committing an offense, or after the commission of the crime escape; detention of minors, by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing to the competent authorities; the lawful detention of persons for the prevention of the spreading of infectious diseases, the detention of the mentally ill, alcoholics, drug addicts or vagrants; the lawful arrest or detention of a person in order to prevent illegal entry into the country, or of a person against whom action is being taken with a view to deportation or extradition (Art. 5).

The provisions of this article of the Convention, otherwise, provides a wide range of rights of persons, deprived of their liberty. Persons deprived of their liberty under the provisions of this Convention, shall be entitled, immediately, in a language they understand, be informed about the reasons for their arrest and about the charges against them (art. 5, par. 2). Catalog of these individuals rights is completed with the right to be promptly brought before a court and the right to trial within a reasonable time (art. 5 par. 3). An integral part of the corpus of person's deprived of liberty human rights, is the right to challenge the legality of his detention, and the right to compensation for the deprivation of liberty, undertaken in contravention of the Convention provisions (art. 5 par. 4 and 5).

A wide range of persons deprived of liberty is provided by the *Draft Principles for the Protection of unauthorized detention*. By these principles, it is envisaged that persons deprived of their liberty have the right to be informed about the reasons for his arrest (in particular, it focuses on custody), to be promptly brought before a judge, to be tried as soon as possible and within a reasonable time be allowed to freedom.[2] Essentials of rules, that protect right and

2 See: Human rights - UN activities in the field of criminal justice and crime prevention, JRKK, no. 3-4/79 p. 5

freedom of unauthorized deprivation of liberty, are the restrictions on actions of government bodies in the arrest of the defendant. Detention can not be determined without a written order, signed by an authorized judge (art. 6). The period from the time of arrest to the contact with the judge, must not be longer than 48 hours, a period of detention can not be longer than four weeks, with the possibility of extension in special circumstances (art.14). Judicial authorities have an obligation to periodical review of the detention reasons (art. 15). A person deprived of liberty shall be informed about the charge content, the right to defense and the right to communicate freely with counsel. The use of torture and other inhumane impact on the personality of detainees is prohibited. *Draft Principles for the Protection of unauthorized deprivation of liberty*, as the act of the UN, particularly emphasizes the need to protect persons deprived of their liberty, in a state of emergency. [3]

Protecting of the detainees and convicted human rights is regulated by *"A set of minimum rules for treatment of prisoners",* adopted in Geneva in 1955., and confirmed by the Economic and Social Council of the United Nations in 1967.[4] These rules made the standardization of right of prisoners, but also foresees the rights of arrested persons and detained persons (paragraphs 84-91), representing civilized standards in the treatment of persons deprived of their liberty. The provisions of "Minimum rules" paragraph 84. anticipates, that the person deprived of liberty is a person who is arrested, detained in police custody or in prison, but not yet convicted, and, therefore, can not be treated as a prisoner.

Provisions of „Minimum rules" provides a wide range of rights of detainees. Detainees have the ability to communicate with his lawyer and family members, no auditory monitoring by prison staff, the right to use medical services, the ability to feed its own expense, to carry their own stuff, etc.[5]

Summa summarum, guarantees to protect the rights of persons deprived of their liberty under international documents on human rights, related to the exercise of freedoms and rights, which may be compromised in the process of deprivation of liberty, which are a) prohibition of arbitrary deprivation of liberty, b) the right of a prisoner to the court decides on the legality of his arrest and c) the right to a reasonable length of detention before the main trial, d) the right to humane treatment during detention.[6]

CONSTITUTIONAL PROTECTION OF PERSONAL LIBERTY

Human rights and freedoms can be limited by acts of public authorities, aimed at achieving criminal protection of social values. Constitution of Serbia lays down the procedure for the exercise of fundamental freedoms and human rights. From constitutional provisions follows that the rights and freedoms of the citizens may be limited in scope and purpose that is permitted by the Constitution, without interference into the substance of the rights guaranteed (art. 20 of the Constitution). Proclaimed inviolability of freedom may be restricted by deprivation of liberty, in the cases and in the procedure established by law (art. 27, par. 1 of the Constitution). Thereby, person deprived of liberty shall have rights, which are the essence of the protection of personal freedom principle. These are: right to be immediately, in a language which he understands informed about the reasons for arrest, about the reason that he was charged, and about his rights, and the right to notify choosen person, about his/her deprivation of liberty, without delay (art. 27, par. 2). An arrested person has the right to a court decision about the legality of his detention, on the basis of appeal (art. 27, para. 3).

The Constitution proclaims the humane treatment of deprived of liberty persons, the prohibition of violence and extortion of statements (art. 28). The constitutional proclamation lays particular emphasis on additional rights of persons deprived of liberty without a court order.

3 Ibid, p.6.

4 These rules are confirmed by the Resolution of the Economic and Social Council of the UN number. 663 C (XXIV) from 31. 07. 1957.

5 For more information: Dragan Obradovic, ratified international treaties and generally accepted rules of international law and criminal law of the State Union Serbia and Montenegro, the paper with a set of criminal legislation, organization and functioning of the judiciary in the State Union of Serbia and Montenegro, Zlatibor, 18-20. 09. 2003. p. 164

6 Dr George Lazin, Custody of the Yugoslav criminal procedure and international human rights standards, Serbian Journal of associations to criminal law, Kopaonik, 1995., p. 161.

These persons have the right to remain silent, the right to expert assistance of counsel, and so. called the rights of the poor. The person deprived of liberty without a court decision, must, without delay, and no later than 48 hours be submitted to court or released (art. 29).

DEPRIVATION OF LIBERTY – TERM AND TYPES

Under the deprivation of liberty is considered „any involuntary restriction of the free movement right of a person, along with the simultaneous obligation to stay at a certain place, and to ensure proper and smooth conduct and completion of the criminal proceedings, which is sanctioned in some way".[7]

From the provisions of the Criminal Procedure Code[8] indicates that the rights and freedoms of the accused (and other entities - primarily witnesses) may be limited by the following aspects: police arrest, arrest a person caught while committing a crime, keeping people on the crime scene, apprehension, detention, minor detention, temporary housing of juveniles in institutions, and placing the defendant in an appropriate medical facility for psychiatric observation. At this point the essence of suspected detention, by police activity, undertaken prior to submission to the judiciary authorities will be exposed.

POLICE CUSTODY

In order to exercise criminal protection of society, the authorities can apply repressive measures before the formal criminal proceedings. It is the task of the so-called. preliminary investigation to create the conditions for initiating criminal proceedings.For this purpose, the police can keep certain people. The Criminal Procedure Code provides for two types of detention - detention of the suspected and retention of potential witnesses.

Keeping the suspect is a measure of procedural coercion, which, by the decision of the police, the arrested person for a short period closes, for questioning or interrogation. This measure is a substitute for the former police custody. Its purpose is to create procedural requirements for initiating criminal proceedings. Therefore, the police provides short-term closure of the suspected, in order to establish the existence of normative requirements for the initiation of criminal proceedings. By additional time-out the police allow to keep the person in custody (for which exists some of the reasons for detention) and to obtain information, needed to initiate criminal proceedings.

To this powers of the police, it can be argued from a conceptual and nomotechical point of view. It is conceptually inconsistent to authorize the police to take action, which, phenomenologically speaking, is a form of detention of certain persons (albeit brief). The basic postulates of democracy and humanity require that such measures can only determine by the actions of the court. On the other hand, nomotechnical disadvantage lies in the fact that in order to determine the detention grounds for suspicion that a person has committed an offense are sufficient, while for custody degree of reasonable suspicion is necessary. However, the need for effective criminal prosecution prompted lawmakers in many states, to authorize the police to taking measures from the arsenal of repressive instruments of personal freedom limitation.

POLICE CUSTODY ACCORDING TO LAW OF SERBIA

Provisions of art. 294 CPC provides for the establishment of detention, arrested by the police, if exists a custody reason, of persons deprived of their liberty during the commission of the offense and the suspected. It is important to note that this measure can be applied to a person, which was called for questioning as a suspected, but to a person who is still in the process of

7 Dr Branko Petric, Detention in criminal proceedings, Novi Sad, Right, 12/87, p. 40
8 "Off. Gazette of RS", no. 72/2011, 101/2011, 121/2012, 32/2013 and 45 / 2013.

collecting information, acquired the status of a suspected (art. 289 para. 2 of the CPC). The duration of the repressive measures is limited to 48 hours from the time of arrest, or responding to a call. The police must, within two hours to deliver a decision to detainee, which specifies: the offense for which the suspected is charged, grounds for suspicion, the day and hour of arrest or summons responding, as well as the start time keeping (art. 294 para. 2. of the CPC). Against this decision the suspected and the defense counsel may file an appeal to the judge for preliminary proceedings, that within four hours has to decide on the merits about the appeal (art. 229, para. 2 and 3 of the CPC). Protection of human rights of the suspected would certainly be contributed by predicting the obligation for the police to questioning the justification of the decision to detain a suspected every twelve hours, *ex officio*.

Detained suspect has rights which are the essence of the protection of personal freedom principle. It is the right of people to, in a language which he understands to be informed about the reasons for detention, the right to silence, and the expert assistance of an attorney, and to notify their immediate family members of the act of detention. Detained suspected must have an attorney "as soon as the police make the decision about detention." It is, therefore, a mandatory defense, by which the defendant or suspected, lose his exclusive right to be holder of the right to defense. If the suspected does not make his own attorney, the police have an obligation to appoint defense counsel ex officio, and questioning of the suspected must be delayed until the arrival of counsel, but up to four hours.

Respect for international legal standards on the treatment of persons deprived of liberty is manifested in the right of a person deprived of liberty to initiate proceedings questioning the legality of his detention (habeas corpus act) before the competent investigating judge (art. 5. para. 3. CPC). Postulates of humane treatment to deprived of liberty persons also respect the rights of persons to a medical examination. The authority, who arrested and retained the suspected, has an obligation to treat them humanely, in accordance with the basic postulates of respect for human dignity.

Corpus of detainees rights in Serbian law (including a person who has some retention) is expanded by the sanctioning not only of unlawful, but also unjustified deprivation of of liberty (art. 27. para. 4. of Serbian Constitution and art. 584 CPC). By this the compatibility of the CPC Serbia on the treatment of persons deprived of liberty, with the provisions of the most important international legal documents on human rights protection, with the extension of the scope of these individuals, is manifested.

According to the CPC, arrest is unfounded, among other things, if, at the end of the retention, criminal proceedings is not initiated (art. 584 para. 1 CPC). The deprivation of liberty is also unfounded, when the body of the criminal proceedings erroneously or illegally treated, by applying procedural coercion. C*ondicio sine qua non* of the right to compensation based on this is wrong or unlawful operation of government bodies. Retention is considered unlawful certain: if there were no conditions for the determination of these measures of procedural coercion; if it is unlawfully prolonged detention; if the determination of retention has been abusing powers of authority, which determined this measure (the police).

Police Act[9] of Serbia (art. 53) provides for the possibility of detention person that violate public order, if public order can not be otherwise established, or if not possible otherwise endangering removed. Retention, thereby, can last up to 24 hours. A person who is extradited to the security personnel, to be submitted to the competent court, could be detained for up to 48 hours (art. 53 para. 2). This measure is determined by the decision, which shall be issued and served on hold within six hours of apprehension in official premises Legality and legitimacy of detention can be challenged by complaint filed to a higher court, on which a decision must be made within 48 hours (art. 53 para. 3).

A detained person, under the provisions of the Police Act, has a right, which constitute the core principles of the protection of personal freedom. It is a right, that on the language, which he understands, be informed about the reasons for detention, the right to silence, and the expert assistance of an attorney, and to notify their immediate family members about the detention (art. 54, para. 1). It is possible to delay further action until the arrival of a lawyer, to a maximum of two hours (art. 54, para. 3).

9 "Official. Gazette of the RS ", no. 101/2005 and 63/2009 - decision.

The retention of defendant, as a security measure of this subject, is also envisaged by the Law on Misdemeanors of the Republic of Serbia.[10] In the misdemeanors procedure, the court may order retention: if the identity of the accused or the domicile or residence can not be determined, and if reasonable suspicion that he will run away exists, if he go abroad to avoid responsibility for the offense, which is punishable by imprisonment, if caught in the performance of the minor offense, and the detention is necessary in order to prevent further commission of offenses (art. 166). Retention is determined by a court order, stating the date and hour of detention, as well as the basis for determining these measures (art. 167).

To this measure of procedural coercion may be subjected a person who is under the influence of alcohol or drugs, caught in the act of misdemeanor performing. However, in contrast to the retention, according to the particular art. 166 of the Law on Misdemeanors, order the detention of those persons, except the court may order and authorized police officer (art. 168)! Retention is mandatory if the driver of the vehicle has a 1.2 or more promils of alhohol in blood, or he is under the influence of intoxicating substances (art. 168 para. 3). The retention is also required, if the person refuses to submit to testing for the presence of alcohol or intoxicating substances in the blood (art. 168 para. 49.). Ability to retain persons, caught in the act of breaching, under the influence of opiates, at the discretion of the police officer, as well as relativism an obligation to inform his family about the detention (art. 168 para. 5), is a departure from standards, set forth in the most important international documents on the human rights protection.

RETENTION IN THE COMPARATIVE LAW

Retaining of the suspected is provided in many other legislative. In French law, there is an institution *garde à vue* (keeping an eye on), which allows the retention of a suspected up to 24 hours, while the time limit may be extended for another 24-hour, by order of the public prosecutor. The continued existence of police custody is possible, for another 48 hours, if there is suspicion of committing of drug trafficking offense (art. 706-29 of French CPC). The decision to extend the detention of a suspected, in this situation, brings a judge of freedom and detention. The judge of freedom and detention (le juge des libertés et de la detention) may also extend the retention, specified by the police for 72 hours, if the suspected is charged with the criminal offense of terrorism (art. 706-23 of the CPC).[11]

French Code of Criminal Procedure (CPC) respects the basic postulates of the protection of individual freedoms principle, contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 5-2). In accordance with French CPC (art. 63-1), a police officer is obliged to inform the detained person about the criminal offense for which he is charged. This obligation applies not only to the legal qualification of the offense, but also to the facts known to the police, giving rise to suspicion of committing a criminal offense of detained suspected. However, the police information about the new criminal offense of detained suspected does not have to be presented. If, however, the knowledge, related to the commission of the drug trafficking or terrorism crime, it must presented to the detained suspected. This is due to the possibility of changing the regime of detention in these situations.[12]

The suspected, placed under detention, has right to be informed about the basis of retention on understandable language (art. 63-1). This right includes the possibility of using a translator, and an interpreter for deaf and illiterate persons. In addition, the nearest relatives have the right to, without delay, be promptly notified, about the detention the suspected (art. 63-2). Similarly, French law allows the realization of the right to legal defense, already from the beginning of police custody (art. 63-4 of the CPC). This right belongs to the detained by the extension of the detention, and after twelve hours from decision about the extension of the detention (art. 63-4 par. 6). However, the right to communicate of detained suspected with counsel was reduced, if it comes to organized crime, terrorism and drug trafficking. In these cases, communication with a lawyer can be achieved starting from 36 hours from determining of the detention (for

10 "Official Gazette of RS", no. 101/2005, 116/2008 and 111 / 2009.
11 : Read more: J. Pradel, Prolégomenènes, Revue pénitentaire et de droit penal, No. 1, avril, 2001.
12 See: Mirjana Tomic-Malic police custody and detention in French law, Yugoslav Journal of Criminology and Criminal Justice, Belgrade, 2001, no. 2-3, p. 231.

organized crime), or after 72 hours (for terrorism and drug trafficking). Catalog of detained suspected rights in French law is complemented by a right to information about the progress of the criminal proceedings (art. 77-2 of the CPC), the right to silence (art. 63-19, the right to health protection (art. 63-5), and the right on getting a meal in a clearly defined time (art. 64 and 65 of the CPC). The legality of the detention regime in French law is strengthened by the obligation to legal control of the court and the public prosecutor, and by the parliamentarians ability to visit police stations.[13]

Retaining of the suspected as a form of liberty deprivation, also exists in the law of England and Wales. Although this is case law, adopting the Law on the Police and Criminal Evidence Procedure (Police and Criminl Evidence Act) from 1984., a systematic normative basis for criminal prosecution of perpetrators was created. In accordance with the provisions of the law, the police are authorized to detain a suspected. Retaining can lasts for 24 hours, starting from the moment of transfer of the suspected to the first police station in the territory of England and Wales. The extension of the police custody (police detention) is possible for another twelve hours, by the decision of the chief inspector of police, if there is reasonable belief of the detention necessity, in order to secure an evidence, or to obtain an evidence, by questioning of suspected, and it is also necessary to be serious crime (serious arrestable officence). Before making a decision about the extension of detention, the suspected and his lawyer have the right to an oral or written communication.

If detained person is not charged within 36 hours, it must be released. Any further retention is only possible on the basis of the magistrate court order for further retention (warrant of further detention), initiated by the request of police. It can take up to 48 hours. Thus, the total duration of the suspected detention, prior to indictment, may last up to 96 hours. By raising the charges, the suspect will be released, with the guarantee or without it, except if his name and address is unknown, or there is reasonable suspicion that they are inaccurate; If it is reasonable to believe that retention is necessary for the safety of the suspected or others, or to prevent damage to property; if there are reasonable grounds to believe that the suspected will not appear in court, or he/she must be protected from the intervention of the court administration, or from investigations for any particular offense.[14] Otherwise, in English law periodical validation of detention by the police is provided (six hours by determining the detention, and nine hours after the previous revision of detention). When deciding about the survival of certain detention, the suspected and his lawyer can point out your opinion. (art. 15.1-15.5 of Criminal Police and Evidence Act).

Italian law provides for ability to retain the suspected, as a measure of the State Prosecutor‘s Office primary jurisdiction. It can be determined if there is unable to determine the identity of suspected, or because of the risk of flight, and the suspicion is related to the commission of offenses for which the law provides for life imprisonment, a fine or a prison sentence of two to six years, or the case of crimes relating to weapons and explosives (art. 384 para. 1. LCP). However, under these conditions, the retention of suspected may be determined by judicial police (art. 384 para. 2). This power can be realized due to the police emergency (art. 384 para. 3). The police can hold suspected no longer than 24 hours, with an obligation to urgently carry out of suspected to state prosecutor.. The judicial police shall notify the defense counsel of suspected about the act of his detention.. Likewise, about detention of a suspected, judicial police shall immediately notify to the closest relatives (art. 387 of the Italian CPC). Detention of a suspected, based on the autonomous decisions of the public prosecutor, may last 48 hours (including 24 hours, on the basis of Judicial Police decision). At that time, the public prosecutor may interrogate the suspected. Eventual continuation of the suspected detention can be based on the decision of the judge for preliminary proceedings, enacted at a special hearing about the confirmation of retention.

In German law, there is the possibility of preventive closure of suspected, before initiating a formal criminal proceedings. This power have the Attorney General and the police, in which detention may last 24 hours. (§ 127 StPO). After this period, the suspected must be submitted to the court. The court may take suspected no later than the next day (§ 115). If the court finds that retention is not established, suspected makes available to the state prosecutor. If, within

13 Read more: Mirjana Tomic-Milic, op. cit, p. 234-235.
14 A. Iller, M. S., Goodwin, G. A. , Criminal Litigation, London, 1985, p. 57.

one day, the charge is not brought, the suspected be released (§ 129). In Austrian law, detain of the suspected, prior to submission to judicial authorities, may last up to 48 hours (Article 172 StPO). The court may detain of the suspected, replace with the custody or with some of the precautions.

DETENTION IN THE PRACTICE OF EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights has been decided on the legality of police detention of suspected. The Court in several judgments was on the opinion that detention the suspected is not in conflict with the right of the suspected to be promptly brought before a court.

Referring to art. 5 The Convention, the Court takes the view that the purpose of arrest and police detention must be: bringing of people, for which there is a reasonable suspicion of committing a offense, or who is about to commit a offense, or who attempts to evade the law, after the commission of the offense. However, the European Court pleaded that the suspect's release, without charge, and without bringing to the competent legal authority, after the police custody, by itself, does not constitute a violation of art. 5 of European Convention! The right to liberty and security is violated if the arrested person is released, before making of any kind of judicial review about his detention was possible. [15]

From the practice of the European Court of Human Rights arises the necessity of an immediate appearance of the person deprived of liberty before the Court. The Court, in the case of *Brogan v. United Kingdom*, found that the duration of police detention in duration of four days and six hours, which did not resulted in bringing to trial, is not in accordance with art. 5 para. 3 of ECHR. Likewise, the arrested person shall, immediately upon detention, be in a position to initiate judicial review procedure by which his personal freedom has been limited. An urgent judicial review of his detention is an important guarantee against the abuse of the person, who was detained.[16] In accordance with the decisions of the European Court, the judicial control of deprivation of liberty must be «automatic», ie. it should not depend on the prior submission of person deprived of liberty.[17]

From the Court's practice, it follows that the need for initiating of criminal proceedings, or to prevent the commission of the offense, may represent the initial justification for the detention of the suspected. However, the continued restriction of personal liberty of the suspected shall be subject to immediate judicial review, which will not consider only the legality and the justification of deprivation of freedom undertaken, but its later appropriateness. The existence of reasonable suspicion of crime comitting itself, may not be a basis for further detention of the suspected up to trial. In addition to the existence of reasonable suspicion that the detainee has committed a crime, according to the jurisprudence of the European Court, there has to be some of the reasons for the extension of deprivation of liberty, namely: risk of flight, the risk of interference with the judiciary, the need to prevent crime or need to preserve public order.[18]

By the judgments of the European Court of Human Rights the criteria relevant to the extension of detention, before the surrender of the suspect to the judicial authority have been concretized. Thus, there is a risk of flight if the suspect fled after the earlier criminal charge, if requested his extradition, or was clearly shown to be terrified of custody if there is a clear plan for the escape of the suspect connection with a state that can help him on the run , and the like.[19] The risk of interference with the judiciary exists: if there are indications that the suspected could put pressure on witnesses, if he will provide an information to other persons, under investigation, if he will destroy the documents and other physical evidences, and so one. All of these circumstances can not be in bstracto, but must be factually substantiated. The fact that the suspected was previously

15 Judgement in the case of Brogan and Others v. United Kingdom, from 29.11. 1998.
16 Judgment in the case of Aksoy v. Turkey, from 18.12.1998
17 See: Gilles Ditertr Extracts from the most important decisions of the European Court of Human Rights, Belgrade, 2006, p. 129.
18 Jeremy McBride, Monica Macovei, The right to liberty and security of person, Guide for the application of art. 5 of European Convention of Human Rights, Manual on Human Rights no. 5, the Council of Europe, Belgrade, 2004, p. 57.
19 Jeremy McBride, Monica Macovei,,op. cit, p. 65.

convicted for similar offenses, may indicate a need for extending the detention of a person for the purposes of crime prevention. On the other hand, the need to maintain public order, as a basis for the extension of the detention of a suspect does not have to exist, and if the nature of the crime points to the possibility of a more severe punishment.[20]

The relevant period for assessing the admissibility of life imprisonment, undertaken prior to execution of the suspected before the court, begins to run from the time of arrest. Therefore, the relevant date of taking into custody, and not a later date, when the judge ordered the custody.[21] On the other hand, the period of deprivation of liberty ends on the day when the decision on guilt is made, even if it is the first instance.[22] In doing so, a period between the date of conviction and the date of its abolition was irrelevant, when and the case is back to retrial. Consequently to the attitude of the European Court, a person found guilty at trial can not be considered detained, because of «the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offense.» Therefore, this person does not fall under the protection of the provisions of art. 5 para. 3 of ECHR, but the legal situation of the person regulated under art.. 5 para. 1a, which permits detention «after the conviction pronounced by a court of competent jurisdiction".[23]

Provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides for the right to an enforceable benefit of persons who are arrested or detained, contrary to the provisions of the Convention (article 5 para. 5). Therefore, a violation of the European Convention is a deprivation of liberty, taken in accordance with domestic law, but contrary to the provisions of art. 5 para. 5 of the Convention. This undoubtedly arises from the already mentioned case of *Brogan v United Kingdom.*

CONCLUDING REMARKS

A short-term closure of the suspected, prior to judicial authority delivery, sometimes appears as an imperative of effective community responses to persons, for which there is a relevant degree of assurance, that they committed a crime. Power of the police to detain a suspect determined, although conceptually and nomotechnical insufficiently grounded, is one of the possibilities for securing the presence of the person deprived of liberty, with the aim of collecting information, for the purpose of creating the normative requirements for the initiation of criminal proceedings.

Strict legality in determining detention is provided by supervision of the investigating judge's implementation of these measures. On the one hand, the investigating judge, at any time, may request bringing of the suspected, and, on the other hand, he is empowered to decide about the appeal of the measure determination. In addition, the guarantee on the basis of the protection of individual freedoms principle (especially the right to legal defense) complete mechanism of normative barrier against possible arbitrary and willfully treatment of the police. Optimal level of detained suspected protection, contributed to the legal obligation of periodic review of the justification for further implementation of these measures, as well as legislative changes solutions, contained in certain systemic laws, that allow certain relativization safeguards to protect a personal liberty.

REFERENCES

1. Iller, A., Goodwin, M. S., Criminal Litigation, London, 1985;
2. McBride, Jeremy, Macovei, Monica, Right to liberty and security of person, the Guide for the application of Art. 5 European Convention on Human Rights, Manual on Human Rights no. 5, the Council of Europe, Belgrade, 2004;

20 Ibid, p. 64-66.
21 Judgement of the European Court in the case of *Miller v. France, 17* March in 1997, Application no. 21802/92.
22 See judgments in cases *Labita against Italy* from 6 April 2000. , application no. 26772/95 and *Vemhof against Germany*, from 27 06 1968, Series A no. 7, p. 23., paragraph 9.
23 Judgment in the case of Kudla v. Poland, 26 10 2000 Brief no. 30210/96, § 104.

3. Pradel, Jean, Prolégomenènes, Revue pénitentaire et de droit penal, No. 1, avril, 2001.
4. Grubač, Momcilo, Procedural and legal guarantees of personal liberty of citizens, Legal life, 1998, no. 9;
5. Ditertr, Gil, Excerpts from the most important decisions of the European Court of Human Rights, Belgrade, 2006;
6. Lazin, George, Custody in the Yugoslav criminal procedure and international human rights standards, Proceedings of Serbian Association of Criminal Justice, Kopaonik, 1995;
7. Obradovic, Dragan, ratified international treaties and generally accepted rules of international law and criminal procedure legislation of the State Union of Serbia and Montenegro, the paper with a set of criminal legislation, organization and functioning of the judiciary in the State Union of Serbia and Montenegro, Zlatibor, 18-20. 09 , 2003;
8. Petric, Branko, detention in criminal proceedings, Novi Sad, right, br.12/87;
9. Tomic-Malic, M., Police custody and detention in French law, Yugoslav Journal of Criminology and Criminal Justice, Belgrade, 2001, no. 2-3.

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MAIN PRINCIPLES OF ENFORCEMENT OF CRIMINAL SANCTIONS AGAINST JUVENILES

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Abstract: Although the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles (LoJ) introduced diversion orders as special *sui generis* measures for the first time in 2006., the main form of response to criminal behaviour of juveniles in the Republic of Serbia is still reflected through criminal sanctions, primarily educational measures. This data indicates that principles underlying the execution of criminal sanctions against juveniles must be given adequate attention. The LoJ nominates twelve main principles which are corresponding to standards established in relevant United Nations and Council of Europe documents in this area. An exemption to this is the principle of prohibition to carry firearms, and this should be harmonised with Rule 65. of Havana Rules (HR) in the forthcoming amendments, since they prescribe that no firearms shall be allowed within facilities where juveniles serve their sentences.

Consistent application of these principles is, as the author emphasises, a necessary assumption of executive individualisation which makes organic and functional unity with legal and court individualisation. In that way, criminal sanction will be adapted to juvenile personality, thus contributing to more successful realisation of its purpose.

Keywords: Juvenile criminal law, criminal sanctions, educational measures, principles of enforcement of criminal sanctions against juveniles, individualisation.

CRIMINAL SANCTIONS AGAINST JUVENILES

Starting from general substantive-formal notion of criminal sanctions,[1] criminal sanctions against juveniles can be defined as legally stipulated measures which, aimed at suppression of juvenile delinquency and based on the final court decision made in proceedings against juvenile or exceptionally in criminal proceedings in which the proceedings conducted against a juvenile is combined with proceedings conducted against adult offender, are applied, i.e. enforced against juveniles who have committed illegal acts defined by law as criminal acts.[2]

Pursuant to Article 9. paragraph 1. of the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles (hereinafter referred to as: LoJ),[3] juveniles can be sentenced for the acts they committed with the following: educational measures, juvenile detention and security measures, stipulated by Article 79. of the Criminal Code (CC)[4], with the exception of restraint to be engaged in his/her occupation, business activities or duties.[5] Younger juveniles (who at the moment of commitment of crime were more than fourteen but less than sixteen) can be pronounced only educational measures, while older juveniles (who at the moment of commitment of crime were more than sixteen but less than eighteen) in addition to educational

1 "Criminal sanctions are legally stipulated repressive measures which, aimed at suppression of criminality, are applied against the offender who has committed illegal act defined by law as criminal act, based on court decision made upon the implemented criminal proceedings." Stojanović, Z., Krivično pravo – opšti deo, Belgrade, 2009, p. 245.

2 In order to dismiss any terminological doubts, the author of this definition stresses that term "delinquency" implies only crime committed by juveniles, not other behaviours which could be classified as the so-called anti-social behaviour, i.e. other forms of delicts. Škulić, M., Maloletničko krivično pravo, Belgrade, 2011, pp. 285. and 26-27.

3 "Službeni glasnik RS", no 85/05.

4 "Službeni glasnik RS", no 85/05, 88/05 – corr., 107/05 – corr., 72/09, 111/09, 121/12 and 104/13.

5 For amendments in the area of criminal sanctions against juveniles made by the LoJ with regard to previous substantial criminal law, see: Perić, O., Milošević, N., Stevanović, I., Politika izricanja krivičnih sankcija prema maloletnicima u Srbiji, Belgrade, 2008, p. 123.

measures which are primarily applied, can be exceptionally pronounced the sentence of juvenile prison (Article 9. paragraphs 2. and 3. of the LoJ). In addition to educational measure or juvenile prison, a juvenile, as we already stressed, can be pronounced security measures, stipulated by Article 79. of the CC, with the exception of restraint to be engaged in his/her occupation, business activities or duties. Security measures related to compulsory treatment of alcoholics and compulsory treatment of drug users cannot be pronounced along with educational measures of warning and guidance, while measure of compulsory psychiatric treatment and confinement in medical institution can be ordered separately (Article 39. of the LoJ). Enforcement of court admonition and probation sentence against a juvenile shall not be allowed.

In the register of criminal sanctions enforced against juveniles, educational measures deserve special attention. They are the main type, i.e. group of criminal sanctions intended for juvenile offenders of crime, and courts in the Republic of Serbia, as indicated in statistical data, have been giving highest confidence to them for a range of years.[6] The LoJ (Article 11. paragraph 1. items 1) -3)) stipulates three types of educational measures with several educational measures contained therein (a total of nine). These are the following:

1. warning and guidance – court admonition and alternative sanctioning;
2. measures of increased supervision – increased supervision by parents, adoptive parent or guardian, increased supervision in foster family, increased supervision by guardianship authority, increased supervision with daily attendance in relevant rehabilitation and educational institution for juveniles;
3. institutional measures – remand to rehabilitation institution, remand to correctional institution, committal to special institution for treatment and acquiring of social skills.

Through Article 11. paragraphs 2-4. the legislator indirectly gives guidance to courts about framework criteria they should be driven by when deciding which group of educational measures should be taken into account in a specific case.[7] In accordance with that, measures of warning and guiding are pronounced when it is necessary and enough to apply those measures to affect personality of a juvenile and his/her behaviour. Unlike them, measures of increased supervision are pronounced, as conceived by legislator, when education and development of a juvenile require measures in longer period of time, which are to be implemented with proper professional supervision and assistance (primarily, of guardian bodies), when it is not necessary to isolate such juvenile from the his/her previous environment. Finally, institutional measures are pronounced when it is necessary to apply permanent measures of upbringing, treatment and training with isolation of juvenile from his/her previous environment, in order to intensify influence on him/her. Institutional measures are last resort measures – *ultima ration* (quantitative limit) and they can take, within legally defined limits), only for such time needed for realisation of educational measures purpose (time limit).[8] It is obvious that legal criteria for application of this type of educational measures are based on the principle of gradualism, i.e. non-enforcement of more serious measures as long as less serious one can be applied to achieve the purpose.

In addition to framework criteria for application of different educational measures, Article 12 of the LoJ prescribes a general criterion for the selection of educational measure, regardless of the subject measure. The general criterion stipulates that the court, when selecting educational measure, shall take under deliberation the age and maturity of the juvenile, other aspects of his/her character and degree of deviation in social behaviour, gravity of the offence, motives for committing the offence, living circumstances and environment of the juvenile, his/her behaviour following the commission of the offence (particularly whether he/she prevented or attempted to prevent occurrence of damaging results, compensated or attempted to compensate for the damage caused), whether the juvenile has any prior criminal or misdemeanour conviction, as well as all other circumstances of relevance for pronouncement of such measure that would

6 Out of a total of 10.363 juveniles who were convicted for committed crime in the period between 2008. and 2012., educational measures were pronounced to 10.307 persons, or 99,46% cases, juvenile prison to only 56 persons, or 0,54% cases. See: Maloletni učinioci krivičnih dela u Republici Srbiji, 2012, Saopštenje br. 200, 15.07.2013, Republički zavod za statistiku, Belgrade, p. 3.

7 Lazrević, Lj., Grubač, M., Komentar Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica, Belgrade, 2005, p. 39.

8 See: Rules 17.1 b), v) and 19. of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* – The Beijing Rules (BR), and rule 2. of the *United Nations* Rules for the *protection* of *juveniles deprived* of *their liberty* – The Havana Rules (HR).

best serve to achieve the purpose of educational measures. It is obvious that when selecting educational measure, priority significance is given to circumstances related to the juvenile personality (those indicating his/her psycho-physical characteristics, socialisation expressed through manifested behaviour, family and social ambience, existence/non-existence of social responsibility and moral value system), although the legislator refers to the assessment of objective circumstances, first of all, gravity of the committed crime. In addition, the court shall take into account other circumstances of subjective and objective character, which can affect proper choice of educational measure.[9]

The purpose of criminal sanctions against juveniles is realised within general purposes of criminal sanctions (Article 4. paragraph 2. of the CC), which means that criminal sanctions prescribed for this age category of perpetrators provides for the protective function of criminal law, since prescribing thereof and subsequent pronouncements suppress acts which violate or endanger values protected by criminal laws.

Within the general purpose of criminal sanctions, the purpose of educational measures is to influence the development and improvement of personal responsibility of the juvenile, education and proper development of their personality through supervision, protection and assistance, as well as general and professional qualifications so as to enable his/her social reintegration (Article 10. paragraph 1. of the LoJ). The purpose defined in this way and manners of implementation thereof lead to the conclusion that educational measures primarily emphasise special prevention.

The purpose of juvenile detention mainly matches the purpose of educational measures; however, there are certain specificities. In addition to the specified purpose of educational measures, enforcement of juvenile detention is to administer intensified influence on the juvenile offender not to commit criminal offences in the future, and as deterrent to other juveniles not to commit criminal offences (Article 10. paragraph 2. of the LoJ). In other words, special prevention is underlined and general one is emphasised, which was not the case with educational measures.[10]

Pursuant to Article 78. of the CC, the purpose of security measures is to dismiss the situation or conditions which could influence the offender to commit crime in the future, so it is clearly reasonable that this is the purpose of security measures which can be pronounced to juvenile offenders. Therefore, special-preventive effect is also stressed here.

Domination of special prevention indicates that the aim of the abovementioned criminal sanctions is in the juvenile's personality and need to educate, supervise, protect and assist him/her. The basis and measurement for the sanction is personality, with the committed crime standing behind as the reason for the pronouncement thereof. In accordance with that, priority significance is given to diagnosis of a person's needs and problems in his/her development, as well as forecast of the effect of sanctions in juveniles' upbringing and proper development.[11] Familiarising with juvenile offenders personality, taking into account significant bio-psychological and social differences that exist amongst juveniles, is a necessary assumption for adjustment of sanction (legal, judicial and executive individualisation) to his/her characteristics, therefore for the achievement of special prevention.

As organisational activity, enforcement of criminal sanctions against juveniles relies on principles which enable realisation of their purpose. In addition to basic principles which will be considered in details, there are also General provisions on the enforcement of educational measures (Articles 98-100. of the LoJ), as most important criminal sanctions intended for juvenile offenders, as well as Joint provisions on the enforcement of institutional measures (Articles 113-119), which imply restricting the juvenile's freedom of movement and his/her institutionalisation.

9 Radulović, Lj., Maloletničko krivično pravo, Belgrade, 2010, pp. 95-96; Škulić, M., *op. cit.*, pp. 289-290; Perić, O., Komentar Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica, Belgrade, pp. 34-35; Soković, S., Vaspitne mere, Pravni život, Belgrade, no. 9/2010, Volume I, pp. 672-674.

10 Perić, O., *op. cit.*, p. 32.

11 Kambovski, V., Kazneno pravo – opšt del, Skopje, 2006, p. 811.

BASIC PRINCIPLES OF ENFORCEMENT OF CRIMINAL SANCTIONS AGAINST JUVENILES

Within the Basic provisions on the enforcement of criminal sanctions against juveniles (Article 87-97. of the LoJ), the following basic principles for the enforcement of these criminal sanctions have been defined:

1. Personal jurisdiction – provisions on the enforcement of criminal sanctions against juveniles shall apply to adult offenders who have been pronounced with educational measure or juvenile detention (cases when adults can be pronounced with certain sanction intended for juveniles are stipulated in Articles 40. and 41. of the LoJ), as well as to persons who have ceased to be juvenile during the enforcement (if the pronounced educational measure or sanction of juvenile detention continues even after the person turns eighteen).

General conditions referred to in Article 4. of the Law on the Enforcement of Criminal Sanctions (LECS)[12] apply to the enforcement of criminal sanctions against juveniles. In accordance with that, the enforcement is initiated when the decision pronouncing the sanction becomes enforceable and if the enforcement of sanction is not legally challenged. Only exceptionally, when specifically defined so by law, enforcement of the sanction can be initiated even before the decision through which the sanction has been pronounced becomes enforceable;[13]

2. Prohibition of discrimination – juveniles who are subject to criminal sanctions shall be equal regardless of their race, skin, sex, language, confession, political or other belief, national, ethnic or social origin, financial status, status acquired by birth or other status of a juvenile, his/her parent, adoptive parent or guardian, as well as other form of differences. This is a very important principle formulated in almost the same way at international and national levels.[14] Practical value of prohibition of discrimination is realisation, i.e. guaranteeing and protection of principle of equality, which implies: equality before law, equal legal protection and equality in implementation of law. The third element of the principle of equality is of specific significance since it clearly emphasises that sanction shall not be applied in discriminatory manner.

As negation of equality, discrimination, regardless of its form,[15] shall be any unallowed differentiation,[16] i.e. different treatment which is not objectively and reasonably justified. In the enforcement of criminal sanctions against juveniles, discrimination accordingly can be defined as truly unjust treatment based on rationally insignificant differences;

3. Individualisation in the way of treatment – during the enforcement of criminal sanctions, the treatment should be executed in the way that corresponds to the juvenile's age, level of his/

12 "Službeni glasnik RS", no. 85/05, 72/09 and 31/11.

13 Pursuant to Article 80. paragraph 2. of the LoJ, an appeal against the decision ordering an educational measure enforced in a detention facility and/or an institution shall stay enforcement of the decision if the Court, in agreement with the juvenile's parents and following questioning of the juvenile, does not decide otherwise. Therefore, enforcement in this case can be initiated even before the decision through which some of the mentioned sanctions have been pronounced is enforceable and executive.

14 See: Articles 2. and 7. of the Universal Declaration on Human Rights (UDHR); Article 2. paragraph 1. and Article 26. of the International Covenant on Civil and Political Rights (ICCPR); Article 1. paragraph 1. of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women; Rule 6.1) of the Standard Minimum Rules for the Treatment of Prisoners (SMRTP); Principle 5 of the *Body* of *Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (PPDI); Principle 2. of the Basic Principles for the Treatment of Prisoners (PTP); Article 14 of the European Convention on Human Rights and Fundamental Freedoms (CHRFF); Article 1 of the Protocol no 12 to CHRFF; Rule 13. of the European Prison Rules (EPR); Paragraph 55, 3rd General Report on the CPT's activities [CPT/Inf (93) 12]; Paragraph 25, 10th General Report on the CPT's activities [CPT/Inf (2000) 13]; Article 2 of the Convention on the Right of the Child (CRC); Rule 2.1 of the BR; Rule 4. of the HR; Article 21. paragraphs 1-3. Constitution of the Republic of Serbia (Constitution), "Službeni glasnik RS", no. 83/06 and 98/06; Articles 128, 317. and 387. of the CC; Article 1. paragraph 1, Article 2. paragraph 1. item 1), Article 3. paragraph 1. and Article 4. of the Law on prohibition of discrimination, "Službeni glasnik RS", no. 22/09.

15 The Law on prohibition of discrimination stipulates wide range of prohibited forms of discrimination. In particular, the following shall be prohibited: direct and indirect discrimination; violation of the principle of equal rights and duties; tcalling to account; associating for the purpose of exercising discrimination; hate speech, as well as disturbing and humiliating treatment (Articles 5-12). Also, severe forms of discrimination (Article 13) and special cases of discrimination (Articles 15-27) shall also be prohibited.

16 Dimitrijević, V., Paunović, M., Ljudska prava (udžbenik), Belgrade, 1997, p. 185.

her maturity and other aspects of his/her personality, respecting the dignity of the juvenile, encouraging his/her overall development and participation in his/her own resocialisation process. Competent authorities shall observe modern pedagogical, psychological and penological knowledge and experience.

Enforcement of educational measures and juvenile detention is based on individual treatment programme for a juvenile, which is adjusted to his/her personality and is in accordance with modern scientific, pedagogical and penological practice. Those programmes are developed based on a comprehensive overview of maturity and other aspects of juvenile's personality, his/her age, educational level, earlier life and behaviour in social environment, forms of behavioural disorder, type of crime and circumstances under which it has been committed.

Individual programme determines in particular: level of the juvenile's maturity, other aspects of his/her personality, possibility to include him/her into the educational and work training process, use and organisation of free time, work with the juvenile's parent, adoptive parent or guardian and with other members of his/her family, as well as other forms of psycho-social, pedagogical and penological influence on him/her. Taking into account that every juvenile has own personality, treatment programmes significantly differ. Flexibility is also their important characteristic, as a necessary prerequisite for the achievement of purpose of the pronounced educational measure or sanction of juvenile detention;[17]

4. Provision of conditions for acquisition of education degree – low educational level, negative attitude towards school and neglect of work-related duties are important characteristics of criminal offenders. Due to the situation that they leave school early, they are deprived of positive upbringing-educational influence over a longer period of time, which leaves the space for influence of a range of factors with high aetiological importance in the formation of criminality. In accordance with that, the juvenile is provided with conditions for acquisition of elementary and secondary degree and work-related training.[18] Acquisition of one or another type of education, i.e. work-related training, depends on the age and specific situation of juvenile offender upon whom the criminal sanction is enforced;

5. Freedom of confession – religion can play an important role in mitigation of frustration and deprivations specific for institutional criminal sanctions (therefore can contribute to more successful realisation thereof), due to which a juvenile is enabled to express his/her religious feelings freely, as well as exercise of religious rituals.[19] The LoJ, as well as LECS, does not go further than external religious objectivities, and for completely justified reasons does not deal with subjective religiousness, i.e. juvenile's inner, personal experience of the sacred;[20]

6. Health protection – juveniles under the enforcement of institutional educational measure or sanction of juvenile detention are subject to systematic health check at least once a year in appropriate healthcare institution.[21] In addition to this check, primarily aimed at overview of physical health, at least twice a year a report on the juvenile's psychological state is made and submitted to the juvenile judge who decided in first instance proceedings and who enforces supervision, i.e. who has insight into the enforcement of criminal sanction;

7. Prohibition of sending to solitary confinement – a juvenile cannot be pronounced with discipline sanction of sending to solitary confinement,[22] since isolation, as a rule, results in harmful consequences for juvenile's personality and negatively affects his/her upbringing process. Prohibition of pronouncement of solitary confinement refers also to adult criminal

17 Perić, O., *op. cit.,* p. 180.

18 See: Article 26. paragraphs 1. and 2. UDHR; Rule 71.5) of the SMRTP; Principle 6. of the PPDI; Rules 28.1-3, 35.2 and 103.4b of the EPR; Paragraph 31, 9th General Report on the CPT's activities [CPT/Inf (99) 12]; Rules 26.1 and 26.6 of the BR; Rules 38, 39, 42. and 43. of the HR; Article 71. paragraphs 1. and 2. of the Constitution; Coyle, A., A Human Rights Approach to Prison Management (Handbook for prison staff), London, 2009, p. 140; Handbook for prison leaders (A basic training tool and curriculum for prison managers based on international standards and norms), United Nations, New York, 2010, p. 89.

19 See: Article 18. of UDHR; Article 18. paragraph 1. of ICCPR; Rules 6.2) and 42. of MSRPT; Principle 3. of PTP; Article 9 paragraph 1 of CHRFF; Rules 29.1 and 29.2 of EPR; Rule 48. of HR; Article 43. paragraphs 1. and 3. of the Constitution.

20 V. V. Veković, Sistem izvršenja krivičnih sankcija, Belgrade, 2013, p. 90.

21 See: Rule 62. of MSRPT; Rule 39. of EPR; Paragraph 52, 3rd General Report on the CPT's activities [CPT/Inf (93) 12]; paragraphs 38, 41, 9th General Report on the CPT's activities [CPT/Inf (99) 12]; Rule 26.2 of BR; Rule 49. of HR.

22 See: Paragraph 35, 9th General Report on the CPT's activities [CPT/Inf (99) 12]; Rule 67. of HR.

offenders who have been pronounced with institutional educational measure or sanction of juvenile detention, as well as persons who cease to be juveniles during the enforcement of sanctions. Exceptionally, discipline measure of removal to separate premises can be pronounced instead (Article 130. paragraph 1. item 3) of the LoJ), which implies continuous stay of two or more juveniles in separate premises (paragraph 6. of the same Article);

8. Prohibition to carry firearms – no firearms is allowed inside the institution or facilities where institutional measures or sanction of juvenile detention are enforced;[23]

9. Budget financing of the enforcement of criminal sanctions – costs for the enforcement of criminal sanctions against juveniles shall be borne by the budget. There are however, some exceptions to this principle. Actually, parent, adoptive parent or guardian, i.e. other person obligated by law to support the juvenile, as well as the juvenile with income or property, if they are in position to do so, they are obligated to bear a part of costs for the enforcement of special duties, measures of increased supervision in a foster family, increased supervision with daily attendance in relevant juvenile rehabilitation and educational institution, remand to educational institution, remand to correctional facility and sanctions of juvenile detention.

The option to pay a part of costs for the enforcement is considered by the court which had made the decision in the first instance proceedings, at the proposition of public prosecutor for juveniles, or of the guardian authority. If it is necessary to engage in deeper investigation of financial status of these persons for the purpose of making such a decision, the court will firstly make a decision about the pronouncement of criminal sanction, and then will continue the proceedings to reach a decision about paying a part of costs, which is finalised through a specific ruling.

The Panel of Juvenile Judges who decided in the first instance proceedings can make a specific ruling and change the decision about the participation in costs for the enforcement, either by relieving the persons of the duty, increase or decrease the amount of the part of costs because the costs for the enforcement have in the meantime increased or decrease, and so on.

Parent, adoptive parent, guardian, or other person shall bear a part of costs for the enforcement of listed criminal sanctions as long as their legal obligation of support of the juvenile is in place. The juvenile's obligation to participate in these costs lasts as long as he/she can bear them;

10. Protection of the rights of the juvenile – when the juvenile judge during the enforcement of criminal sanction establishes that there are facts and circumstances indicating a need to undertake measures to protect the juvenile's right, he/she is obligated to inform about that the guardian authority according to the juvenile's domicile or residence;

11. Right to complain – if a juvenile deems that he/she has been deprived certain rights, or that such rights have been violated, as well as that other illegalities or irregularities have been exercised during the enforcement of institutional measure and sanction of juvenile detention, he/she is entitled to lodge a complaint to the warden of institution or facility where such criminal sanction is being enforced.[24] The warden is obligated to issue a written rationale – ruling, as a reply to the juvenile's complaint within three days. The ruling can reject the complaint as groundless, or can establish that there are full or partial grounds for it, in which case it is necessary to apply urgent and appropriate measures for elimination of violations or deprivations of the juvenile's rights, other illegalities or irregularities. The ruling shall have advice on legal remedy;

12. Court protection of the rights of the juvenile – against the ruling of the warden related to the lodged complaint, the juvenile can lodge a complaint within eight days from the reception day, to the panel of the first instance court which has been supervising the enforcement of the

23 This principle established in Article 92. of the LoJ, harmonised with Rule 65. of HR, is not consistently implemented in the law. According to Article 132. paragraph 2. of the LoJ, firearms and weapons can be exceptionally used against a juvenile in a correctional facility only if by other means of force or restraint the life of a juvenile or other person cannot be protected in event of direct attack. The use of weapons implies that carrying thereof shall be allowed within these institutions andfacilities, so that provisions referred to in Article 92. and Article 132. paragraph 2. are mutually exclusive. The provision referred to in Article 132. paragraph 2. of the LoJ we can found with certain modifications which do not change its core meaning, in Article 89. paragraph 2. of the Rulebook on the house rules in a correctional institutions, as well as in Article 140. paragraph 2. of the Rulebook on the house rules in a correctional institution for juveniles, both published in the "Službeni glasnik RS", no. 71/06.

24 See: Rule 36.1) of MSRPT; Principle 33 paragraph 1. of PPDI; Rule 70.1 EPR; Paragraph 54, 2nd General Report on the CPT's activities [CPT/Inf (92) 3]; paragraph 36, 9th General Report on the CPT's activities [CPT/Inf (99) 12]; Rule 75. of HR.

educational measure, or to the panel of the first instance juvenile court which had decided in the proceedings when the sanction of juvenile detention had been pronounced.[25] The right to complain, as well as the above mentioned right to complain to the warden, is a significant tool for the protection of other rights of juvenile offenders and for realisation of their guaranteed position in the institution or facility where the pronounced sanction is being enforced. Due to that reason, it is necessary to create a fair and efficient system to process complaints, which will enjoy full confidence of these persons.

CONCLUSION

Although looking for adequate response to the issue of criminality amongst juveniles in the Republic of Serbia resulted that legislator in 2006. introduced for the first time diversion orders as specific *sui generis* measures, the main response to criminal behaviour of this age category of offenders are still criminal sanctions, primarily educational measures.[26] This data unambiguously indicates that basic principles underlying the enforcement of criminal sanctions against juveniles must be given adequate attention in theoretical and legislative, but also in practical terms.

The LoJ nominates twelve basic principles, common for the enforcement of all criminal sanctions against juvenile criminal offenders. These are the following: principle of personal jurisdiction; prohibition of discrimination; individualisation in treatment; provision of condition for acquisition of education degree; freedom of confession; health protection; prohibition of sending to solitary confinement; prohibition to carry firearms; budget financing of the enforcement of criminal sanctions; protection of the rights of the juvenile; right to complain, as well as the court protection of the rights of the juvenile. The considered principles correspond to standards established in relevant United Nations and Council of Europe documents in this area. The exemption is the principle of prohibition to carry firearms; actually, Article 92. and Article 132. paragraph 2. of the LoJ are contradictory and mutually exclusive. Therefore it is necessary to correct this mistake through new amendments of the existing LoJ, which have been expected for some time now, and to adopt a solution harmonised with Rule 65. of the HR, prescribing that staff in all institutions where juveniles are accommodated shall not be allowed to carry or use firearms.

Consistent application of analysed principles is *conditio sine qua non* to achieve executive institutionalisation. With regard to that, it is necessary to remind that executive individualisation is not independent and separated phase of criminal law response with respect to legal and court individualisation. On the contrary, they make organic and functional unity in the way that every next stage in adaptation of criminal sanction contributed to realisation of its purpose. To this end, executive individualisation is an extension of court individualisation, building up to its results.

25 See: Article 2. paragraph 3. of ICCPR; Rule 36.3) of MSRPT; Principle 33 paragraph 4. of PPDI; Article 13 of CHRFF; Rule 70.3 of EPR; Paragraph 54, 2nd General Report on the CPT's activities [CPT/Inf (92) 3]; paragraph 36, 9th General Report on the CPT's activities [CPT/Inf (99) 12]; Rule 76. of HR; Article 36 paragraph 2. of the Constitution.

26 E.g. in 2010 number of juveniles who were sanctioned with criminal sanction for the committed crime was 1.640, and number of received diversion orders was – 151 (in 59 cases diversion order was applied by public prosecutor for juveniles, and in 92 cases judge for juveniles). In 2012, number of juvenile offenders sentenced with criminal sanction increased to 2.302, while number of diversion orders decreased to 126 (public prosecutor for juveniles applied the order in 106, and judge for juveniles in only 20 cases). See: Maloletni učinioci krivičnih dela u Republici Srbiji, 2010, Saopštenje br. 202, 15.07.2011, Republički zavod za statistiku, Belgrade, pp. 1 and 3; Maloletni učinioci krivičnih dela u Republici Srbiji, 2012, Saopštenje no. 200, *op. cit.,* pp. 1 and 3.

REFERENCES

1. Coyle, A., A Human Rights Approach to Prison Management (Handbook for prison staff), London, 2009.
2. Dimitrijević, V., Paunović, M., Ljudska prava (textbook), Beograd, 1997.
3. Handbook for prison leaders (A basic training tool and curriculum for prison managers based on international standards and norms), United Nations, New York, 2010.
4. Instrumenti Saveta Evrope – ljudska prava, Beograd, 2000.
5. Kambovski, V., Kazneno pravo – opšt del, Skopje, 2006.
6. Lazarević, Lj., Grubač, M., Komentar Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica, Beograd, 2005.
7. Making standards works – an international handbook on good prison practice, London, March 2001.
8. Maloletni učinioci krivičnih dela u Republici Srbiji, 2010, Saopštenje br. 202, Republički zavod za statistiku, Beograd, 15.07.2011.
9. Maloletni učinioci krivičnih dela u Republici Srbiji, 2012, Saopštenje br. 200, Republički zavod za statistiku, Beograd, 15.07.2013.
10. Perić, O., Komentar Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica, Beograd, 2007.
11. Perić, O., Milošević, N., Stevanović, I., Politika izricanja krivičnih sankcija prema maloletnicima u Srbiji, Beograd, 2008.
12. Prava deteta i maloletničko pravosuđe - odabrani međunarodni instrumenti, Sveske 1–7, Beograd, 2005.
13. Radulović, Lj., Maloletničko krivično pravo, Beograd, 2010.
14. Soković, S., Vaspitne mere, Pravni život, Beograd, br. 9/10, Tom I.
15. Stojanović, Z., Krivično pravo – opšti deo, Beograd, 2009.
16. Škulić, M., Maloletničko krivično pravo, Beograd, 2011.
17. The CPT standards "Substantive" sections of the CPT's General Reports, CPT/Inf/E (2002) 1 – Rev. 2003, Strasbourgh.
18. Univerzalni dokumenti o ljudskim pravima – zbirka, Beograd, 2001.
19. Veković, V. V., Sistem izvršenja krivičnih sankcija, Beograd, 2013.

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THE PROBLEM OF PRISON OVERCROWDING IN THE REPUBLIC OF SERBIA AND WAYS TO OVERCOME IT[1]

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Abstract*:* The increased crime rate, especially in some areas on the one hand, and limited accommodation capacity of the existent prisons on the other hand, are the reasons why the prison overcrowding is referred to as one of the biggest problems of penitentiary system. In our circumstances, the constant tightening of legislator and courts' penitentiary policy increases the issue. The constant increasing in number of persons deprived of liberty and increasing rate of imprisonment are present in Serbia since 1991, and what most contributes to that is imposing of short-term prison sentences. As a consequence we have overcrowded penal facilities, which brings into question the functioning of penitentiary system and possibilities of optimal realization of persons' deprived of liberty rights. This paper indicates the possible ways to overcome this problem, and related to that, the significance of applying the alternative penal sanctions, first of all work for public interest and so called ''house arrest'', which could contribute to decreasing in number of imposed prison sentences, i.e. number of prisoners; but also indicates certain obstacles that prevent the use of these sanctions to the extent that corresponds to the structure of committed crimes and characteristics of their offenders. Apart from that, it indicates the significance of parole as institution which, if applied correctly and moderately, can contribute to significant results in the field of prison population level control. The paper also analyzes very poor applying of financial penalty which shows constant decrease since the introduction of new solutions in relation to its determination and imposing, and which could certainly contribute to diminution of imposed short-termed prison sentences if applied more frequently. On the other hand, the number of accommodation capacities as well as the improvement of prison life conditions can also have an impact on the overcrowding problem. In the end, it indicates that in Serbia problem is not in the legislative aspect, but in the fact that many obstacles which complicate the applying of legislative provisions in practice still exist. Among other things, they relate to lack of organizational preconditions, insufficient financial support of the country, as well as to the fact that the prevailing attitude in Serbia is imprisonment as the best way to solve the problem of crime.

Keywords: prison sentence, prison overcrowding, alternative penal sanctions, parole, amnesty, private prisons.

INTRODUCTION

We talk about prison overcrowding when there are more inmates in prisons than the accommodation capacities of these facilities permit[2]. Thereby, the inmates are not only persons sentenced to prison in criminal and misdemeanor proceedings but they are also persons held in preliminary proceedings, then persons detained during criminal proceedings, as well as persons to whom certain security measures related to liberty deprivation are imposed.

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2 Ilić A: Prison overcrowding – phenomenological and etiological aspects, *Crimen*, no. 2/2011, p. 246.

The impression is that understanding of repressive measures applying as the most efficient way of combating crime still rules in Serbia. Among other things, this happens because low prison sentences are easily considered as synonym for the county's inefficiency in combating crime, and their tightening as a remedy, i.e. as a solution, usually when an extreme criminal act cause a stir[3]. We can add a fact that in present times there is an increase in legal minimum of prison sentence of thirty days, the possibility of prison sentences from thirty to forty years is introduced; significant tightening of courts' penitentiary policy is visible, especially when certain types of crimes are concerned, etc. If we add the fact that both new and some of the old alternative penal sanctions are insufficiently applied in practice, it is clear why the overcrowded accommodation capacities are the biggest problem in the system of penal sanctions enforcement. Unfortunately, this is rarely discussed in public, although it is very serious problem which brings into question the functioning of penitentiary system and possibilities of optimal realization of persons' deprived of liberty rights.

CAUSES OF PRISON OVERCROWDING

Since 1991, there is a constant increasing in number of persons deprived of liberty and in rate of imprisonment in Serbia, to which the imposing of so called short-termed prison sentences[4] contributes the most. The total number of reported adult offenders in 2012 is 5% bigger compared to 2011, the number of accused adults is 6% bigger, and the number of convicted is 2% bigger. Thereby, the yearly increasing in number of persons sentenced to imprisonment is evidential, so that in 2012 the prison sentence constituted 32.6% of all penalties.[5]

	2008	**2009**	**2010**	**2011**	**2012**
Total convicts	42138	40880	21681	30807	31322
Imprisonment	9658	9763	5908	8158	10212
Up to 1 year	7393 (77%)	7368 (75%)	3701 (63%)	5264 (65%)	6833 (67%)
Over 1 year	2265 (23%)	2395 (25%)	2207 (37%)	2894 (35%)	3379 (33%)

Table 1: Number of sentences of imprisonment, 2008-2012[6]

On the other hand, the tendency of increasing in prison sentence applying is discordant to the attitudes in many international documents of the United Nations, Council of Europe and the European Union. Videlicet, the sentence of liberty deprivation is confronted to numerous and different rejections[7] in the last decades, so that everything related to it is submitted to critical consideration, from mere characteristics and essence of this measure, to pointing out the resocialization as a purpose of penalty. The so called short-termed prison sentences are especially criticized[8]. Videlicet, the main cause of prison overcrowding is the fact that in total number of prison sentences, the prison sentence up to six months and the prison sentence from six months to one year are still widely present (table 1). The majority of short-termed prison sentences convicts committed a crime that by rule is classified in the field of so called small crimes. Comparing the seriousness of the committed crime to the weight of sentence and its unfavorable effects (separation of convicts from their families, work environment, lack of time to conduct the correctional treatment etc)[9], we can conclude that it would be more humane and

3 Nikolić-Ristanović V, Ćopić S: The position of victims in Serbia: Criminal procedure and possibilities of restorative justice, *Temida*, no. 1/2006, p. 68.
4 Although there is no unique attitude in the literature about which prison sentences are considered short-termed we consider most acceptable the one by which those are all prison sentences up to one year, see also: Ignjatović Đ: *Criminology*, Belgrade, 2011, p.173.
5 Data source: Bulletins of the Republic Bureau of Statistic, available at: www.stat.gov.rs, revised on 15th December 2013.
6 Data source: Bulletins of the Republic Bureau of Statistic, available at: www.stat.gov.rs, revised on 15th December 2013.
7 Maljković M: An alternative to the imprisonment, *Social tought, no.* 2/2011, p.9-22
8 Tanjevic N: Towards European trends in the penal policy – The alternative sanctions in Serbia, *The Security Review*, no. 2/2011.
9 See: Mrvić Petrović N: *Prison crisis*, Belgrade, 2007, p.102; Lazarević D: *Short-term prison sentences*, Belgrade, 1974; Atanacković D: *Penology,* Belgrade, 1988, p. 94; Milutinović M: *Penology,* Belgrade, 1977, p.144.

efficient for them to apply some different, less repressive measures[10].

The public opinion in our country is repressively oriented and attitude that the imprisonment is the best way to solve the problem of crime and that citizens are safe only if convicts are behind bars prevails. There are numerous stereotypes and prejudices along with the aforementioned, and ignorance and disinterest lead the citizens to think that those who go to prison "have got what they deserve", i.e. that they must bear the consequences for their acts and to be severely punished. This attitude certainly contributes to emergence and development of the prison overcrowding problem.

The number of convicts and detained in Serbia in the last 20 years increased more than three times, i.e. from 3,600 in early 1990s to 6,000 persons deprived of liberty in 2000, then from 7,800 in 2004 to 11,300 (October 2012)[11]. That led us to the circle of countries with high rate of convicts[12] and in the last years to first places in Europe.[13] Upon enforcement of the Law on Amnesty[14] in November 2012, the number of persons deprived of liberty decreased, so at the end of 2012 it was 10,226 which is still a problem for system functioning. This gets more serious by the fact that among the convicts are mostly those convicted for crimes with elements of violence and crimes of illicit production and distribution of narcotic drugs (table 2), which implies that the majority of convicts from the mentioned category is initially accommodated in closed prison unit, where the overcrowding problem is the greatest.

Type of criminal offence	Number of convicts on 31/12/2012	Number of convicts in %
Murder and attempted murder	824	11.84
Robbery	988	14.20
Rape	200	2.87
Grand larseny, larseny, covering	1648	23.68
Bodily injury	144	2.07
Fraud	144	2.07
Drug abuse	1474	21.18
Family violence	171	2.46
Possession of weapons with intent to endanger life or property	136	1.95
Traffic endangering	183	2.63
Illegal border crossing and human smuggling	43	0.62
Offences with the elements of organized crime	80	1.15
War crimes	44	0.63
Other	879	12.63

Table 2: Structure of convicts by type of criminal offence[15]

At last, besides the big number of prisoners who serve the sentence (especially the short-termed prison sentences), it is noticed that the prison population is composed of many persons

10 Mrvić-Petrović N: Solutions of prison treatment as an alternative criminal sanction and measure, *Foreign legal life*, no. 2/2012, p. 213.
11 Draft of Strategy for penal sanctions enforcement for the period 2013-2020, p.6, available at http://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php, revised on 12th December 2013.
12 Stojanović Z: Strategy for achieving the purposes of the criminal law, *Archive for Legal and Social Sciences*, no. 3-4/2008, p.180.
13 Soković S: Penological pragmatism in the criminal law framework, *Legal life*, no. 10/2013, p. 42.
14 Official Gazette of the RS, no. 107/2012.
15 Draft of Strategy for penal sanctions enforcement for the period 2013-2020, as mentioned above, p. 8, revised on 12th December 2013.

in detention (table 3). Because of that, one of the reasons for prison overcrowding lies in the fact that detention measure is used easily and often unnecessary. With indiscriminate use and imposition of detention, this measure as the toughest measure of procedural coercion to ensure the presence of the accused in criminal proceedings becomes a kind of punishment, which certainly leads to overcrowding and contributes neither to respect of persons' deprived of liberty human rights nor to their resocialization.

2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
1739	1632	1833	1837	2187	2351	2586	3328	3019	2478

Table 3: Number of detainees[16]

CONSEQUENCES OF PRISON OVERCROWDING

During the last years the "prison crisis" has been frequently mentioned, stressing the excessive number of convicts in prison according to the existent capacities, insufficient number of prison staff, bad prison conditions, commotions among prison staff, low security rate, negative mutual influences between convicts who serve together the prison sentence, then influences of the convicts with mental psychoses to other convicts, riots and other disorders in control of prisoners[17].

In our country the existent facilities for penitentiary sanctions enforcement dispose of obsolete, inadequate and insufficient buildings for the accommodation of prison population. According to the European standards, every person deprived of liberty has the right to at least four square, or eight cubic meters of space[18]. If this standard was respected in Serbia, in the existent prisons should not be more than about 7.000 persons. If we have in mind that at the end of 2012 this number was 10.226, it is obvious that the overcrowding problem certainly exists, and it is most prominent in detention rooms[19]. The aforementioned is confirmed by the reports of the Protector of citizens which state that in dormitory rooms of the Correctional Facility Sremska Mitrovica is accommodated greater number of detainees in relation to the facility's capacity, so that each detainee has about six cubic meters, i.e. less than three square meters of space[20], and they also indicate the overcrowding problem of Belgrade District Prison, citing that this biggest detention unit in Serbia is not architecturally appropriate for its use and that it is in very bad condition[21].

The lack of space is evidential not only in accommodation rooms but also in other rooms used by convicts (living rooms, halls of sports and recreational, cultural and leisure activities, etc). The consequence is that buildings inadequate for accommodation of convicts and in very bad conditions and without the adequate conditions for hygiene maintenance are being used. Also, in some prisons is noticed that detainees who have not been previously convicted are being accommodated in rooms-dormitories along with persons who have, because of accommodation capacities overcrowding, and insufficient attention is paid to allocation of detainees in rooms-

16 Draft of Strategy for penal sanctions enforcement…p. 8, revised on 12th December 2013.
17 Janković D: The principle of resocialization in the process of criminal sanctions implementation, *Social thought, no*. 2/2011.
18 Article 67, The Law on Execution of Criminal Sanctions, *Official Gazette of the Republic of Serbia*, no. 85/2005, 72/2009. and 31/2011.
19 For more information: Prohibition of ill-treatmentand and rights of persons deprived of their liberty in Serbia, Belgrade Centre for Human Rights, Report II, Belgrade, 2011.
20 Report on the control visit to Correctional Facility Sremska Mitrovica, Protector of citizens, Belgrade, 2013, available at http://ombudsman.npm.rs/attachments/339_KPZ-13-09-2013.pdf, revised on 10th of November 2013.
21 The report of the Protector of citizens for year 2012, Belgrade, 2013, available at http://www.ombudsman.rs/attachments/Redovni%20godisnji%20izvestaj%20zastitnika%20gradjana%20za%202012%20godinu%20-%20final.pdf., revised on 11th December 2013.

dormitories according to the type of crime they are charged of. This kind of accommodation can easily incite the development of offender subculture and help the maintenance of criminal organizations cohesion and make the supervising extremely hard, if not impossible[22]. On the other hand, the overcrowding level in a prison or its unit can be big enough to be inhumane or physically humiliating. That is why the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)[23] was many times obliged to conclude that inhumane and humiliating accommodation conditions are result of harmful effects of overcrowding. Thereby, there is no doubt that accommodation overcrowding in facilities for penal sanctions enforcement also leads to violation of persons' deprived of liberty rights, because the time and space reserved for walk or other activities of those persons out of cells is always reduced.

Related to this is a fact that excessive number of prisoners in a prison increases the risk of suicide and self-mutilation,[24] and at the same time it makes harder prompt identification and seclusion of those who demonstrate changes in behavior or those who tend to react aggressively. On the other hand, the excessive number of prisoners in relation to insufficient number of medical staff makes harder the provision of adequate medical care. This is a very serious problem, due to the fact that the level of medical protection offered to convicts represents one of the most significant indicators of the level of prison system humanity and respect of convicts' human rights, and because of that, the unsatisfactory level of medical care can quickly lead to situations within the scope of the term "inhumane or humiliating treatment". Therefore, it is reasonably pointed out that big medical risks coming from impossibility to provide a minimum medical and hygienic conditions for convicts is one of the most serious consequences of prison overcrowding[25].

It should not be overlooked that consequences of prison overcrowding affect not only the persons deprived of liberty, but the whole society, i.e. the country. First of all, the prison sentence enforcement implies big allocations from the national budget for maintenance of penal facilities system.[26] Another problem is the fact that because of lack of space in prisons persons sentenced to prison cannot serve the sentence, but remain at liberty, which increases the risk to commit a crime again. Finally, violation of human rights of persons deprived of liberty because of overcrowding exposes the country to risk of paying compensations on appeals (verdicts) of local courts or the European Court for Human Rights.

POSSIBLE WAYS TO OVERCOME THE PROBLEM OF PRISON OVERCROWDING

Our country, confronted with a problem of growing number of overcrowding facilities for prison sentence enforcement, is making great efforts both on legislative and plan of better and more consistent applying of existent regulation in order to decrease prison population last years. However, those efforts have not given satisfying results so far, and intensive work is still being performed on finding appropriate mechanisms to overcome this problem. For this purpose, in 2010, the Strategy for reducing accommodation capacities overcrowding in facilities for penal sanctions enforcement in the Republic of Serbia between 2010 and 2015[27] has been adopted and

22 CPT standards, The most important sections of the general reports, Council of Europe, Strasbourg, 2007, p.25, http://www.lls.rs/attachments/Standardi.pdf, revised on 27th October 2013.
23 This body was established in 1987 by the convention of the Council of Europe with same denomination. Pursuant to the Article 1 of the Convention, CPT through the visits to persons deprived of liberty examines how they are treated aiming to, if needed, increase the protection of those persons from torture or inhumane or humiliating punishments or acts. After every visit, CPT compiles a report in which indicates its findings and which contains recommendations and other advices, if necessary.
24 Ignjatović Đ: *Criminology*, Belgrade, 2011, p.173.
25 Mrvić Petrović N: *Prison crisis,* Belgrade, 2007, p. 160-178.
26 According to some calculations, one convict costs the country about 20 euros a day, i.e. 608 euros a month, which is more than one average salary in Serbia, see also – Petrović A: Is Serbia a prisoner of its prisons, *Politics*, 3rd of January 2014, p. 9.
27 Official Gazette of the RS, no. 53/2010.

is wholly committed to these issues. This strategy, along with the analyses of situation in this field and reasons which led to that situation, suggests a series of concrete measures which could amend such situation. Among those measures, a greater use of parole and early release, use of alternative penal sanctions and measures, increasing of accommodation capacities and facilities' conditions improving, amnesty, etc. is suggested.

Generally speaking, modern approaches to decrease prison overcrowding are directed in two ways: to decrease entering the prison (front door strategy) by wider applying of alternative sanctions and measures and to shorten the stay in prison (back door strategy) through programs of earlier release.[28] Statistical data show that short-termed prison sentences (up to one year)[29] consisted about three quarters of total number of imposed prison sentences in the last five years (see table 1), so if replaced at least partly with some other sanctions, prisons would be significantly disburdened, and there would be a lot of space for more adequate treatment of convicts.

The idea to replace short-termed prison sentences with some other, more adequate penal sanction is present many years in the criminal law and more and more studying of many modern countries' penal legislation is present.[30] In this sense, in many countries so called **alternative penal sanctions**,[31] are being introduced, among which work for public interest, different kinds of probation combined with electronic supervision, different kinds of house arrest or weekend imprisonments, settlement and compensation as penal sanction etc. are mentioned the most.

Our criminal legislation accepts more and more the idea of introducing the alternative sanctions in the last years as a way to avoid imposing unnecessary prison sentences as much as possible, and to simultaneously decrease extremely increased proportion of suspended sentence in the total number of imposed penal sanctions in the last years. For that purpose, the Criminal Code from 2005. predicted new penalties: community service and driver's license suspension, retaining the existent warning measures, suspended sentence with or without protective supervision and judicial warning[32]. Driver's license suspension is not actually an alternative criminal sanction and it is rarely used (table 2), while the suspended sentence with protective supervision and judicial warning are sanctions with long tradition in our criminal law, but rarely applied. In contrast, suspended sentence (without protective supervision) is the most imposed penal sanction in our country over the years (in 2011 percent of imposed suspended sentences reached a record level – 58.8%). The most was expected from the new penalty – community service which in great measure should substitute short-termed prison sentences and consequently decrease prison population. However, those expectations are mostly let down. Because of the numerous technical and organizational problems, introduction of this sentence was very slow[33] in practice so that just in the last few years its application is slightly more often (table 4). Rapid opening of the offices for alternative sanctions, ten across Serbia, contributed to that[34].

28 Soković S: Penological pragmatism in the criminal law framework, *Legal life*, no. 10/2013, p. 36.
29 Although there is no unique attitude in the literature about which prison sentences are considered short-termed we consider most acceptable the one by which those are all prison sentences up to one year, see also: Ignjatović Đ: *Criminology*, Belgrade, 2011, p.173.
30 Mrvić-Petrović N, Đorđević Đ: *Power and impotence of punishment*, Belgrade, 1998, p. 89.
31 About alternative sanctions term see also: Stojanović Z: Strategy for achieving the purposes of the Criminal law, *Archive for Legal and Social Sciences*, no. 3-4/2008, p. 176; Ignjatović Đ: *The right of enforcement of criminal sanctions, the fourth revised edition*, Belgrade, 2010, p. 13; Škulić M: Alternative penal sanctions – concept, possibilities and perspectives, in the publication *'' Simplified form of procedure in criminal matters and alternative criminal sanctions"*, Zlatibor, 2009, p. 32.
32 Kiurski J: Alternative criminal penalities under the Criminal Code of Serbia and European Union standards, in publication *The Criminal legislation of Serbia and EU standards*, Zlatibor, 2010,p. 80.
33 Đorđević Đ: Alternative sanctions in our Criminal Code and their application, in the publication *Crime control and European standards: state in Serbia*, Belgrade, 2009, p.171,
34 Derikonjić M: Ten office for alternative sanctions, *Politics*, 5th January, 2014, p.13

	2006	2007	2008	2009	2010	2011	2012
Total convicts	41422	38694	42138	40880	21681	30807	31322
Community service	0	48	35	51	71	357	365
Drivers license suspension	0	2	4	3	3	11	5

Table 4: The number of community service and license suspension sanctions, 2006-2012[35]

The last step towards implementation of alternative criminal sanctions in our legislation was the Law on Amendments to the Criminal Code[36] from September 2009 which foresees the possibility of **prison sentence enforcement in premises where the convict lives**, as one alternative of so called ''house arrest'', which represents a complete innovation in our legislation. However, this specific sanction, although still insufficiently developed, is not new in comparative criminal law, especially Anglo-Saxon[37]. There are very different aspects of this sanction in some legislations and differences are mostly in level of convict's restrictions regarding leaving the place of residence which, during the sentence, represents the place of its enforcement.

Among these, in comparative law there are other types of penal sanctions which represent special modalities of prison sentence enforcement based on partial imprisonment of a convict. Many European countries (Spain, Portugal, Great Britain, Belgium, Italy, France, Scandinavian countries) have alternative prison sentences like so called weekend imprisonment, half-day imprisonment, non-working days imprisonment, partly imprisonment, "halfway house'' system, liberty restrictions without isolation etc. which allow the convict to stay on the present job and with his/her family during the sentence serving[38].

Our legislator has chosen house arrest as modality of prison sentence enforcement mainly because of the same reasons which lead to introduction of alternative sanctions in other countries, and those are the weaknesses noticed in short-termed prison sentences and capacity limitations of our facilities for penal sanctions enforcement. Besides that, this kind of enforcement reduces the costs significantly. However, it seemed at first that problems of applying new way of prison sentence enforcement would prevent its wider use for a long time[39]. Nevertheless, different from some other alternative sanctions introduced in our penal legislation in the last years, the house arrest as a modality of prison sentence enforcement has found its implementation rather quickly in the practice of our courts. The obstacle was, of course, solving of initial, technical problems (procurement of equipment, staff training), but when it was overcame, the courts started very quickly with pronouncing this penal sanction, and the Administration for Penal Sanctions Enforcement with its execution[40]. Thereby, during 2011, 70 prison sentence enforcements in premises where the convict lives with electronic supervision were realized, and 18 without this kind of supervision, and by 2012 that number increased to 528 cases with and 82 cases without electronic supervision[41]. This number is not so big compared with the total number of prison sentences up to one year (where the prison sentence can be served this way) which in the last five years is about five thousand per year, i.e. 1-2% (see table 1). Still, compared to rarely applying or even complete non-implementation of some sanctions which are present much longer in our legislation, like suspended sentence with protective supervision, work for public interest, revocation of driver's license, financial penalty on days and some security measures[42], when this

35 Data source: Bulletins of the Republic Bureau of Statistic, available at: www.stat.gov.rs revised on 15th December 2013.
36 Official Gazette of the RS, no.72/2009
37 Mrvić-Petrović N, Đorđević Đ: *Power and impotence of punishment*, Belgrade, 1998, p.113.
38 Mrvić-Petrović N: *Alternative criminal sanctions and procedures*, Belgrade, 2010, p. 49-46
39 Cirić J: Criminal Code as an instrument of crime prevention, *Crime control and European standards: state in Serbia*, Belgrade, 2009, p. 80.
40 Đorđevic, Đ: House arrest – a new model of execution of imprisonment, part of the thematic monography *Criminal reaction in Serbia, Part II*, Faculty of Law, Belgrade, 2012, p. 128.
41 Administration for Enforcement of Penal Sanctions, Annual Report available at: http//www.uiks.mpravde.gov.rs, revised on 15th December 2013.
42 Đorđević Đ: Criminal sanctions as an instrument of crime prevention, *Criminal justice and crime*

innovation is in question in our Criminal Code is visible the tendency to apply it and to avoid the destiny of the aforementioned sanctions.

However, it seems that significant potential in combating for prison population decreasing lies in possible much **greater application of financial fine**. And besides indisputable advantages this sentence has over the short-termed prison sentence and over the suspended sentence, and which contribute to the fact that it is the most imposed penal sanction in great number of countries, this sentence does not occupy such place in the practice of our courts. During one period (1987-1991), though, it was the most imposed penal sanction in our country, former SFRY, and represented from 40 to 45% of all imposed penal sanctions. However, in the next few years, characteristic by high inflation rate which greatly aggravated the implementation of this sentence; it was applied less and less, so that percentage of its pronouncing in 1994 decreased to only ten percent.[43] When monetary stability was established, the share of financial penalties in imposed sanctions also grew and in the period between 2000 and 2005 reaches about 20% (maximum around 22% in 2005)[44].

	2006	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**
Total convicts	41422	38694	42138	40880	21681	30807	31322
Financial fine	8033 (19,4%)	7413 (19,2%)	7270 (17,3%)	6753 (16,5%)	2406 (11,1%)	3665 (11,9%)	3138 (10,0%)

Table 5: The number of financial fines, 2006-2012. godina[45]

The Criminal Code of Serbia from 2005. brings numerous innovations related to financial penalty, its measurement and imposing. New solutions aimed to more rightful measurement of financial penalty and complete suitability of the imposed penalty to the personality of the offender and to his/her financial status so as to fulfill its purpose. That kind of financial penalty should have replaced numerous short-termed prison sentences and even more numerous suspended sentences which generally do not fulfill their purpose and to become again the most imposed penalty in our penitentiary system, which, however, never happened. Along with numerous theoretical papers which imply the problems related to implementation of new regulations and the judicial practice usually express negative attitude towards them. The research conducted in the Court of Appeal in Novi Sad[46] shows that judges have the same attitude that financial penalties system in daily amounts creates great problems for the court and significantly prolongs the procedure. Judges see a solution of the problem in the provision of the Article 50, Par. 1 of the Criminal Code of Serbia which leaves the possibility of fixed amounts system implementation, mostly applied by the judges. Unanimous evaluation of all respondents is that the system of financial penalties in daily amounts is too complicated, and therefore is not applied at all, so its bigger implementation cannot be expected under these conditions. However, more inconvenient consequence of aforementioned problems with practical implementation of financial penalty new solution in our Criminal Code is that from entry in force of the Criminal Code in 2006 records a constant decrease in number of imposed financial penalties both in absolute amount and in percentage regarding the total number of convicts (table 5), so that in 2012 it reached the lowest level so far (10%). It is obvious that courts incapable of applying the new financial penalty system in daily amounts and confronting with other problems resulting from the parallel existence of two different and insufficiently harmonized systems not only fail to implement the

prevention, Brčko, 2011, p. 246

43 Cirić J, Đorđević Đ, Šepi R: *Criminal policy of courts in Serbia,* Belgrade, 2006*,* p. 81.

44 Data source: Bulletins of the Republic Bureau of Statistic, available at: www.stat.gov.rs revised on 15th December 2013.

45 Data source: Bulletins of the Republic Bureau of Statistic, available at: www.stat.gov.rs revised on 15th December 2013.

46 Nadrljanski S, Milić Žabaljac S, Gazivoda A: Fine in theory and practice, in *Criminal policy (Rift between law and its application),* East Sarajevo, 2012, p. 416.

new system but also rarely apply the financial penalty[47].

Institute of **Release on Parole** is very convenient, not only as an instrument of prisoners' behavior control and punishment purpose accomplishment but also as a way to control the prison population number[48]. This fundamentally criminal law institution exists and has been applied for a long time in our legislation, over 140 years, but in some periods the frequency of its implementation was very unbalanced. It reached its maximum in 1972 when the percentage of persons on parole was even 52.6% in relation to the total number of released persons. However, in the last years significant decrease in applying of this institution is present, especially from 2005, so that in 2012 it would decrease to just 7.01%.[49] New legal solutions regarding the authority to make decisions on parole, solutions of the Law on Penal Sanctions Enforcement from 2005 and especially innovations in this field of the Law on Amendments to the Criminal Code from September 2009,[50] which significantly tightened the conditions for the application of this institution, certainly contributed to that. However, the observed deficiencies as well as the increase in convict population influenced to new solutions regarding parole in the Law on Amendments to the Criminal Code from December 2012[51] that significantly widened the implementation of this institution which, according to new regulations, becomes a right for the majority of offenders (with certain conditions), and for the perpetrators of some, usually serious crimes, is a possibility (also with certain conditions). Release on parole can not be sentenced to a convict who was disciplinary punished twice while serving a sentence and whom the assigned benefits were taken. Also, this institution, pursuant to the Article 5 Par. 2 of the Law on Special Measures to prevent the commission of crimes against sexual freedom of minors, cannot be applied to persons sentenced to prison for some crimes against sexual freedom committed against a minor[52].

This kind of determination of parole with modalities of obligatory and optional release is in concordance to international standards in this field and is very convenient for realization of its goals, first of all contributing to rehabilitation of convicts and fulfilling the purpose of sentencing, but also to realization of very important task in this moment for us, and that is unburdening of overcrowded penal institutions[53].

The implementation of **amnesty** institution can also contribute to prison population decreasing. As stated above, in our country last time it was done at the end of 2012 when the Law on Amnesty was passed according to which 1228 persons were released.[54] However, amnesty has only temporary effects[55]. This institution is applied occasionally and requires adoption of laws, and control of the prison population number is not certainly its basic purpose[56].

However, all these measures under no circumstances deny the need for **expanding prison capacities**, which is pointed out in the mentioned Strategy for reducing accommodation capacities overcrowding in facilities for penal sanctions enforcement in the Republic of Serbia. On the contrary, along with efforts to implement some of the aforementioned solutions so as to unburden prisons, there is an intensive work on expanding prison capacities. The construction of two new prisons, in Pančevo and Kragujevac, has begun, which should allow the accommodation capacities expanding for 900 places. Also, the reconstruction of accommodation capacities was

47 Đorđević Đ: Financial fine in the Criminal Code of Serbia and problems of its application in practice, in the Proceedings of the works *Current issues of criminal law*, Serbian Association for Criminal Law Theory and Practice and Intermex, Zlatibor, 2012, p. 408.
48 Stojanović Z, Kolarić D: New solutions in the Criminal Code of the Republic of Serbia, *Security,* no. 3/2012.
49 Soković S: Penological pragmatism in the criminal law framework, *Legal life*, no. 10/2013, p. 41
50 Official Gazette of the RS, no. 72/2009.
51 Official Gazette of the RS, no. 121/2012.
52 Official Gazette of the RS, no. 32/2013.
53 Soković S : Penological pragmatism in the criminal law framework, *Legal life*, no. 10/2013, p. 46
54 Administration for Enforcement of Penal Sanctions, Annual Report available at: http//www.uiks.mpravde.gov.rs, revised on 15th December 2013.
55 Cirić J: Alternative sanctions in Serbia, in *Archibald Reiss Days,* volume II, Beograd, 2013, str. 4.
56 Stojanović Z: *Criminal Law, General Part*, Belgrade, 2012, p. 329-330.

carried out in some prisons, and in others there is still a need for reconstruction in accordance to the European standards. However, there is a need for a lot of resources, which is very hard to provide in our country during the crisis.

Other countries which also confront with this problem tend to solve it in different ways. Prison overcrowding and large allocations from the national budget for maintenance of penal facilities system have massively influenced to the appearance of **private prisons** during the eighties and nineties of the twentieth century, first of all in USA and Great Britain.[57] Thereby, it could be said that the prison privatization occurred, on the one hand, because of the fact that constant increasing in crime and more tightened penal policy in these countries caused the construction of new prisons which required significant financial resources, and on the other hand because the public opinion, i.e. citizens did not want the budget to be allocated to prison construction and maintenance, but to health and social care, education, etc.[58]

Although it can be concluded that there is not enough relevant comparative researches whose results could lead us to more reliable conclusions about successful work of private institutions for prison sentence enforcement, we still believe that the idea of prison privatization has many flaws[59]. First, primary orientation of private prisons is making profit. As incomes of private prison are funds that state pays to them for each prisoner under its roof, it is obvious that private prison tends to accommodate as many prisoners as possible, and to spend less resources as possible on their needs. That brings into question the way of prisoner's resocialization, training for a profession, education and preparation for social reintegration[60]. In our country, all brings to the conclusion that we cannot expect problems of insufficient capacities and prison overcrowding to be solved by opening private prisons.

CONCLUSION

The increase in crime and recidivism, and along with that the constant tightening of legislator's and courts' penal policy, lead to more and more prison overcrowding in the world. This process is very visible in our country, too, which is classified among countries with the highest rate of prison overcrowding in Europe in the last years. To overcome this problem our country has undertaken numerous measures to decrease the prison population and to provide better treatment for convicts.

When we talk about activities on legislation plan, they are very numerous and diverse. Amendments to the Criminal Code help the establishment of pretty ramified penal sanctions system with quite good specter of alternative sanctions. Numerous legal solutions, which should provide the application of these sanctions, have also been adopted within the Law on Penal Sanctions Enforcement, Law on Juvenile Offenders and Legal Protection of Juveniles, and work on new Law on Penal Sanctions Enforcement and Law on Probation in non-custodial sanctions and measures enforcement is in process. Some acts that define more precisely the implementation of alternative sanctions are adopted, such as Regulations on Suspended Sentence Enforcement with Protective Supervision and Regulations on Work for Public Interest Sentence Enforcement. At the moment, the Draft of Strategy for penal sanctions enforcement for the period 2013-2020 has been made. The Law on Amendments to the Criminal Code has brought mandatory parole when legal requirements are fulfilled, which should contribute to greater use of this important legal and penal institution.

57 Mrvić Petrović N: *Prison crisis,* Belgrade, 2007, p. 197-206.
58 Kovačević M: Private prisons, *Foreign legal life*, no. 2/2012, p. 206.
59 Kokolj M: Efficiency and responsibility of private sector in private prison management, *Science, Security, Police*, no. 3/2005, p. 39-43.
60 Kovačević M: Private prisons, *Foreign legal life*, no. 2/2012, p. 206.

However, as it was the case, bigger problems appear when implementation of new legal solutions is in question. As far as prison sentence alternatives are concerned, we will have to wait the answers about the success of their application. Although there is no doubt that benefits of alternative penal sanctions comparing to prison sentence imply the need for expanding their application, there is an impression that too much expectations are related to these sanctions: to help decreasing in prison population, to decrease costs that country, i.e. society allocates for the system, to contribute to offenders' social reintegration, to reduce returns, etc. It means that their application by itself cannot solve the overcrowding problem, but combined with other measures, such as mandatory parole (when legal conditions are fulfilled), accommodation capacities expanding and other types of prison treatment modification suitable for short-termed prison sentences, significant improvement can be expected.

Nevertheless, we should have in mind that alternative penal sanctions cannot entirely substitute prison sentence because there are crimes that require it, i.e. there are offenders that have to be in prison for society's protection. Because of that, despite the flaws, prison sentence will certainly remain the indispensable resource in combating crime for a long time. In that sense, central strategy of modern penal policy should take the direction in which "multiple limited capacities of criminal justice and prison sentence should be used mostly for serious crimes and offenders with whom other types of acting would be unsuccessful".[61]

REFERENCES

1. Atanacković D: *Penology*, Belgrade, 1988. (*Penologija*, Beograd, 1988)
2. Ćirić J: Alternative sanctions in Serbia, *Archibald Reiss Days,* volume II, Belgrade, 2013.
3. Ćirić J: Criminal Code as an instrument of crime prevention, *Crime control and European standards: state in Serbia*, Belgrade, 2009. (Krivični zakonik kao instrument prevencije kriminaliteta, u publikaciji *''Kontrola kriminaliteta i evropski standardi: stanje u Srbiji"*, Beograd, 2009)
4. Ćirić J, Đorđević Đ, Sepi R: *Criminal policy of courts in Serbia,* Belgrade, 2006*, (Kaznena politika sudova u Srbiji*, Beograd, 2006)
5. Đorđević Đ: Alternative sanctions in our Criminal Code and their application, in the publication *Crime control and European standards: state in Serbia,* Belgrade, 2009 (Alternativne sankcije u našem Krivičnom zakoniku i njihova primena, u publikaciji *''Kontrola kriminaliteta i evropski standardi: stanje u Srbiji"*, Beograd, 2009)
6. Đorđević Đ: Criminal sanctions as an instrument of crime prevention, *Criminal justice and crime prevention,* Brčko, 2011. (Krivične sankcije kao instrument prevencije kriminaliteta, u publikaciji *''Krivično zakonodavstvo i prevencija kriminaliteta"*, Brčko, 2011)
7. Đorđević, Đ: House arrest – a new model of execution of imprisonment, part of the thematic monograph *Criminal reaction in Serbia Part II*, Faculty of Law, Belgrade, 2012. (Kućno zatvaranje – nov modalitet izvršenja kazne zatvora, deo tematske monografije *''Kaznena reakcija u Srbiji II deo"*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2012)
8. Đorđević Đ: Financial fine in the Criminal Code of Serbia and problems of its application in practice, in the Proceedings of the works Current issues of criminal law, *Serbian Association for Criminal Law Theory and Practice and Intermex,* Zlatibor, 2012. (Novčana kazna u KZ Srbije i problemi njene primene u praksi, u tematskom zborniku radova *''Aktuelna pitanja krivičnog zakonodavstva"*, Srpsko udruženje za krivičnopravnu teoriju i praksu i ''Intermeks'' Beograd, Zlatibor, 2012)

61 Stojanović Z: Justification and scope of alternative criminal sanctions and alternative forms of treatment, *Journal of Criminology and Criminal Law*, no. 2/2009, p. 5.

9. Ignjatović Đ: *The right of enforcement of criminal sanctions, the fourth revised edition*, Belgrade, 2010, (*Pravo izvršenja krivičnih sankcija, četvrto izmenjeno i dopunjeno izdanje*, Beograd, 2010)
10. Ignjatović Đ: *Criminology,* Faculty of Law *University of Belgrade,* Belgrade, 2011. (*Kriminologija*, Beograd, 2011)
11. Ilić A: Prison overcrowding – phenomenological and etiological aspects, *Crimen*, no. 2/2011, (Prenaseljenost zatvora – fenomenološki i etiološki aspekti, *Crimen*, br. 2/2011)
12. Janković D: The principle of resocialization in the process of criminal sanctions implementation, *Social thought, no*. 2/2011. (Princip resocijalizacije u postupku izvršenja krivičnih sankcija, *Socijalna misao*, br. 2/2011)
13. Kiurski J: Alternative criminal penalities under the Criminal Code of Serbia and European Union standards, in publication *The Criminal legislation of Serbia and EU standards*, Zlatibor, 2010 (Alternativne krivične sankcije u Krivičnom zakoniku Srbije i standardi Evropske unije, u publikaciji *''Krivično zakonodavstvo Srbije i standardi Evropske unije"*, Zlatibor, 2010)
14. Kokolj M: Efficiency and responsibility of private sector in private prison management, *Science, Security, Police*, no. 3/2005. (Efikasnost i odgovornost privatnog sektora u upravljanju privatnim zatvorima, *Nauka, bezbednost, policija*, br. 3/2005)
15. Kovačević M: Private prisons, *Foreign legal life*, no.2/2012. (Privatni zatvori, *Strani pravni život*, br. 2/2012)
16. Lazarević D: *Short-term prison sentences,* Belgrade, 1974. (*Krakotrajne kazne zatvora*, Beograd, 1974)
17. Maljković M: An alternative to the imprisonment, *Social thought,* no. 2/2011. (Alternative kazni zatvora, *Socijalna misao*, br 2/2011)
18. Milutinović M: *Penology*, Belgrade, 1977. (*Penologija*, Beograd, 1977)
19. Mrvić-Petrović N: *Prison crisis,* Belgrade, 2007. (*Kriza zatvora*, Beograd, 2007)
20. Mrvić-Petrović N: *Alternative criminal sanctions and procedures*, Belgrade, 2010. (*Alternativne krivične sankcije i postupci*, Beograd, 2010)
21. Mrvić-Petrović N: Solutions of prison treatment as an alternative criminal sanction and measure, *Foreign legal life,* no.2/2012. (Varijante zatvorskog tretmana kao alternativne krivične sankcije i mere, *Strani pravni život*, br. 2/2012)
22. Mrvić-Petrović N, Đorđević Đ: *Power and impotence of punishment*, Belgrade, 1998. (*Moć i nemoć kazne*, Beograd, 1998)
23. Nadrljanski S, Milić Žabaljac S, Gazivoda A: Fine in theory and practice, in *Criminal policy (Rift between law and its application)*, East Sarajevo, 2012, (Novčana kazna u teoriji i praksi, u publikaciji *''Kaznena politika, Raskol između zakona i njegove primene"*, Istočno Sarajevo, 2012)
24. Nikolić-Ristanović V, Ćopić S: The position of victims in Serbia: criminal procedure and possibilities of restorative justice, *Temida*, no. 1/2006. (Položaj žrtve u Srbiji: klasični krivični postupak i mogućnosti restorativne pravde, *Temida*, br. 1/2006)
25. Soković S: Penological pragmatism in the criminal law framework, *Legal life*, no. 10/2013. (Penološki pragmatizam u krivičnopravnim okvirima, *Pravni život*, br 10/2013)
26. Stojanović Z: Strategy for achieving the purposes of the criminal law, *Archive for Legal and Social Sciences*, no. 3-4/2008 (Strategija ostvarivanja svrhe krivičnog prava, *Arhiv za pravne i društvene nauke*, br. 3-4/2008)
27. Stojanović Z: Justification and scope of alternative criminal sanctions and alternative forms of treatment, *Journal of Criminology and Criminal Law*, no. 2/2009. (Opravdanost i dometi alternativnih krivičnih sankcija i alternativnih formi postupanja, *Revija za kriminologiju i krivično pravo*, br.2/2009)
28. Stojanović Z: *Criminal Law, general part,* Belgrade, 2012. (*Krivično pravo, opšti deo*, Beograd, 2012)
29. Stojanović Z, Kolarić D: New solutions in the Criminal Code of the Republic of Serbia, *Security,* no. 3/2012. (Nova rešenja u Krivičnom zakoniku R. Srbije, *Bezbednost,* br. 3/2012)

30. Škulić M: Alternative penal sanctions – concept, possibilities and perspectives, in the publication *Simplified form of procedure in criminal matters and alternative criminal sanctions*, Zlatibor, 2009. (Alternativne krivične sankcije - pojam, mogućnosti i perspektive, u publikaciji *''Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije''*, Zlatibor, 2009)
31. Tanjević N: Towards European trends in the penal policy – The alternative sanctions in Serbia, *Journal of Security*, no. 2/2011. (Prilagođavanje savremenim evropskim trendovima u oblasti kaznene politike – primena alternativnih krivičnih sankcija u Republici Srbiji*, Revija za bezbednost*, br. 2/2011)

OTHER SOURCES:

Belgrade Centre for Human Rights, Prohibition of ill-treatment and rights of persons deprived of their liberty in Serbia, Belgrade, 2011.
Bulletins of the Republic Bureau of Statistic, available at: www.stat.gov.rs
Counil of Europe, CPT standards, The most important sections of the general reports, 2007, available at: http://www.lls.rs/attachments/Standardi.pdf.
Draft of Strategy for penal sanctions enforcement for the period 2013-2020, available at http://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php
Ministry of Justice and Public Administration of Republic of Serbia and Administration for Enforcement of Penal Sanctions, Annual Report on Prison Administration Operations, 2013.
Report on the control visit to Correctional Facility Sremska Mitrovica, *the Ombdusman*, Belgrade, 2013, available at http://ombudsman.npm.rs/attachments/339_KPZ-13-09-2013.pdf
Strategy for Reducing Overcrowding in Institutions for Enforcement of Criminal Sanctions in the Republic of Serbia for the period 2012 to 2015*, Official Gazette of the RS*, no. 53/2010 and 65/2011.

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ECONOMIC OFFENCES IN THE LIGHT OF THE CURRENT LEGISLATION REFORM

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Abstract: This paper describes and analyses the key amendments to the Criminal Code Chapter XXII (sanctioning of economic offences) that were introduced, within the framework of the on-going criminal legislation reform, in the 2009 and 2012 versions of the Code. In the first part of the paper, the author provides a Abstract of all amendments, including more severe penalties for a number of criminal offences, as well as the rewording of legal definitions of some criminal offences and the introduction of new ones. The second part of the paper provides a description and analysis of legal definitions of criminal offences pertaining to Chapter XXII that have been considerably amended or modified in terms of their essential or additional characteristics: money laundering (Article 231, CC) and forging of symbols and/or state seals for designating goods, measures and objects made of precious metals (Article 245, CC). The third part of this paper includes a description and analysis of recently introduced criminal offences: failure to pay withholding tax (Article 229a, CC), abuse of position by responsible person (Article 234, CC) and misfeasance in public procurement (Article 234a, CC). The paper ends with the author's conclusions supported by appropriate arguments.

Keywords: Criminal Code; criminal legislation reform; economic offences; criminal offence.

INTRODUCTORY NOTES

The hapter on economic criminal offences was introduced in our legislation for the first time in the Criminal Code enacted in 1951.[1] In a number of countries, economic offences are primarily regulated by by-laws. However, in our country, the generally accepted principle has been, from the onset, that the majority of these offences should be regulated in a separate chapter of the Code, while subsidiary criminal legislation governs a limited number of criminal offences typically committed in the specific areas of economy.

The criminal offences included in the chapter on economic offences are numerous and varied. When it comes to the object of criminal justice protection from criminal offences defined in this chapter, the prevailing theoretical view is that it is the country's economic system, or its specific segments. As economy represents one of the most important areas of life and it implies various forms of establishing connections in the process of production and distribution of goods and services for meeting various demands, it is in the state's direct interest to participate in the country's economic activities. The state performs this role by undertaking appropriate legislative activities, which means that it issues regulations governing the content and form of basic economic relations. As these relations are established on different levels and imply numerous business entities, their harmonisation requires a rich and varied legislative activity. The state, as the most important economic entity, not only regulates the fundamental economic relations which determine the country's economic course, but it also provides appropriate social conditions on which the realisation of these economic relations depends. Bearing in mind the impact of these conditions on the smooth functioning of economic relations and economy in general, criminal law intervention in this area in particular, given the nature and significance of the object of protection, is justified and necessary.[2]

The Code's chapter on economic offences is a relatively dynamic one, as the changes in economic relations are always reflected in the scope and content of their criminal legal protection.

1 "The Official Gazette of the Federal People's Republic of Yugoslavia", No. 13/51, 19/51, 30/59, 11/62 and 31/62 and "The Official Gazette of the Socialist Federal Republic of Yugoslavia", No. 15/65 and 15/67.

2 In this sense, Z. Stojanović stresses that criminal law should not protect economic relations per se, but that it should protect the conditions which bring about the freedom and equality in business operations, or unhampered functioning of economic and market mechanisms. Z. Stojanović, Komentar Krivičnog zakonika, Belgrade, 2012, 663.

THE MAIN AMENDMENTS TO THE CHAPTER ON ECONOMIC OFFENCES

When the new Criminal Code took effect in 2006,[3] it was immediately followed by a legislation reform which has so far included the enactment of five laws: The Law on Amendments to the Criminal Code from September 2009[4] (LACC/2009/September); The Law on Amendments to the Criminal Code from December 2009[5]; The Law on Amendments to the Criminal Code from 2012[6] (LACC/2012) and The Law on Amendments to the Criminal Code from 2013.[7] In the context of the current legislation reform, two laws are particularly relevant for the chapter on economic offences: LACC/2009/September and LACC/2012.

The LACC/2009/September included the following amendments to the Chapter on Economic Offences: six criminal offences entailed more severe penalties; two new forms of sanctions, apart from the existing severe penalties, were added to the criminal offence of money laundering (Article 231, CC); criminal offence "unauthorised use of another's business name" was amended to read "unauthorised use of another's business name and other special marks for goods and services" (Article 233, CC) and the legal definition of criminal offence was modified accordingly; in the Article 238 (abuse of authority in economy), in Paragraph 1, legal description was amended so that the offence – intention of acquiring unlawful material gain – applies not only to legal entities, but entrepreneurs as well, while a new, more severe penalty was added in Paragraph 2 – if material gain in the amount exceeding fifteen million dinars has been acquired, the offender shall be punished with imprisonment of two to twelve years; in the Article 234 (misfeasance in commercial operations) only one terminological modification was made, while a new criminal offence was introduced in the Article 229a – "failure to pay withholding tax".

More severe penalties were imposed for the following criminal offences: for counterfeiting money (Article 223, CC), in Paragraph 1, a cumulative fine is imposed apart from the imprisonment of two to twelve years, the same was done in Paragraph 2, where imprisonment of one to ten years is imposed, as well as in Paragraph 3, where imprisonment of five to fifteen years is imposed, whereas in Paragraph 4 the special maximum penalty is raised, while the alternative fine or imprisonment of up to one year are replaced with a fine or imprisonment of up to three years; for counterfeiting securities (Article 224, CC), in Paragraph 1, the special maximum penalty is raised and imprisonment of one to five years is replaced with imprisonment of one to eight years and a cumulative fine, while in Paragraph 2, the special maximum penalty is raised and the imrisonment of two to ten years is replaced with imprisonment of two to twelve years and a cumulative fine, whereas in Paragraph 3, the special maximum penalty is raised, while the alternative of a fine and imprisonment of up to one year is replaced with imprisonment of up to three years and a cumulative fine; for counterfeiting and misuse of credit cards (Article 225, CC), in Paragraph 1, the special minimum and maximum penalties are raised and imprisonment of three months to three years is replaced with imprisonment of six months to five years and a cumulative fine, while in Paragraph 2, the special minimum and maximum penalties are raised and imprisonment of six months to five years is replaced with imprisonment of one to eight years and a cumulative fine, whereas in Paragraph 3, the special maximum penalty is raised and imprisonment of two to ten years is replaced with imprisonment of two to twelve years and a cumulative fine, and in Paragraph 5, the special maximum penalty is raised, while a cumulative fine and imrisonment of up to one year are replaced with a fine and imprisonment of up to three years. Also, for this criminal offence, in paragraph 4, the definition of the object of offence was expanded to include, apart from other person's credit card, "confidential information governing the use of such card in payment transactions"; for making, acquiring or giving to another person the means for counterfeiting (Article 227, CC), in Paragraph 1, a cumulative fine is imposed in addition to imprisonment of six months to five years, whereas in Paragraph 2, the special maximum penalty is raised, while the alternative of a fine and imprisonment of up to two years is replaced with a cumulative fine or imprisonment of up to three years; for tax evasion (Article 229, CC), in Paragraph 1, the special minimum and maximum penalties are raised and

3 "The Official Gazette of the Republic of Serbia", No. 85/05, 88/05 – corr. and 107/05. corr.
4 "The Official Gazette of the Republic of Serbia", No. 72/09.
5 "The Official Gazette of the Republic of Serbia", No. 111/09.
6 "The Official Gazette of the Republic of Serbia", No. 121/12.
7 "The Official Gazette of the Republic of Serbia", No. 104/2013.

imprisonment of up to three years and a fine is replaced with imprisonment of six months to five years and a fine, while in Paragraph 2, the special maximum penalty is raised and imprisonment of six months to five years, cumulatively imposed with a fine, is replaced with imrisonment of six months to eight years and a fine, whereas in Paragraph 3, the special minimum and maximum penalties are raised and imprisonment of one to eight years, cumulatively imposed with a fine, is replaced with imprisonment of two to ten years and a fine; for the abuse of monopole (Article 232, CC), the special minimum and maximum penalties are raised and imprisonment of up to three years is replaced with imprisonment of six months to five years and a fine; for disclosing business secrets (Article 240, CC), in Paragraph 1, the special minimum penalty is raised and imprisonment of three months to five years is replaced with imprisonment of six months to five years, while in Paragraph 2, a fine is cumulatively imposed in addition to imprisonment of two to ten years.

After the enactment of the LACC/2012, the following amendments were made to the Criminal Code Chapter on economic offences: the criminal offence of failure to pay withholding tax (Article 229a, CC), introduced in the LACC/2009/September, underwent certain modifications in terms of content; the offence of misfeasance in commercial operations was replaced with a new criminal offence: "abuse of position by responsible person" (Article 234, CC); the criminal offence of counterfeiting symbols for marking goods, measures and weights was rephrased to read: "forging of symbols and/or state seals for designating goods, measures and objects made of precious metals" (Article 245, CC); a new criminal offence was also introduced – "misfeasance in public procurement" (Article 234a, CC).

MODIFIED AND AMENDED CRIMINAL OFFENCES

Money laundering (Article 231, CC) – The criminal offence of money laundering was first regulated in the Federal Law on Preventing Money Laundering[8] from 2003, and it became a part of the primary criminal legislation after the enactment of the Law on Preventing Money Laundering[9] in 2005 and the Criminal Code in 2006. The enactment of the LACC/2009/September resulted in the imposition of more severe penalties for some forms of this criminal offence, while two new forms of this offence were introduced and some paragraphs in the Article 231 were renumbered accordingly.

International acts which are particularly relevant for the prescription of this criminal offence are the following: The 1990 CE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (European or Strasbourg Convention); The 1991 CE Directive on Prevention of the Use of Financial Systems for the Purpose of Money Laundering (Directive on Money Laundering); The 1997 UN Convention Against Corruption; The 1999 UN Convention on the Suppression of the Financing of Terrorism (New York Convention); The 2000 UN Convention against Transnational Organised Crime (Palermo Convention); The 2001 European Parliament and the Council of Europe Directive on Money Laundering; The 2002 CE Criminal Law Convention on Corruption; The 2003 UN Convention against Corruption and The 2005 CE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and Financing Terrorism.[10]

The criminal offence referred to in the Article 231 of the Criminal Code has several forms.

The provision in paragraph 1 defines the basic form of the criminal offence which contains, considering some forms of committing the offence, three interconnected forms of criminal offence.

A criminal offender is anyone who converts or transfers property while aware that such property originates from a criminal offence, with intent to conceal or misrepresent the unlawful origin of the property, or who conceals and misrepresents facts on the property while aware

8 "The Official Gazette of the Republic of Serbia", No. 53/03.

9 "The Official Gazette of the Republic of Serbia", No. 85/05.

10 For more information see N. Delić, Кривично дело прање новца – међународни оквири и позитивноправна регулатива, in: *Примена међународног кривичног права од стране домаћих и међународних судова,* Tara, 2006, p. 331–351 and Z. Stojanović, D. Kolarić, *Кривичноправно реаговање на тешке облике криминалитета,* Belgrade, 2010, p. 104–109.

that such property originates from a criminal offence, or obtains, keeps or uses property with foreknowledge, at the moment of receiving, that such property originates from a criminal offence.

The provision further specifies the manner in which this offence may be committed: conversion or transfer of property originating from a criminal offence, concealing or misrepresenting the facts about the property originating from a criminal offence, and obtaining, keeping and using property originating from a criminal offence.

Conversion in a broader sense is a complete or partial conversion of one legal transaction into another with the same effect. In the context of this criminal offence, conversion of property obtained by a criminal offence is primarily conversion of money or its conversion from one currency into another. Conversion can also include other transferrable rights, for example, when money is converted into securities, shares or bonds.

Transfer of property acquired by a criminal offence is a transfer of ownership from one entity (legal or natural) to another and it may be realised in different ways, depending on whether assets or rights are being transfered. For example, transfer of property can be realised by means of sales, gifts, cession or ownership endorsement. Money transfers are realised through payment operations, which means that all payments pertaining to all legal transactions are undertaken through banks or other financial institutions. Payment operations may include cash or non-cash transactions (e.g. cheques or credit transfers are the instruments of non-cash transactions), and the latter implies transfer of assets from the instructing party's account to the beneficiary's account.

Criminal offence of concealing or misrepresenting the facts on the property of unlawful origin is constituted when the relevant facts concerning property originating from a criminal offence are concealed from the authorities, e.g. the origin of property is concealed during transformation of its ownership or relevant facts are presented in a manner which does not match the real circumstances. A criminal act can be manifested as omission (concealing) or commission (misrepresenting).

Acquiring property proceeding from crime constitutes the establishment of ownership right on property proceeding from crime regardless of the actual form of committed offence, e.g. purchasing, gifting or exchange.

Keeping of property obtained by committing a criminal offence constitutes de facto ownership of such property without the possibility of using or disposing of it, e.g. in the case of inheritance, mortgage or non-cash deposits.

Using property which proceeds from crime means that the property is adequately used, e.g. in the case of leasing, savings deposits, cash deposits or security deposits.

Criminal offence may be committed by undertaking one or more actions which are defined as commission. In the case of several commissions being undertaken, they all constitute one criminal offence, which is a fact that may be relevant for determining the severity of penalty.

The object of commission is any property obtained by committing a criminal offence. Under the provision of the Article 112, Paragraph 36 of the Criminal Code, material gain is any kind of assets, tangible or intangible, movable or immovable, the value of which can or cannot be estimated, as well as any document which serves as a proof of the right over or an interest in relation to any such asset. Property or material gain is also income or any other benefit derived from a criminal offence either directly or indirectly, as well as any asset into which it has been converted or with which it has been merged. Within the context of this criminal offence, property refers primarily to money derived from a criminal offence, as well as the rights and objects acquired with this money. Money is metal and paper money or money fabricated of other material that is legal tender in Serbia or a foreign country (Article 112, Paragraph 23, CC). The definition of money, apart from cash, here includes securities (bonds, treasury bills or commercial bills) and other payment instruments (traveller's cheques or credit letters) in national or foreign currency.[11]

11 As the basic form of criminal offence defines "property originating from a criminal offence" as the object of commission and because this concept also implies money, it was unnecessary to define "money or property" as objects of commission in Paragraphs 2, 5 and 6 (the same applies to Article 7), or to treat money separately, as that was not done, quite justifiably, even in the definition of the basic form of criminal offence. There is another terminological ambiguity in relation to these forms of criminal offence, as the definition "money or property representing revenue from committing a criminal offence" is used instead of "property originating from committing a criminal offence".

Criminal offence is established only if the property in question is obtained by commiting criminal offence. In other words, the commission of criminal offence was preceded by the commission of another criminal offence which is related to the criminal offence of money laundering in the sense that the property which is the object of this criminal offence was obtained by committing a prior criminal offence (predicate offence). The property which is the object of money laundering offence may be obtained by committing any criminal offence regardless of its type or seriousness. The only condition is that it must be a criminal offence, not a commercial violation or a misdemeanour.

For a criminal offence of money laundering to be established it is not necessary to obtain a court ruling that the property has been acquired by committing a criminal offence, nor is it necessary to initiate criminal proceedings for this offence. It is possible, for instance, that the perpetrator remains unknown or is not alive, or that criminal prosecution may not be instituted due to elapse of time. For the purpose of criminal proceedings initiated for money laundering it is sufficient to establish that the property derives from a criminal offence and that the offender was aware of it at the time of committing the crime.

Premeditation is the relevant form of guilt. The law stipulates that the offender must be aware of the fact that the property has been acquired by commiting a crime.[12] The wording of the provision governing acquisition, use or keeping of property is such that it may be interpreted, quite arguably in terms of criminal law and politics, that the foreknowledge of the criminal origin of the property must exist at the time of receiving such property, which means that there are no grounds for criminal offence if this knowledge was gained when the property is already used or kept.[13] As far as conversion or transfer of property as forms of committing criminal offence are concerned, the relevant form of offence is direct premeditation, given that the intention to conceal or misrepresent unlawful origin of the property was the subjective element in this case.

In line with the provision of Article 89 of the LACC/2009/September, the law cumulatively stipulates a fine, in addition to imprisonment of six months to five years.

Attempted criminal offence is punishable under the provision of the Article 30.

A more serious form of criminal offence provided for in Paragraph 2 is established if the amount of money or property referred to in Paragraph 1 of this Article exceeds one million five hundred thousand dinars. It is arguable whether there is a qualitative or a quantitative difference between the more serious form and the basic form of the criminal offence (Paragraph 1). As both forms contain identical legal elements, the difference is quantitative and the definition of the offender's attempt must include the fact that the amount of money or the value of property exceed one million five hundred thousand dinars. A cumulative fine, in addition to imprisonment of one to ten years, is also imposed for this form of offence, as provided by the Article 89 of the LACC/2009/September.

A special form of criminal offence defined in Paragraph 3, and introduced in the LACC/2009/September, which exists when the basic form (Paragraph 1) or a more serious form (Paragraph 2) of criminal offence are committed by a person who obtained the property which is the object of money laundering offence on his/her own by comitting a criminal offence, i.e. if that person is the perpetrator of the prior criminal offence in which the property was obtained. The *ratio legis* for this provision lies in the fact that in this case, as well as in the case of reset (Article 221, CC), we are dealing with the so-called subsequent unpunishable offence (the principle of consumption), which should result, in the absence of a rule, in the existence of the previously committed crime only, i.e. the criminal offence of acquiring the property (money laundering would not be included as a criminal offence here). In this manner, the legal definition of the criminal offence was harmonised with the relevant provisions of the The 2005 CE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and Financing Terrorism.

The penalties imposed for this form of criminal offence are the same as for the basic (Paragraph 1) and more serious form (Paragraph 2) of criminal offence – imprisonment of six

12 This is a (quite unnecessary) copy-paste of the provision in the 1990 European (Strasbourg) Convention. See Nataša Delić, Новац као објект заштите у КЗС, in: *Криминал, државна реакција и хармонизација са европским стандардима,* Belgrade, 2013, 221–228.

13 Z. Stojanović, (2012), 687.

months to five years and a fine, and imprisonment of one to ten years and a fine. It can be noted that the legislator, due to an omission, unnecessarily imposes a fine for this form of criminal offence, as it has already been cumulatively stipulated for the forms referred to in paragraphs 1 and 2.

Paragraph 4 defines the most serious form of criminal offence, which is constituted when the offence referred to in Paragraphs 1 and 2 of this Article is committed in a group. A group comprises at least three persons who have joined together to commit criminal offences either continuously or occasionally[14] and it does not have to have predefined roles for its members, continuity of membership or a complex structure (Article 112, Paragraph 22, CC). The penalty is imprisonment of two to twelve years. This form of criminal offence was included in the LACC/2009/September, and the definitions of "group" (Article 112, Paragraph 22, CC) and "organised crime group" (Article 112, Paragraph 35, CC) were added in the provisions of this Law regulating the legal meaning of terms.

Paragraph 5 defines a criminal offence committed out of negligence, which exists if a person commits a criminal offence referred to in Paragraphs 1 and 2 of this Article, and he/she could have been or was obliged to be aware that the property or money are the revenue acquired by the perpetration of a criminal offence.

Despite the fact that the Law makes a distinction between two types of negligence, intentional and unintentional, (Article 26, CC), when a form of criminal offence which includes negligence is sanctioned, the distinction between these two types of negligence, as a rule, is not made. An exception has been made for the criminal offences of money laundering and concealing (Article 221, CC), where only unintentional negligence[15] is considered relevant, and for which criminality is determined on the basis of duty and ability (here on the basis of ability and duty).[16] Two conditions must be met for this criminal offence to be established: objective conditions – the offender was obliged to know that the money or property represent the revenue acquired by the perpetration of a criminal offence, and subjective conditions – the offender could have known that the money or property are the revenue acquired by the perpetration of a criminal offence. Unintentional negligence is required only in relation to one element of the essence of criminal offence, i.e. it apllies to the circumstance when money or property that have the elements of the to be considered object of commission represent the revenue incurred by the commission of a criminal offence. The penalty is imprisonment of up to three years.

Paragraph 6 stipulates that a responsible person in a legal entity who commits an act referred to in Paragraphs 1, 2 and 4 of this Article will be punished with the appropriate penalty, if it is established that the person knew, or could have known and was obliged to know that the money or property represent the revenue acquired by the perpetration of a criminal offence.

The offender can only be a responsible person in a legal entity. A responsible person in a legal entity is the owner of a company or any other business entity, or a person in a company, institution or any other business entity who, on the basis of his/her position, invested assets or authorisation, performs certain management, supervisory or other duties, as well as the person to whom the performance of such duties is delegated in practise. A responsible person can also be an official when the issue does not relate to criminal offences where a responsible person is designated as perpetrator (Article 112, paragraph 5, CC). The Law requires that the offender has the status of a responsible person at the time when the offence is committed. The changes occuring after the criminal offence has been committed are not significant. Similarly, the fact that a responsible person in a legal entity has committed a criminal offence in the country or abroad is of no great relevance. Criminal offence may be committed with premeditation or by negligence.

Paragraph 7 stipulates the seizure of money and property referred to in Paragraphs 1 to 6 of

14 More than one criminal offence.

15 Premeditation and intentional negligence are defined here as serious offences, whereas unintentional type includes only unintentional negligence. I. Vuković, О појму нехата и његовим појавним облицима, in: *Стање криминалитета у Србији и правна средстава реаговања, Четврти део,* Belgrade, 2010, 250.

16 Unintentional negligence is characterised by the lack of due attention, as the offender does not even realise the possibility of a consequence. This means that an offender has committed an offence by negligence if he/she has failed to use his/her abilities and the possibility of a serious consequence has not even occured to them. *Ibid.,* 253.

this Article. This is a mandatory seizure of objects (Article 87, CC) (In this sense, the prevailing attitude in the case law is that the ruling on the seizure of money and property in the case of money laundering must be precisely defined "material gain obtained by a criminal offence shall be seized from the offender and it shall be determined by the amount of money or the value of objects subject to seizure" (Supreme Court of Serbia, Kž. 111/O6).[17]

Forging of symbols and/or state seals for designating goods, measures and objects made of precious metals (Article 245, CC) – This criminal offence was defined as "counterfeiting symbols for marking goods, measures and weights" until the enactment of the LACC/2012. The definition included, apart from sanctioning the forging of symbols for marking goods, the sanctioning of forging measures and weights. However, due to legal omission, it applied only to forging of symbols for marking goods. As a result, the name of the criminal offence was redefined and its legal description was rephrased.[18]

The criminal offence under Article 245 of the Criminal Code has two forms.

Blanket nature of this criminal offence requires the application of appropriate regulations included in the following legal acts: The Law on Standardisation,[19] The Law on Trademarks,[20] The Law on Measuring Units and Measures,[21] The Directive on Specific Administrative Measuring Units and Their Implementation[22] and The Law on Metrology.[23]

The first form of the criminal offence is committed by a person who,with intent to use them as real, fabricates false stamps, seals, trademarks or other symbols for designating domestic or foreign goods used to stamp timber, livestock or other goods or whoever with same intent alters the genuine symbols or whoever such false or altered symbols uses as real (Paragraph 1).

Commission is alternatively provided for and may be undertaken in the following manner: by fabrication of false stamps, seals, trademarks or other symbols for designating domestic or foreign goods used to stamp timber, livestock or other goods; by altering genuine symbols or using false or altered symbols.

The offence of fabricating false symbols for marking goods is based on the assumption that genuine symbols exist and that they are being counterfeited.[24] The altering of symbols implies that they are altered by adding or deleting the elements which are integral parts of symbols for marking goods. The use of false or altered symbols for value means that they are used for their original purpose. A criminal offence is completed with the termination of any activity which has a character of commission.

The object of commission are seals, stamps, trademarks and other symbols for designating domestic or foreign goods used to stamp timber, livestock or other goods. These symbols were stipulated by competent government authorities and they guarantee a certain level of quality or quantity of goods. As a rule, these symbols are designated for specific goods after the goods have been inspected by a competent authority. It should be noted that these are not the symbols used by manufacturers to mark their goods in terms of types of goods, quality or other characteristics. If someone would fabricate or use such symbols, this offence would not apply, but rather a criminal offence of unauthorised use of other person's business name or other special symbol for marking goods or services shall apply (Article 223, CC).

The relevant form of guilt is premeditation. Fabrication and alteration as forms of criminal offence commission imply direct premeditation and corresponding intention. This offence is punishable by a fine and imprisonment of up to three years.

The other form of criminal offence is committed by a person who, with intent to use them as real, fabricates fake certificates on approved types of measures and certificates of attestation of measures, and/or stamps and other symbols of conformity used for stamping measures and objects of precious metals set out in regulations on metrology and control of objects made of precious metals, or whoever with the same intent alters the original certificate and/or the real

17 Избор судске праксе, Belgrade, 2007/11, 37.
18 The legal definition is terminologically inadequate. See N. Delić, Кривична дела фалсификовања у КЗС, in: *Казнена реакција у Србији, Трећи део*, Belgrade, 2013, 131–132.
19 "The Official Gazette of the Republic of Serbia", No. 36/09.
20 "The Official Gazette of the Republic of Serbia", No. 104/09.
21 "The Official Gazette of the Republic of Serbia", No. 80/94, 83/94 and 12/98.
22 "The Official Gazette of the Republic of Serbia", No. 43/11.
23 "The Official Gazette of the Republic of Serbia", No. 30/10.
24 J. Tahović, *Komentar Krivičnog zakonika,* Belgrade, 1957, 457.

government stamps or other symbols of conformity , and/or uses such fake or altered certificates and/or government stamps and other symbols of conformity as real.

Commission is alternatively provided for and may take the following forms: fabrication of fake certificates on approved types of measures and certificates of attestation of measures, and/or stamps and other symbols of conformity used for stamping measures and objects of precious metals set out in regulations on metrology and control of objects made of precious metals; alteration of original certificates and/or the real government stamps or other symbols of conformity and/or the use of such fake or altered certificates and/or government stamps and other symbols of conformity as real. Criminal offence is completed with the undertaking of any commission.

The object of commission are certificates on approved types of measures, or stamps and other symbols of conformity used for stamping measures and objects of precious metals set out in regulations on metrology and control of objects made of precious metals.

The subjective side of this criminal offence is premeditation. Fabrication and alteration as the modes of committing a criminal offence imply direct premeditation and a corresponding intention. The penalty is a fine or imprisonment of up to three years.

The seizure of fake certificates, government stamps and symbols, measures and objects made of precious metals is mandatory under Paragraph 3 of the Law.

NEW CRIMINAL OFFENCES

Abuse of position by a responsible person (Article 234, CC) – In accordance with the provision of the Article 21 of the LACC/2012, criminal offence of misfeasance in commercial operations was replaced with the criminal offence of the abuse of position by a responsible person. The evolution of this criminal offence, laid down in the chapter on economic offences, is closely linked to the criminal offence of abuse of office (Article 359, CC) which belongs to the group of offences against official duty. By setting out this criminal offence, our law for the first time made a distinction between an official and a responsible person whose responsibility was extracted from the essence of the criminal offence of abuse of office and was regulated separately. This means that the abuse of office by a responsible person was not decriminalised, only the scope of criminal liability was limited, which is reflected in the fact that the criminal offence of abuse of position by a responsible person applies only to acqusition of unlawful material gain, as well as in the imposition of more lenient penalties for this criminal offence. This is also evident in the fact that the content of the legal definition of a responsible person has been modified and it no longer includes owners who do not perform duties and functions of a responsible person (Article 112, Paragraph 5, CC).[25] The stipulation of this criminal offence results from the need to distinguish between a responsible person and an official, as the two are different entities with different competences in different areas. An official performs his/her official duty in administrative bodies, while a responsible person performs certain functions related to management and operations of a business entity. However, as the limits of criminal law protection for this criminal offence have not been clearly defined relative to all elements of its essence, it is to be expected that this criminal offence, following the example of German legislation, will be replaced with the sanctioning of intentional causing of material damage to other person's property or property interests by abusing their powers or the relationship of mutual trust in commercial operations.[26]

The criminal offence set out in the Article 234 of the Criminal Code has its basic and two more serious forms.

The basic form of this criminal offence (Paragraph 1) is committed by a responsible person who through abuse of his position or powers, by exceeding his powers or by failure to discharge his duty, acquires for himself or another natural person or legal entity unlawful material gain or

25 Z. Stojanović, D. Kolarić, Нова решења у Кривичном законику Републике Србије, *Безбедност,* Belgrade, 2012/3, 19–20.

26 Z. Stojanović, Да ли је Србији потребна реформа кривичног законодавства? *Crimen*, Belgrade, 2013/2, 129.

causes material damage to another.

Commission may be undertaken in one of the following ways: by abusing one's position or powers; exceeding one's powers or failing to discharge one's duty. Actions that have the character of commission should be interpreted in the same way as in the case of the criminal offence of abuse of office (Article 359, CC). This means that criminal offence has been committed in the following cases: if a responsible person undertakes actions that are allowed by law, or if he/she acts in accordance with the assigned position or powers, but he/she does so for personal or another person's gain; if a responsible person undertakes actions that are allowed by law, but these actions fall under competence of another responsible person, or if a responsible person undertakes actions within his/her competence, but has no powers to undertake actions in a given case because his/her powers in that particular case are limited by specific regulations or interests (as a rule, these are the regulations which do not include discretionary authorisation), and finally, when a responsible person either fails to perform a duty (or more duties) that is within his/her powers or if a responsible person performs an activity inadequately and the activity in question fails to produce expected results.

Criminal offence is complete when the consequence of the offence has occurred. The consequence may consist of the acqusition of unlawful material gain for oneself or another natural person or legal entity or causing material damage to another person. Both gain and damage can be material only. If commission has been undertaken without the resulting consequence, the case will be treated as attempted criminal offence which is not punishable. A responsible person is the offender. The relevant form of guilt is premeditation. The penalty is imprisonment of three months to three years.

More serious forms of criminal offence are present if the commission of the offence referred to in Paragraph 1 of this Article results in acquiring material gain exceeding four hundred and fifty thousand dinars (Paragraph 2), while the most serious form of criminal offence implies that the material gain exceeds one million five hundred thousand dinars (Paragraph 3). The penalty for the first, more serious form of the criminal offence is imprisonment of six months to five years, while the penalty for the second, the most serious form of the criminal offence is imprisonment of two to ten years.

Failure to pay withholding tax (Article 229a, CC) – Criminal offence of failure to pay withholding tax became an integral part of the primary criminal legislation with the enactment of the LACC/2009/September. Until then, this criminal offence was specified in the Article 173 of the Tax Procedure and Tax Administration Act[27] (TPTAA). Under Paragraphs 2 and 2a of the TPTAA, tax included all public revenues collected by the Tax Administration and local government units, which meant that all public revenues collectible after withholding tax, i.e. taxes, dues and contributions, were protected by the stipulation of this criminal offence. When this criminal offence was transfered from secondary legislation, i.e. when it was included in the Criminal Code enacted in 2006, it did not specify that other public revenues are considered tax, which automatically narrowed the object of criminal offence, as contributions and other dues were not specified as taxes.[28] The necessary enlargement of criminal law protection relative to the object of commission of this criminal offence was made when the LACC/2012 was enacted. In addition, Paragraph 4 was deleted, which stipulated that the entrepreneur and responsible person of the taxpayer shall be punished for the criminal offence specified in Paragraphs 1-3 of this Article with the security measure of being prohibited from practising a particular profession, activity, or performing duties in the period of one to five years. This provision was not harmonised with the provision in the Article 85 of the Criminal Code which regulated the security measure of prohibition on practising profession, activity or performing duties because this measure is not mandatory under law, while it was also stipulated that the duration of this measure cannot be less than one nor more than ten years, which means that there is no possibility of regulating the duration differently.

The criminal offence specified in the Article 229a of the Criminal Code has several forms.

27 "The Official Gazette of the Republic of Serbia", No. 24/01, 80/02, 80/02 – different statute, 135/04, 62/06, 65/06 – corr., 31/09, 44/09, 18/10, 50/11 – Constitutional Court Decision.

28 Look in M. Kulić, G. Milošević, Однос кривичних дела пореске утаје и неуплаћивање пореза по одбитку у српском кривичном праву, *Анали Правног факултета у Београду,* Belgrade, 2011/2, 339–341.

Blanket nature of this criminal offence requires the application of a large number of regulations included in the following legal acts: The Income Tax Law[29] (ITL), TPTAA, The Corporate Profit Tax Law[30] (CPTL), The Law on Contributions for Mandatory Social Insurance,[31] The Law on Administrative Taxes,[32] The Law on Court Fees[33], etc.

The basic form of the criminal offence (Paragraph 1) is committed by the responsible person of a legal entity – tax disburser, as well as an entrepreneur – tax disburser who, with intent to avoid payment of withholding taxes, mandatory social security contributions or other prescribed dues, does not pay the amount assessed as withholding tax, and/or mandatory social security contributions, to the appropriate receiving account for public revenues or fails to pay other prescribed dues.

The object of commission is failure to pay withholding tax, withholding mandatory social security contributions or other dues. The commission is omission, or non-compliance with a specific legal obligation. Criminal offence is present both in the cases of total or partial non-payment of withholding tax, or withholding mandatory social security contributions or any other dues.

The criminal offence is complete at the moment when tax payment becomes due. If the withholding tax or mandatory social security contributions are not paid, they will become collectible on the date when salaries are paid, while in the case of other dues, the payment will depend on the type of due in question. For example, the payment of court fees for the complaints filed becomes due at the moment the complaint was filed.

According to the legal definition, the grounds for criminal offence exist if the amounts of withholding tax, withholding mandatory social security contributions or other dues have been assessed. The assessed amount of taxes that have not been paid is not relevant for determination of the grounds for criminal offence. According to the Law, if the amount in question is not high, and the conditions provided by law have been fulfilled, the instititute of the offence of minor significance will be applied (Article 18, CC).[34]

As provided for under provision of the Article 20 of the LACC/2012, the object of commission of the criminal offence is, apart from withholding tax, withholding mandatory social security contributions and other dues.

Withholding tax is paid for the following revenues: salaries/wages; revenues from copyrights and industrial property rights, if the payers of revenues are legal entities or entrepreneurs; yield on capital; revenues from real estate, if the payers of revenues are legal entities or entrepreneurs; revenues from leasing out chattels, if the payers of revenues are legal entities or entrepreneurs; games of chance winnings; revenues from personal insurance; revenues of athletes and sports specialists and other revenues (e.g. on the basis of temporary service agreement, additional work, volunteering, collection and selling of raw materials, etc.), if the payers of revenues are legal entities or entrepreneurs (Article 99, ITL). Withholding tax is also charged and paid on the revenue earned by a non-resident from a resident on the teritorry of Serbia, on the basis of dividends and a share in the profit of a legal entity, copyrights and related rights and industrial property rights, interest and rent on leased real estate or chattels, unless otherwise provided under international agreements on the avoidance of double taxation (Article 40, Paragraph 1, CPTL). Withholding tax is assessed and paid by the income payer.

Mandatory social security contributions include pension and disability insurance contributions, health insurance cntributions and unemployment insurance contributions. These contributions are paid after withholding when a payer or revenues is obliged, in the name and on behalf of the taxpayer or in his own name, and on the behalf of the taxpayer, to calculate and pay the contributions simultaneously with the payment of income for which contributions are paid.

Other dues include: fees, charges for the use of public goods and self-contribution fees.

29 "The Official Gazette of the Republic of Serbia", No. 24/01, 80/02, 80/02 – different statute, 135/04, 62/06, 65/06 – corr., 31/09, 44/09, 18/10, 50/11 – Constitutional Court Decision.
30 "The Official Gazette of the Republic of Serbia", No. 25/01, 80/02, – different statute, 43/03, 84/04 and 18/10.
31 "The Official Gazette of the Republic of Serbia", No. 84/04, 61/05, 62/06 and 5/09.
32 "The Official Gazette of the Republic of Serbia", No. 43/03, 51/03, 61/05, 101/05, 5/09 and 54/09.
33 "The Official Gazette of the Republic of Serbia", No. 28/94, 53/95, 16/97, 34/01, 9/02, 29/04, 61/05, 116/08 and 31/09.
34 Z. Stojanović, (2012), 680.

Fees are a monetary equivalent of services rendered by government authorities to natural persons and legal entities. They include: administrative fees, court fees, local municipal charges and sojourn fees. Administrative fees are calculated and paid simultaneously with filing requests to competent bodies in written form. Court fees are calculated in accordance with the Fee Tariff, and are payable relative to the type of fees - for example, fees for motions submitted in court, fees for the copies of documents, when requested at court, for court decisions upon their publication or submission of copies, for court settlement when these are concluded, etc. Local municipal charges are calculated at the moment they are introduced by the competent bodies in local government units, and they are collectible from the day when the relevant right, object or service is first used or provided. Sojourn fee is calculated upon the decision of the competent body of a local government unit which includes the stipulation of a deadline for payment.

The charges for the use of public goods are paid only by some categories of taxpayers. These fees include, for example, water use charges, forestry charges, road charges, etc. A charge for the use of public goods is calculated when the use of a particular public good is being negotiated, and its amount depends on the costs of maintenance and a constant improvement of the public good in question.

Self-contribution is imposed on the basis of self-contribution payers' free will. The funds collected in this way are used for covering expenses which are determined in advance. Self-contribution fees are calculated and paid within deadlines set in a decision on imposing self-contribution. The entity in charge of income payment is obliged to calculate and pay self-contribution fee simultaneously with every income payment.

The offender is a responsible person of a legal entity – tax disburser, as well as an entrepreneur – tax disburser. Tax disburser is the payer of income to the taxpayer who is under the obligation to assess, withhold and pay appropriate tax on that income, in the name and for the account of taxpayer, to the appropriate payment account (Article 12, Paragraph 3, Item 2, TPTAA). A legal entity is also a section of a legal entity, or an operating unit of a non-resident legal entity registered with a competent government authority, as well as government bodies and organisations (Article 99, Paragraph 2, ITL). An entrepreneur is a natural person performing a commercial, professional or any other activity independently and in compliance with law, and who pays individual income tax on the revenue generated from a self-performed activity.

On a subjective level, direct premeditation and intention to avoid paying withholding tax, withheld mandatory social security contributions and other dues are required. The offender's premeditation should also include the awareness of the failure to pay the withholding tax, withheld mandatory social security contributions and other dues. Given the nature of this criminal offence, this is a specific relation of the subjective elements of its essence, because the very presence of premeditation implies the existence of intention. The penalty for this criminal offence is imprisonment of up to three years and a fine.

A more serious form of the criminal offence (Paragraph 2) is present if the amount of assessed, but not paid, tax exceeds one million five hundred thousand dinars. The most serious form of the criminal offence is present if the amount of assessed, but not paid, tax exceeds seven million five hundred thousand dinars. The penalty for the more serious form of the criminal offence is imprisonment of six months to five years and a fine, while the most serious form entails imprisonment of one to ten years.

Misfeasance in public procurement (Article 234a, CC) – Criminal offence of misfeasance in public procurement was set forth for the first time when the LACC/2012 was enacted and in line with GRECO recommendations contained in the Third Evaluation Report on the Republic of Serbia which was adopted at the Strasbourg Conference. Given the frequent occurence of malpractice in public procurement which, as a rule, involves both contracting authorities and bidders, and in order to provide a stronger criminal law protection, the law has set a very broad legal definition of this criminal offence.

The criminal offence provided for under Article 234a of the Criminal Code has multiple objects of protection. Apart from commercial relations which are protected by setting the rules for public procurement procedure, property and official duty are also objects of protection.

This criminal offence has three forms, two of which are basic and one more serious.

Blanket nature of this criminal offence requires the application of relevant regulations

included in the Public Procurement Law[35] (PPL) and The Budget System Law of the Republic of Serbia[36] (BSL).

The first form of the criminal offence (Paragraph 1) is committed by a responsible person in a company or other business enterprise with capacity of legal entity or an entrepreneur, who in respect to public procurement submits an offer based on false information, or colludes with other bidders, or undertakes other unlawful actions with the aim to thus influence the decision of a contracting authority.

Commission may be undertaken in one of the following ways: by submitting an offer based on false information; colluding with other bidders or undertaking other unlawful actions. Criminal offence can be constituted only if an action which has a character of commision is undertaken in respect to public procurement. Public procurement is the procurement of goods, services or works, in the manner and under the conditions prescribed by the Public Procurement Law (Article 3). The submission of offers based on false information means that the submitted offer contains data which do not correspond to actual facts. It is not quite clear what colluding with other bidders implies. According to the text of the Law, criminal offence can be constituted by undertaking any other unlawful action. As with "colluding", this is also a general provision the meaning of which is unclear and may result in a non-consistent case law. The criminal offence is complete by commission with intention.

The offender is a contracting authority, i.e. a responsible person of a company or other business enterprise having the capacity of a legal entity or an entrepreneur. Under Article 3 of the PPL, a bidder is a person who in public procurement procedure offers to deliver goods, provide services or perform works. The subjective element of the criminal offence consists of a direct premeditation and intention to influence the decision-making of the contracting authority.

The other form of the criminal offence (Paragraph 2) is committed by a responsible person or official in the contracting authority who through abuse of position or powers, by exceeding his powers or failure to discharge his duty violates the law or other regulations on public procurement and thus causes damages to public funds.

The commission is the abuse of position or powers, exceeding of powers or failure to discharge duty. The actions that have the character of commission should be interpreted in the same manner as for the criminal offence of abuse of office (Article 359, CC).

The consequence of the criminal offence is the violation of law and other regulations governing public procurement. A prerequisite for a completed criminal offence is the presence of an objective condition for sanctioning, which implies that damage has been done to public funds. Public funds are the funds under the control of and at the disposal of the Republic of Serbia, local authorities and organizations for mandatory social security (Article 2, BSL).

The offender is a responsible person or an official in a contracting authority. The relevant form of guilt is premeditation. The objective condition for sanctioning is not comprised in the offender's culpability.

The same penalty of imprisonment of six months to five years is imposed for both forms of the criminal offence.

A more serious form of this criminal offence has been committed if the act specified in Paragraphs 1 and 2 of this Article has been committed in respect to public procurement the value of which exceeds one hundred and fifty million dinars. The value of public procurement constitutes a qualifying circumstance and it has to be included in the offender's premeditation. The imposed penalty is imprisonment of one to ten years.

Under the provision in Paragraph 4, the perpetrator specified in Paragraph 1 of this Article who voluntarily discloses that the offer is based on false information or collusion with other bidders, or that he/she has undertaken other unlawful actions with intent to influence the decision of the contracting authority prior to the issuance of decision on the selection of bid, may be remitted from punishment. This is the example of special grounds for remittance of penalty which, by their very nature, represent the institute of genuine remorse. These optional grounds for remittance of penalty are applicable only to a contracting authority, not to a responsible person in a contracting authority and can be established if three conditions are met: voluntary

35 "The Official Gazette of the Republic of Serbia", No. 124/2012.
36 "The Official Gazette of the Republic of Serbia", No. 9/2002 and 87/2002.

disclosure, elimination of the consequences of the criminal offence and timeliness.[37]

FINAL REMARKS

The enactment of the Criminal Code in 2006 marked the beginning of a new era in the development of Serbian criminal legislation, as our country was provided with a modern and state-of-the-art criminal code which reformed, in terms of form and content, and codified our criminal law. However, further attempts at developing Serbian criminal legislation have failed to follow the course set out in the legal solutions prescribed in the Code. These solutions took into account both our legal tradition and the accomplishments of the modern doctrine and, as such, provided a platform for the creation of modern, liberal and human-oriented criminal law.

The amendments to the criminal legislation from 2009 (September and December) have generally deformed the existing criminal law system and brought about its detorioration both in terms of its essence and its legislative-technical aspects.[38]

The enactment of the LACC/2012 represents a positive turn in the criminal legislation reform. Apart from its other purposes, the objective of this Law was to correct the technical and material errors made in the previously enacted laws. However, this Law failed to eliminate the incongruities created by the imposition of more severe penalties for a large number of criminal offences, which resulted in discrepancies between some criminal offences and their forms. In addition, the cases where criminal law intervention is not required or justified were not decriminalized. It should be expected that further legislation reform will result in an improved criminal law that will be able to address the need for an efficient criminal law protection which will match the scope, dynamics and forms of modern crime.

The reform of the chapter on economic offences that has been carried out so far is characterised, on one hand, by the imposition of more severe penalties for some criminal offences, which was the general intention of 2009 amendments, and, on the other, by the stipulation of new criminal offences.

This is a partial enlargement of penal framework, which is in direct contradiction with the principle of legality which requires that penalties should match the abstract level of social threat inferred in every criminal offence and that they should represent the Abstract of different forms of criminal offence. The range bewteen the stipulated special minimum and maximum penalties indicates that they were imposed arbitrarily and without legal grounds and therefore could create problems in the case law. This is all the consequence of the legislator's false belief that the rise of specific crimes, or criminality in general, can be prevented by increased repression. In fact, the truth is that efficient criminal law requires rationally set limits of criminal law enforcement and a balance between the legislative system and its implementation.

With regard to the imposition of new criminal offences in this chapter, a "step forward" in terms of quality is definitely the stipulation of the criminal offence of abuse of position by responsible person (Article 234, CC) and the criminal offence of misfeasance in public procurement (Article 234a, CC). These amendments were intended to adjust the system of incriminations to match the dynamics and structure of modern day criminality. However, in terms of legislation, the criminal offence of abuse of position by responsible person should not have been formulated, as was the case, in the manner in which the criminal offence of abuse of office (Article 359, CC) was defined, as the latter is characterised by a very broadly defined commission. In addition, the wording used to describe the criminal offence of misfeasance in public procurement lacks the precision that would provide the consistency of case law.

An in-depth appraisal of other criminal offences stipulated in this chapter has not been done yet and it remains to be done in the next phase of the legislation reform. Descriptions of some criminal offences need to be revised by introducing concepts and terms that are more precise in terms of logic, grammar and legal meaning, as well as unambiguous (e.g. money laundering in Article 231, CC and forging of symbols and/or state seals for marking goods, measures and objects made of precious metals in Article 245, CC). Similarly, it should be reconsidered whether

37 For more information on remorse, look in N. Delić, *Нова решења општих института у КЗС,* Belgrade, 2009, 42–45.

38 For more information, look in Z. Stojanović, „Казнена политика у Србији: сукоб законодавца и судске праксе", in: *Казнена реакција у Србији, Други део,* Belgrade, 2012, 1–16.

the real grounds for the stipulation of some criminal offences still exist, or whether it would be justified to leave out some criminal offences or some of their forms and include them in the economic violations system (e.g. preventing control in Article 241, CC).

REFERENCES

1. И. Вуковић (2010), О појму нехата и његовим појавним облицима, у: *Стање криминалитета у Србији и правна средстава реаговања, Четврти део,* Београд, 243–256.
2. Н. Делић (2006), Кривично дело прање новца – међународни оквири и позитивноправна регулатива, у: *Примена међународног кривичног права од стране домаћих и међународних судова*, Тара, 333–350.
3. Н. Делић (2009), *Нова решења општих института у КЗС*, Београд,
4. Н. Делић (2013), Новац као објект заштите у КЗС, у: *Криминал, државна реакција и хармонизација са европским стандардима,* Београд, 211–230.
5. Н. Делић (2013), Кривична дела фалсификовања у КЗС, у: *Казнена реакција у Србији, Трећи део*, Београд, 113–152.
6. М. Кулић, Г. Милошевић (2011), Однос кривичних дела пореске утаје и неуплаћивање пореза по одбитку у српском кривичном праву, *Анали Правног факултета у Београду,* Београд, број 2, 332–345.
7. З. Стојановић (2013), Да ли је Србији потреба реформа кривичног законодавства? *Crimen*, Београд, број 2, 119–143.
8. З. Стојановић (2012), *Коментар Кривичног законика,* Београд.
9. З. Стојановић, Д. Коларић (2010), *Кривичноправно реаговање на тешке облике криминалитета*, Београд.
10. З. Стојановић, Д. Коларић (2013), Нова решења у Кривичном законику Републике Србије, *Безбедност,* Београд, број 3, 5–32.
11. Ј. Таховић (1957), *Коментар Кривичног законика*, Београд.

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ILLEGAL EVIDENCE IN THE LIGHT OF HUMAN RIGHTS STANDARDS IN CRIMINAL PROCEEDING

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Abstract: The authors consider the issue of proving in criminal proceeding that has not only process, but also the social and political significance. In this sense, the authors point out that the system of illegal evidence is conditioned to multiple factors. This system depends on whether it is a mixed type of criminal proceedings or indictment type, then on the extent to which the particular process has the element of crime controle, due process or victim participation model, as well as the circumstances whether the illegality of the evidence establishes ex lege or ex iudicio. The authors believe that the combination of the above mentioned factors should enable the protection of fundamental human rights and especially the rights of the defense, but not hamper judicial authorities in the prosecution of offenders. Illegal evidence certainly can not be used in criminal proceedings respectively they may not base a judgment. The authors discuss the aforementioned problems in the light of human rights standards, particularly bearing in mind the practice of the European Court of Human Rights and the Constitutional Court.

Keywords: evidence, illegal evidence, criminal procedure, human rights, the European Court of Human Rights, the Constitutional Court.

INTRODUCTION

The problem of evidence and proof in criminal proceedings has not only process, but also the social and political significance.[1] The exceptional importance of this matter stems from the fact that the evidence touching upon the fundamental guarantees of the individual providing the rule of law, and in particular the presumption of innocence as one of the essential elements of a fair trial.[2] It is understandable therefore request that in the criminal proceedings can only be used the material which was obtained with respect to the basic form of the process and guarantees of human rights. In this way, the particular person provides the necessary guarantee that even after the accusation the presumption of innocence will be protected, and the evidence obtained through violation of his rights and freedoms will not cause damage because of their use in criminal proceedings.[3] This also protects the state's legitimacy, which, in the case of punishment on the basis of evidence obtained in violation of the law, would be called into question, and state authorities equated with persons against whom criminal proceedings are conducted .[4] Contribute to the achievement of the stated objectives of evidence is (*Beweisverbote*) whose *raison d'être* is based on the idea that through the courts to set standards of conduct for civil authorities in gathering evidence.[5] Violation of above prohibition has resulted in the implementation of various sanctions, ranging from those that afflict the official who has violated the law (compensation, disciplinary action or criminal sanctions), through reduction of the sentence to the accused, dismissal of the charges and, ultimately, the inability to use such evidence in criminal procedure.[6]

1 Tihomir Vasiljević, *Sistem krivičnog procesnog prava SFRJ*, Savremena administracija, Beograd 1981[3], 305.
2 Serge Guinchard, Jacques Buisson, *Procédure pénale*, Litec Groupe LexisNexis, Paris 2002[2], 441.
3 John R. Spencer, „Evidence", *European Criminal Procedures* (ed. by M. Delams-Marty, J. R. Spencer), Cambridge Univesity Press, Cambridge 2002, 603.
4 See Davor Krapac, „Nezakoniti dokazi u kaznenom postupku prema praksi Europskog suda za ljudska prava", *Zbornik Pravnog fakulteta u Zagrebu* 6/2010, 1208.
5 T. Vasiljević, 604; Mirjan Damaška, „Procesne posljedice upotrebe dokaza dobivenih na nedozvoljeni način", *Naša zakonitost* 3–6/1960, 228.
6 Jean Pradel, *Droit pénal comparé*, Paris 2002[2], 474.

The way will be arranged system of illegal evidence depends on several factors.[7] It is important first of all, whether it is a mixed or indictment type of criminal proceedings, then the extent to which the particular process has the element of crime controle, due process or victim participation model and, finally, whether the illegality of the evidence establishes *ex lege* or *ex iudicio*. The combination of the above mentioned factors should enable the protection of fundamental human rights and, in particular, the rights of the defense, and also not to hamper the judicial authorities in the prosecution of offenders. It is basically about finding a balanced approach that should be „reconciled" mutually opposed the request for the effective prosecution with the guarantees of a fair trial that the defendant enjoys. In this connection, it is possible to make some difference depending on whether the evidence collected by the representatives of judicial authorities or individuals. With regard to criminal justice authorities can come to the evidence and by force, it is understandable that the standards that they must respect on that occasion are far and away higher.[8]

The doctrine usually defines the illegal evidence as a basis that materially or formally constituted a violation of fundamental human rights and can not be used for inferring the facts that are established in the criminal proceedings.[9] And the Serbian Criminal Procedure Code (hereinafter CPC)[10] contains provisions on illegal evidence. It is, above all, the rules stipulating that the court's decisions can not be based on evidence, directly or indirectly, by themselves or by way of obtaining inconsistent with the Constitution (hereinafter Constitution),[11] the CPC, any other law or generally accepted rules of international law and ratified international treaties (Article 16, paragraph 1 of the CPC). On the other hand, in Article 84, paragraph 1 of the CPC provides that evidence that was obtained in contravention of Article 16, paragraph 1 of the CPC (*illegal evidence*) can not be used in criminal proceedings, which undoubtedly has a wider scope than the impossibility of establishing a court decision on unlawful evidence.

In the wake of the provisions of Article 16, paragraph 1 of the CPC on illegal evidence could be called first when he was in *itself*, ie. *materially* in conflict with the legal system and human rights standards in criminal proceedings (for example, irrational proofs). In this case, however, it is not the evidence, because there is no plausible physical basis for inferring the fact that is determined in the process. When it comes to the evidence that would *indirectly* by itself fall within the category of illegal evidence, one could conclude that it was the wrong legal editorial Article 16, paragraph 1 of the CPC. Therefore, the above legal provision should be interpreted so that it comes to evidence *themselves, either directly or indirectly, by way of obtaining* contrary to the legal system and human rights standards in criminal proceedings.

The illegality of evidence may be due to the *way they were obtained*. In this regard, the evidence that was *directly* to the manner of obtaining contrary the Constitution, CPC, the other law and human rights standards in criminal proceedings, it is possible to make some difference. There is evidence that is explicitly provides that in them can not base judgment (for example, to the case of the provisions of Article 85, paragraph 5 and Artticle 95, paragraph 4 of the CPC). Based on that, *argumentum a contrario*, it can be concluded that the legislator surrendered to the Court to assess whether other violations that have occurred in the way of obtaining the said statements by their nature such that it would be considered illegal evidence (for example, a lawyer interrogation of the defendant contrary to Article 72, paragraph 2, item 3 of the CPC or failure of the procedure pursuant to Article 96, paragraph 1 of the CPC calls witnesses to sworm before the test). One could therefore speak of the absolute and relative illegality of evidence with regard to the way they were obtained. Finally, by the formulation of the illegality of the

7 D. Krapac, 1208, 1209; Igor Bojanić, Zlata Đurđević, „Dopuštenost uporabe dokaza pribavljenih kršenjem temeljnih ljudskih prava", *Hrvatski ljetopis za kazneno pravo i praksu* 2/2008, 974.

8 S. Guinchard, J. Buisson, 471. And in our criminal procedure distinguishes between gathering evidence and material for the defense, on the one hand, and evidence gathering, on the other. See Goran P. Ilić, Miodrag Majić, Slobodan Beljanski, Aleksandar Trešnjev, *Komentar Zakonika o krivičnom postupku*, Edicija Komentari, Službeni glasnik, Beograd 2013[6], 702, 703.

9 D. Krapac, 1208, 1209; I. Bojanić, Z. Đurđević, 974; G. P. Ilić, M. Majić, S. Beljanski, A. Trešnjev, 272; Berislav Pavišić, *Komentar Zakona o kaznenom postupku*, Dušević & Kršovnik d. o. o., Rijeka 2011, 88. Somewhat different point of view represented by: Miodrag N. Simović, *Krivično procesno pravo*, Fakultet za bezbjednost i zaštitu, Banja Luka 2007[2], 173.

10 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* N[os]72/11, 101/11, 121/12, 32/13 and 45/13.

11 Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia* N[o] 98/06.

evidence is indirect, by way of acquisition, contrary to the Constitution, CPC, the other law and human rights standards in criminal proceedings, the legislature has explicitly adopted the doctrine of the „fruit of the poisonous tree".[12]

STRASBOUR APPROACH TO THE ILLEGAL EVIDENCE

Contrast to most international human rights instruments that do not have effective mechanisms for the implementation,[13] the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR)[14] are not only directly applicable to the national level, but have the advantage above provisions of domestic law.[15] As a result, at the European level human rights are fully become an area of positive law,[16]and key contribution is made by the European Court of Human Rights (hereinafter ECtHR). The main feature of the Strasbourg practice is an attempt to ensure not only protection, but also the *development* of human rights, which has the effect that the provisions on human rights essentially adapting to social changes.[17] It is a teleological approach, based on the ideal of *the rule of law* mentioned in the Preamble of the ECHR, by which the Convention is seen as a „living instrument which is interpreted in light of the circumstances of modern life".[18] In interpreting the provisions of the ECHR Court seeks to do so and „in light of the prevailing views in modern democracies", as in the doctrine referred to as „consensually" interpretation.[19]

A general direction which the ECHR held in connection with the issue of illegal evidence originated in the practice of the Commission on Human Rights (hereinafter Comm.HR). One of these decisions is *H. v. the United Kingdom* where he expressed the view that the task of the Commission is to say whether the national courts properly assessed the evidence, but to examine whether the evidence in favor and against the defendant derived in a manner that requires a fair trial.[20] It is, therefore, a restrictive approach which is based on the idea that Article 6 of the ECHR governs the right to a fair trial, not a question of admissibility of evidence, since it is in the primary jurisdiction of national law. Therefore, the ECtHR does not exclude in principle and *in abstracto* admissibility of certain evidence that was obtained illegally, it examines whether the proceedings as a whole were fair.[21]

The question of the illegality and the evidence ECtHR considered in light of other violations of law, other than the right to a fair trial under Artticle 6 of the ECHR. It is the prohibition of torture, inhuman or degrading treatment (Article 3 of the ECHR) and the right to respect private and family life, home and correspondence (Article 8 of the ECHR). The specificity of this approach lies in the fact that a finding of a violation of Art. 3 and 8 of the ECHR rule is not enough, but it is necessary to determine whether it resulted that the criminal proceedings as a whole were unfair.

One of the reasons that the ECtHR did not build a clear criteria for evaluation if the way to obtain or use any evidence should be considered illegal, according to differences in normative

12 On the concept of illegal evidence in our law and jurisprudence see G. P. Ilić, M. Majić, S. Beljanski, A. Trešnjev, 272-274.
13 See Miodrag A. Jovanović, Ivana Krstić, „Ljudska prava u XXI veku: između krize i novog početka", *Anali Pravnog fakulteta u Beogradu* 4/2009, 6.
14 The ECHR became part of the Serbian legal order upon the adoption of the Law Ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols Thereto, as amended, *Official Journal of Serbia and Montenegro* – International Treaties, N^{os} 9/03, 5/05 and 7/05-corrigendum and *Official Gazette of the Republic of Serbia* – International Treaties, N^{o} 12/10).
15 Dragoljub Popović, *Evropsko pravo ljudskih prava*, Edicija Međunarodni propisi i evropsko pravo, Službeni glasnik, Beograd 2012, 44.
16 Frédéric Sudre, *La Convention européenne des droits de l'homme*, Presses Universitaires de France, coll. Que sais-je?, Paris 1997^{4}, 3, 7.
17 *Ibid.*, 29.
18 As a result, in jurisprudence of ECtHR is developed theory of the „essential elements characteristic of a right". See Louis Favoreu (*et al.*), *Droit des liberté fondamentales*, Dalloz, Paris 2009^{5}, 424, 425.
19 *Ibid.*, 425, 426.
20 Comm.HR, *H. v. United Kingdom*, 7 July 1975.
21 ECtHR, *Schenk v. Switzerland*, 12 July 1988, § 46.

construction of illegal evidence in the member states of the Council of Europe.[22] While under the influence of jurisprudence of the ECtHR the European legal space gradually comes to overcoming the old dispute between supporters of the adversarial and inquisitorial models in favor of „adversarial" model represents a future European model of criminal procedure,[23] it is indisputable that there are still substantial differences between national legal systems. They are based on a difference of opinion about the relationship between state and society.

According to one view, the task of the state is to support existing social practice, while the other view gives the state the right to appoint certain social goals and to lead the company in that direction.[24] In the first case of the reactive state, a fundamental principle on which it was built judiciary is the perception that the judicial process conflict parties and the court intervenes only if it is absolutely necessary for a fair resolution of the dispute. It is, therefore, a procedure that matches what is in the common law tradition called „adversarial proceedings" in the continental legal tradition, „party", „contradictory" or „adversarial" process.[25] On the other hand, there is an activist state in which the procedure is designed to facilitate the search for the best government response to an event that is the subject of the proceedings. This model is commonly referred to as „inquisitorial", „non-adversarial" and sometimes the „official" method.[26] Exposed differences have resulted to the reactive state procedural fairness perceived as equal treatment presupposes the material justice that is equal to the exact outcome of the proceedings. In contrast, the activist state material justice takes precedence over procedural fairness, so the breach of procedural rules, particularly those related to illegally obtained evidence, corrected only if they are essential, ie. if cast doubt on the correctness of judicial decisions.[27]

In the lines that follow will consider the jurisprudence of the ECtHR, as well as some of the Serbian Constitutional Court (hereinafter CC) in connection with the issue of the admissibility of evidence. In this regard, there is the doctrine of the view that the legality of obtaining evidence has two aspects, wherein the first is called material legality (*légalité matérielle*), and other formal legality (*légalité formelle*).[28] Within the material legality placed two demands – respect for human dignity and respect for the principles of fairness in gathering evidence.[29] On the other hand, formal legality contains two rules of a general character, of which the first is respect for the rights of the defense, and the other to respect for private life.[30] In contrast to these divisions, in this paper, the issue of the admissibility of evidence is viewed in a different way. This will be done by taking into account the importance of a human right and the degree to which it is injured. Accordingly, it is possible to speak of the *absolute* and *relative* inadmissibility of evidence. The absolute prohibition of the use of certain evidence (*absolutae ab effectu*) due to the importance of certain rights and intensity of his injury still results in the inability of its use in criminal proceedings, otherwise it would be called into question the fairness of the proceedings. On the other hand, in the case of a relative inability to use certain evidence (*relativae ab effectu*) it is necessary, in addition to the importance of the law and the intensity of his injuries, examine the *extent* to which the use of such evidence affected the fairness of the criminal proceedings.

ABSOLUTE PROHIBITION ON USE OF EVIDENCE

The point is that the ECHR issues of illegality and the evidence considered in the light of the prohibition of torture, inhuman or degrading treatment (Article 3 ECHR). It is a right that

22 D. Krapac, 1211, 1212.
23 Mireille Delmas-Marty, „Introduction", *Procédures pénales d'Europe (Allemagne, Angleterre et pays de Galles, Belgique, France, Italie)* (sous la dir. de M. Delmas-Marty), coll. Thémis , Presses Universitaires de France, Paris 1995, 38.
24 Mirjan Damaška, *Lica pravosuđa i državna vlast Uporedni prikaz pravosudni sustava*, Nakladni zavod Globus, Zagreb 2008, 76.
25 *Ibid.*, 84.
26 *Ibid.*, 92.
27 *Ibid.*, 142, 188.
28 S. Guinchard, J. Buisson, 471.
29 *Ibid.*, 472, 473.
30 *Ibid.*, 477.

belongs to the „core“ of human rights[31] and is an integral part of the concept of European public policy that materially include provisions that have fundamental importance in a democratic European society, and are binding for both countries and for their citizens. A key role in shaping this concept is that the ECtHR, dynamic interpretation of the ECtHR imposes certain obligations to member states of the Council of Europe. It is primarily the duty of the state that the adoption of appropriate regulations create conditions for the unhindered exercise of the rights guaranteed by the ECHR.[32] Enjoyment of fundamental freedoms and human rights also implies a negative obligation of the state to refrain from interfering with the human rights, especially those that are covered by the term „core“ of human rights. However, for the effective realization of human rights is necessary for the state to take positive measures in this direction, which is, after the decision in the case of *Airey v. Ireland*,[33] referred to as the concept of its positive obligations. This approach is particularly used in relation to the rights covered by the concept of public policy in the European criminal law.

Infringement of Article of the 3 ECHR only exceptionally may result in the impossibility of establishing a judicial decision on such evidence. Condition *sine qua non* is that the testimony of a person is obtained under *torture*, which include acts of physical or mental violence undertaken by a certain person who, taken as a whole, have resulted in severe pain or suffering, and have particularly serious and cruel character.[34] This attitude in the thirties of the last century took the Supreme Court of the United States in the case of *Brown v. Mississippi* (297 U.S. 278 (1936)),[35] and the inability to use confessions obtained by torture envisaged by the provisions of the Convention was the United Nations Convention against Torture and other Cruel, Inhuman or Degrading punishment or treatment.[36] This attitude is expressed in the ECtHR case *Jalloh v. Germany*[37] and thus, according to some authors,[38] introduced under the Convention exclusion rule, and the absolute prohibition of the use of evidence obtained by torture. In other words, the use of statements obtained through torture as evidence to determine the facts in a criminal proceeding makes the proceedings as a whole unfair, regardless of the probative value of statements and their crucial importance for passing judgment.[39] Regarding the violation of Article 3 of the ECHR, which do not amount to torture, but inhuman or degrading treatment, it is necessary to evaluate the importance given to such evidence and whether the victim of such conduct has the opportunity to contest its introduction and use in the process.[40] It is an assessment that is conducted in the light of the right to a fair trial as will be discussed.

One of the cases in which the ECtHR dealing with these issues is *Stanimirović v. Serbia*.[41] In this case, the criminal investigation was not carried out, although there were clear indications that torture occurred, so suspects are not detected and punished, which resulted in a violation

31 In accordance with Article 15, paragraph 2 of the ECHR, the „core“ of human rights includes the right to life (Article 2 of the ECHR), the prohibition of torture (Article 3 of the ECHR), the prohibition of slavery and forced labor (Article 4 of the ECHR), punishment without law (Article 7 of the ECHR) and the right not to be twice tried or punished in the same matter (Article 4 of the Protocol 7).

32 In jurisprudence of the ECtHR (*Šilih v. Slovenia*, 9 April 2009, § 193) and the European doctrine (Serge Guinchard (et al.), *Droit processuel Droit commun et droit comparé du procès équitable*, Dalloz, Paris 2007[4], 209) points out that this is an obligation of result (*obligation de résultat*) and not on the obligation of resources (*obligation de moyens*).

33 Specifically speaking, the concept of positive obligations of the state in the jurisprudence of the ECtHR has been introduced in connection with violation of Article 8 of the ECHR (ECtHR, *Marckx v. Belgium*, 13 June 1979 § 31), soon to be expanded to include the right of access to court as an integral part of the right to a fair trial under Article 6 of the ECHR (ECtHR, *Airey v. Ireland*, 9 October 1979, § 25). See Martin Kuijer, *The blindfold of Lady Justice Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR*, EM Meijers Institute of Legal Studies of Leiden University, Leiden 2004, 53-55.

34 ECtHR, *Selmouni v. France*, 28 July 1999, § 105. See Božidar Banović, Dragomir Vukoje, „Zabrana mučenja kao norma ius cogens međunarodnog i domaćeg krivičnog prava“, *Revija za kriminologiju i krivično pravo,* 2/2010, 147-168.

35 The U.S. Supreme Court is bound by this decision and the courts of the federal states to exclude this evidence, pointing out that the extortion of confession by torture is a violation of the due process clause of the fourteenth Amendment to the U.S. Constitution. See Ronald Banaszak, Sr. (Edit. by), *Fair Trial Rights of the Accused A documetary History*, Greenwood Press, Westport, Connecticut - London 2002, 89-93.

36 G. P. Ilić, M. Majić, S. Beljanski, A. Trešnjev, 87, 113.

37 ECtHR, *Jalloh v. Germany*, 11 July 2006, § 105.

38 I. Bojanić, Z. Đurđević, 979.

39 ECtHR, *Gäfgen v. Germany*, 1 June 2010, § 166.

40 ECtHR, *Schenk v. Switzerland*, 12 July 1988, § 46-48; *Jalloh v. Germany*, 11 July 2006, § 106.

41 ECtHR, *Stanimirović v. Serbia*, 18 October 2011, § 39, 40, 41, 50, 52.

of Article 3 ECHR. On the other hand, the domestic courts found that the applicant had been tortured at the police station in Smederevo and are not accepted as evidence statements that he made on this occasion, as opposed to the recognition given to the investigating judge. Given the seriousness of torture and temporal closeness of confession before the investigating judge, there is no doubt that the applicant was given recognition for fear that the police continue to torture as a result of his abuse at the police station in Smederevo. The fact that the police were able to secure the return of the applicant's detention and to continue to abuse proves that his fears were justified. In these circumstances, regardless of the impact of these statements on the outcome of the criminal proceedings, their use has made the process unfair as a whole, and the ECtHR found a violation of Article 6, paragraph 1 ECHR. In other words, tortured into confessing always results in unfair criminal proceedings.

RELATIVE PROHIBITION ON USE OF EVIDENCE

It is pointed out that the ECtHR issues of evidence admissibility considered primarily in light of the violation of the right to a fair trial under Article 6 of the ECHR. The importance of this right is much written, and at this point we should just say that the provisions of Article 6 of the ECHR is a succinct embodiment of the fair administration of justice and, as such, is the fundamental element of the concept of the rule of law.[42] Headquarters of the right to a fair trial fairness is at the basis of the claim to equal treatment with the same things.[43] Fairness is related primarily to the existence of the basic guarantees of a good administration of justice, which finds its expression in the public airing of things, the demand for an independent and impartial tribunal, equality of arms, within a reasonable time of the procedure etc.[44] In this regard, the ECtHR pointed out that Article 6, paragraph 1 of the ECHR is the basic norm, while the remaining two paragraphs of this Article shall govern cases of its special applications.[45] Although not covered by the provisions of paragraph 1, is already contained in Article 6, paragraph 2 of the ECHR, and the presumption of innocence in the Strasbourg jurisprudence is viewed as a mandatory element of a fair trial.[46] The same applies to the warranties contained in Article 6, paragraf 3 of the ECHR, because it analyzed in the light of the basic provisions of Article 6, paragraf 1 of the ECHR.

The specificity of the Strasbourg considering the admissibility of evidence use can be reduced to the evaluation of the impact that the breach of general or specific elements of due process, resulting from the use of certain evidence had on the process as a whole. In other words, the ECtHR does not preclude the use of illegal evidence, which had resulted in violation of the principle of due process is later removed, and this will be assessed in the light of the rights of the defense in relation to the illegal evidence and circumstances whether a conviction based solely on unlawful evidence.[47] When it comes to the rights of the defense to challenge the use of illegal evidence the rule is that the ECtHR examined whether the defendant had access to an effective remedy in accordance with Article 13 of the ECHR, ie. whether in the trial could effectively requires testing the legality of the use of evidence obtained in an illegal way or the provisions of the ECHR.[48]

In this way, the ECtHR examines the impact of any evidence to the standards of a fair trial. It is important that the criminal process is adversarial nature and to ensure equality of arms between the prosecution and the defense, which is one of the basic elements of a fair trial.[49]

42 Clare Ovey, Robin C. A. White, *The European Convention on Human Rights*, Oxford University Press, Oxford 2006[4], 158.
43 Gérard Cornu (sous la dir. de), *Vocabulaire juridique*, Association Henri Capitant, Quadrige, Presses Universitaires de France, Paris 2003[4], 354, 355.
44 Jean Pradel, Geert Corstens, Gert Vermulen, *Droit pénal européen*, Dalloz, Paris 2009[3], 375.
45 ECtHR, *Lutz v. Germany*, 25 August 1987, § 52.
46 ECtHR, *Minelli v. Italy*, 25 March 1983, § 30.
47 ECtHR, *Schenk v. Switzerland*, 12 July 1988, § 46-48.
48 D. Krapac, 1213, 1214.
49 Right to contradiction implies the possibility of introducing the allegations or evidence of the opposite side, and especially (in the case of English law) obligation to disclose the defense of all evidence available to the prosecution (ECtHR, *Rowe Davis v. United Kingdom*, 16 February 2000, § 60). Disclosure of evidence in our criminal procedure see G. P. Ilić, M. Majić, S. Beljanski, A. Trešnjev, 708-711.

In the lines that follow will discuss several important situations in which the admissibility of evidence considered in the light of the right to a fair trial.

The prohibition of the self-incrimination and the presumption of innocence

When it comes to the testimony of the defendant, the guarantees of Article 6 of the ECHR include his right to refuse to give evidence to the police and did not contribute to his self-incrimination,[50] which does not exclude the possibility that the use of coercive means from the suspect seized items and clues that exist independently of his will (for example, certain documents, blood, urine or certain bodily samples for DNA analysis).[51] In this regard, the view of the ECHR is that the silence of the suspect to the police and in the course of the trial should not be used as evidence against him, it would thus be violated the presumption of innocence and burden of proof derived from it.[52]

The presumption of innocence (Article 6, paragraph 2 of the ECHR) protects the accused from the moment of the accusation until a final conviction. The existence of the presumption of innocence requires, among other things, that the members of the court in the exercise of its functions do not depart from the prejudice that the accused committed the offense, the prosecutor has the *onus probandi*, and a doubt goes to the accused. In addition, the duty of the prosecutor to provide sufficient evidence on which will be based conviction.[53] The field of application of Article 6, paragraph 2 of the ECHR is not limited to the case of violation of the presumption of innocence by the judiciary but also includes violations by other holders. However, it does not prevent them to inform the public about the procedures that are in progress, but it should make the necessary discretion and with full respect for the presumption of innocence before the commencement of the preparatory stages.[54] In this way, there is also the question of the obligation of the press to respect the presumption of innocence.[55]

In the jurisprudence of the Constitutional Court has also been a case in which is violation of the presumption of innocence. In the case of *Dimović*[56] violation of presumption of innocence was the result of what is taken as an established fact that the applicant, which has the constitutional complaint, as one of the defendants, committed the criminal offense he was charged, although criminal proceeding are not completed but he was just under investigation. In another case,[57] the Appeals Court violated the presumption of innocence, because the decision on rejecting the appeals filed by the defense counsel, expressed the view that the complainant accomplice „is well-known" to him.[58]

Provocation to the crime

One of the issues dealt with in the light of the ECHR guarantees contained in Article 6, paragraph 1 of the ECHR related to the provocation of the crime. In the case of *Teixeira de Castro v. Portugal* ECtHR reminded that the public interest can not justify the use of materials

50 ECtHR, *John Murray v. United Kingdom*, 8 February 1996, § 45.
51 ECtHR, *Saunders v. United Kingdom*, 17 December 1996, § 69.
52 ECtHR, *John Murray v. United Kingdom*, 8 February 1996, § 41.
53 ECtHR, *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 77.
54 ECtHR, *Allenet de Ribemont v. France*, 10 February 1995 § 36, 38.
55 Despite doctrinal understanding that under certain conditions a campaign in the press against the accused could lead to violations of Article 6, paragraph 2 of the ECHR, Strasbourg current jurisprudence suggests that freedom of expression outweighs the presumption of innocence (J. Pradel, G. Corsten, G. Vermeulen, 398). In this regard, it should be noted that in jurisprudence the ECHR come up question the ability of journalists not to disclose their sources of information, even when such a request set judgment. In one case the journalist acted in this way, and the court sentenced him to a fine for contempt of court. The attitude of the ECtHR was that it hurt Article 10 of the ECHR, which guarantees freedom of expression, because the command to discover the source of the information can not reasonably be considered in a proportionate way to achieve a legitimate aim for restricting these freedoms (ECtHR, *Goodwin v. United Kingdom*, 27 March 1996 § 46).
56 CC, Už-746/2008, 17 June 2009.
57 CC, Už-1600/2009, 22 June 2010.
58 See Goran P. Ilić, „Uticaj prakse Ustavnog suda Srbije na standarde ljudskih prava u krivičnom postupku", *Uloga i značaj Ustavnog suda u očuvanju vladavine prava 1963-2013.* (prir. B. M. Nenadić), Ustavni sud, Beograd 2013, 198, 199.

obtained by police provocation.[59] In this case it is important to determine whether the activity of two police officers got out of the frame of the loaded agent. Given that the authorities did not have good reasons to suspect that Mr. Teixeira de Castro is a drug dealer, the cops are not known them, but they came in contact with him through intermediaries, a drug is not found in his residence, so nothing support the contention that the applicant had intention to commit an offense. Given these circumstances, it should be concluded that the two officers were not limited to the passive testing of criminal activity, but have committed such an impact that it incites the commission of the offense. On this basis, the ECtHR concluded that the activity of the police officers went beyond the treatment of the loaded agent and was the incitement to an offense who, without their intervention would not have been made. Moreover, the reasoning of the judgment was based solely on the testimony of the two police officers. In this way, in the criminal proceeding the applicant denied the *ab initio* and finally a fair trial, which was violated Article 6, paragraph 1 of the ECHR.

Anonymous witnesses

On the issue of anonymous witnesses ECtHR met first in case *Kostovski*.[60] Such behavior is not encountered at the general judgment, but as a general rule noted that the accused must have adequate and sufficient opportunity to challenge the evidence against him and to examine witnesses at the time of his testimony or later. When it comes to the infiltrators who were examined as anonymous witnesses should be mentioned case *Lüdi*[61] in which the ECtHR condemned the Swiss authorities for violation of Article 6, paragraph 3 of the ECHR. The basis for the conviction did not constitute the practice of using undercover agents, since it is essential in the fight against drug trafficking, but the fact that in this case the Swiss authorities were able to organize a confrontation in a way that would preserve the anonymity of witnesses. In the case *Birutis and others*[62] statements of anonymous witnesses were read at the trial, a previously recorded by the investigating authorities. The court in these statements based the judgment, failing to investigate anonymous witnesses (and the defense could not do so) and to critically examine the manner and circumstances under which they were made statements, violating the right to a fair trial under Article 6, par. 1 and 3 of the ECHR.

Of particular importance to this issue is the case *Doorson*[63] which sets conditions for assessing admissibility of anonymous witnesses.[64] Examination of anonymous witnesses can be done provided that there is other evidence, the judge participates in the examination of witnesses, and to be convinced of their authenticity. In this regard, the ECtHR considered that police officers generally have to accept that in relation to other persons are not exposed to serious dangers, which means that they can be heard as anonymous witnesses only in exceptional circumstances. When this is the legitimate right of the police authorities to preserve the anonymity of the agent who was involved in covert operations, not only to ensure the protection agent and his family, but that would not be called into question the possibility of its involvement in future operations.[65]

Explanation of the court decision

One of the implicit guarantees of a fair trial is that the court must explain its decision. The court decision can not be without any explanation, and it must not be lapidary character.[66] The obligation of the reasoning the court decision, however, does not mean that the decision must give detailed answers to all the arguments put forward.[67] This is especially true for the reasoning of the decision of the remedy courts in which are the accepted arguments made in the lower

59 ECtHR, *Teixeira de Castro v. Portugal*, 9 June 1998, § 36, 38, 39.
60 ECtHR, *Kostovski v. Netherlands*, 20 November 1989, § 41.
61 ECtHR, *Lüdi v. Switzerland*, 15 June 1992, § 41.
62 ECtHR, *Birutis and others v. Lithuania*, 28 March 2002, § 34
63 ECtHR, *Doorson v. Netherlands*, 26 March 1996, § 73, 76.
64 See Božidar Banović, „Zaštita svedoka u krivičnom postupku“, *Pravni život* 9/2003, 651.
65 ECtHR, *Van Mechelen and others v. Netherlands*, 23 April 1997, § 56, 57.
66 ECtHR, *Georgiadis v. Greece*, 29 May 1997, § 43; *Higgins and others v. France*, 19 February 1998, § 43.
67 ECtHR, *Van der Hurk v. Netherlands*, 19 April 1994, § 61.

courts. In such cases, the evaluation of compliance with fair trial standards necessary to consider whether the court examined the remedy determined the issues before him, expressed or satisfied by merely confirming the decision of the lower court. This requirement is even more significant if the party was not able to verbally express their own thing during the procedure.[68]

With regard to the reasoning of the decision the court stated, among other things, how he appreciated certain evidence and the reasons noted (non)existence of certain facts, reasoning the court decision has a direct link with the assessment of the evidence. This issue CC dealt in the case *Janković*.[69] In assessing the constitutional complaint, the CC recalled obligation of the instance courts to effectively examine the evidence and the parties were to assess their importance in making decisions.[70] In the view of CC, first instance court failed to carry out assessment of the credibility of contradictory evidence and to state clearly the reasons for the crucial fact about the guilt of the accused in the present collision taken as proven. The first instance court was required that discrepancies between the findings of the expert and the obvious circumstances, as well as doubts about the accuracy of the opinion eliminate re-examination of expert witnesses, and if it would not be possible to appoint another expert who will do a new expert. Therefore, in the opinion of CC, Municipal Court of Mionica in this particular case is not made clear, sufficient and constitutionally acceptable reasons for their legal standing of the decisive facts that are relevant to determining whether the defendant committed the crime. Based on the above CC concluded that the impugned judgment is not explained in a way that meets the requirements of Article 32, parafraph 1 of the Constitution, that does not meet fair trial standards established by jurisprudence of the CC and ECtHR.

The right to privacy

Right to privacy may be infringed by implementation of certain evidentiary actions such is the search of place or person,[71] as well as special evidentiary action such as surveillance of communication. At this point will be discussed only on the standards that apply to specific evidentiary actions. These documents are placed in the area of surveillance of communications,[72] but also apply to other special evidentiary actions. Accordingly, the legislature is expected to indicate the range of persons to whom it may apply such measures, the nature of the offenses which provide a basis for this, the time limits of duration of measures, conditions for the preparation of the minutes of the undertaken measures, ways to control the minutes, as well as to predict reasons for deletion and destruction of the material collected.[73] If the ECtHR finds the violation of rights under Article 8 of the ECHR, it is necessary to examine whether in the present case that resulted the criminal proceedings can be evaluated as a whole unfair.[74]

In this regard, it should be noted that the decision of the CC[75] in the case in which estimated the constitutionality of the provisions of the Electronic Communications Act,[76] which prescribes the duties of operators to retain data on electronic communications (the retained data)[77] for the purpose of investigation, detection of crime and the conduct of criminal proceedings in accordance with the law governing criminal procedure, as well as the need to protect national security and public safety of the Republic of Serbia, in accordance with the laws governing the work of the security services and the operation of Interior. In addition, the operator is required to retain the data so that they are immediately accessible, that is, without delay, be submitted at the request of the competent state authority.

68 ECtHR, *Helle v. Finland*, 19 December 1997, § 60.
69 CC, Už-1157/2008, 14 April 2011.
70 See ECtHR, *Kraska v. Switzerland*, 19 April 1993, § 30.
71 See D. Krapac, 1221, 1222.
72 See Božidar Banović, „Zaštita podataka o ličnosti i specijalne istražne tehnike“, *Pravni život* 9/2013, 759-776.
73 G. P. Ilić, M. Majić, S. Beljanski, A. Trešnjev, 415.
74 In the previous section it was explained that the ECtHR does so and when it finds a violation of the Article 3 of the ECHR, which represents inhuman or degrading treatment.
75 CC, IUz-1245/2010, 13 June 2013.
76 Electronic Communications Act, *Official Gazette of the Republic of Serbia* Nº 44/10.
77 In terms of the data needed to monitor and identify the source, destination, start, duration and end of communication, types of communication, identification of terminal data processing and determination of local mobile user terminal equipment. So this is not about data revealing the content of communication.

For the CC it was undisputed that the introduction of these obligations operator shall, in accordance with the laws governing criminal procedure, the work of the security services of the Republic of Serbia and law enforcement agencies. This method establishes the obligation of operators which could indirectly lead to a violation of the confidentiality of data, if the retained data are not used in accordance with the provisions of Article 41, paragraph 2 of the Constitution, which means without a court order and without specifying the time in which they are used. In the view of CC, from the constitutional provision which guaranteed the inviolability of the secrecy of letters and other correspondence implies that framers of the Constitution had in mind not only means of communication content protection, but the protection of this right applies to all features of the communication means, meaning that they are protected and others elements related to the data, such as when, with whom, where and how often a person has made contact via electronic communications. On this basis, the CC established the unconstitutionality of the provision which predicted that in compliance with the law, and no court decision allow a deviation from the Constitution guarantees of the inviolability of the secrecy of correspondence and other means of communication. It is also established the unconstitutionality of a legal provision that the operator is required to make available the data retained at the request of the competent authority, without a prior court decision, because in this way it distorts the inviolability of the right to confidentiality of electronic communications of communications users.[78]

CLOSING REMARKS

In criminal proceedings may be used only evidence that has been obtained with respect to the basic form of the process and guarantee human rights. In contrast, illegal evidence are submitted to the system of evidentiary prohibition, and established standards of conduct for civil authorities in gathering evidence, which aims to balance the conflicting demands for effective prosecution, on the one hand, and the realization of the right to a fair trial, which enjoys the defendant, on the other hand.

Under the illegal evidence doctrine generally involves basis that materially or formally constituted a violation of fundamental human rights and can not be used for inferring the facts that are established in the criminal proceedings. According to the CPC evidence are illegal if they are by themselves, either directly or indirectly, by way of obtaining contrary to the legal system and human rights standards in criminal proceedings. In other words, it is the evidence that the law explicitly forbids it, and then the evidence that the law is not prohibited, but because of acquisition are considered illegal. In this absolute prohibition of the use of certain evidence, due to the importance of certain rights and intensity of his injuries, always results in the inability of its use in criminal proceedings, otherwise it would be called into question the fairness of the proceedings. In the case of relatively ban is necessary, in addition to the importance of the law and the intensity of his injuries, examine the extent to which the use of such evidence affected the fairness of the criminal proceedings. The attitude of the illegality of certain evidence in the case law, as the ECtHR and national courts, takes in accordance with the provisions of the ECHR, which guarantees the right to a fair trial, the right to respect private and family life, his home and his correspondence, but also prohibits torture and inhuman or degrading treatment.

Starting from the ECtHR case law, and the Constitutional Court, it can be concluded that there is an absolute ban on the use of evidence obtained by torture, while the evidence obtained by inhuman or degrading treatment, it is necessary to assess the importance given to such evidence and whether the victim of such treatment was able to challenge its introduction and use in the process.

When it comes to the consideration of the admissibility of certain evidence in the light of the right to a fair trial, starting from evaluating what the impact of certain evidence obtained in violation of certain elements of the right to a fair trial had on the fairness of the proceedings as a whole. It was pointed out that the ECHR does not preclude the use of illegal evidence

78 CC attitude expressed in the above decision had an impact on the conduct of the prosecution at pretrial proceedings. See Higher Court in Belgrade - Special Department, *Kv.Po1 601/13*, 13 August 2013.

which caused the violation of the principle of due process is later removed, whereby to assess in light of the rights of the defense in relation to the illegal evidence and circumstances whether a conviction based solely on unlawful evidence. In this regard, particular characteristic of the situation obtaining evidence which may violate the prohibition on self-incrimination and the presumption of innocence, then the impact of provocation to the crime and anonymous testimony to the fairness of the proceedings, and the importance of its judgment in light of the evaluation of the evidence presented, especially those that are contradictory.

The right to privacy in criminal proceedings generally hurts the performance of certain evidentiary actions, and above all special evidentiary actions. Therefore, based on the standards established by the jurispridence of the ECtHR, the legislature is expected to indicate the range of persons to whom it may apply such measures, the nature of the offenses which provide a basis for this, the time limits of duration of measures, conditions for the preparation of the minutes of the undertaken measures, ways control record, and to provide reasons for deletion and destruction of the material collected. If you suspect that there has been a violation of the right to respect private and family life, his home and his correspondence, it is necessary for the court to examine whether in the present case that resulted in the criminal proceedings can be evaluated as a whole unfair.

REFERENCES

1. Banaszak Sr., Ronald (edit. by), *Fair Trial Rights of the Accused A Documetary History*, Greenwood press, Westport, Connecticut – London 2002;
2. Banović, Božidar „Zaštita svedoka u krivičnom postupku“, *Pravni život* 9/2003;
3. Banović, Božidar, Vukoje, Dragomir, „Zabrana mučenja kao norma ius cogens međunarodnog i domaćeg krivičnog prava“, *Revija za kriminologiju i krivično pravo* 2/2010;
4. Banović, Božidar, „Zaštita podataka o ličnosti i specijalne istražne tehnike“, *Pravni život* 9/2013;
5. Bojanić, Igor, Đurđević, Zlata, „Dopuštenost uporabe dokaza pribavljenih kršenjem temeljnih ljudskih prava“, *Hrvatski ljetopis za kazneno pravo i praksu* 2/2008;
6. Cornu, Gérard (sous la dir. de), *Vocabulaire juridique*, Association Henri Capitant, Quadrige, Presses Universitaires de France, Paris 2003[4];
7. Damaška, Mirjan, „Procesne posljedice upotrebe dokaza dobivenih na nedozvoljeni način“, *Naša zakonitost* 3–6/1960.
8. Damaška, Mirjan, *Lica pravosuđa i državna vlast Uporedni prikaz pravosudni sustava*, Nakladni zavod Globus, Zagreb 2008;
9. Delmas-Marty, Mireille, „Introduction“, *Procédures pénales d'Europe (Allemagne, Angleterre et pays de Galles, Belgique, France, Italie)* (sous la dir. de M. Delmas-Marty), coll. Thémis, Presses Universitaires de France, Paris 1995;
10. Favoreu, Louis (et al.), *Droit des liberté fondamentales*, Dalloz, Paris 2009[5];
11. Guinchard, Serge, Buisson, Jacques, *Procédure pénale*, Litec Groupe LexisNexis, Paris 2002[2];
12. Guinchard, Serge (et al.), *Droit processuel Droit commun et droit comparé du procès équitable*, Dalloz, Paris 2007[4];
13. Ilić, Goran P., „Uticaj prakse Ustavnog suda Srbije na standarde ljudskih prava u krivičnom postupku“, *Uloga i značaj Ustavnog suda u očuvanju vladavine prava 1963-2013.* (prir. B. M. Nenadić), Ustavni sud, Beograd 2013;
14. Ilić, Goran P., Majić, Miodrag, Beljanski, Slobodan, Trešnjev, Aleksandar, *Komentar Zakonika o krivičnom postupku*, Edicija Komentari, Službeni glasnik, Beograd 2013[6];
15. Jovanović, Miodrag A., Krstić, Ivana, „Ljudska prava u XXI veku: između krize i novog početka“, *Anali Pravnog fakulteta u Beogradu* 4/2009;

16. Krapac, Davor, „Nezakoniti dokazi u kaznenom postupku prema praksi Europskog suda za ljudska prava“, *Zbornik Pravnog fakulteta u Zagrebu* 6/2010;
17. Kuijer, Martin, *The blindfold of Lady Justice Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR*, E.M. Meijers Institut of Legal Studies of Leiden University, Leiden 2004;
18. Ovey, Clare, White, Robin C. A., *The European Convention on Human Rights*, Oxford University Press, Oxford 2006[4];
19. Pavišić, Berislav, *Komentar Zakona o kaznenom postupku*, Dušević & Kršovnik d. o. o., Rijeka 2011;
20. Popović, Dragoljub, *Evropsko pravo ljudskih prava*, Edicija Međunarodni propisi i evropsko pravo, Službeni glasnik, Beograd 2012;
21. Pradel, Jean, *Droit pénal comparé*, Paris 2002[2];
22. Pradel, Jean, Corstens, Geert, Vermulen, Gert, *Droit pénal européen*, Dalloz, Paris 2009[3];
23. Simović, Miodrag N., *Krivično procesno pravo*, Fakultet za bezbjednost i zaštitu, Banja Luka 2007[2];
24. Spencer, John R., „Evidence“, *European Criminal Procedures* (ed. by M. Delams-Marty, J. R. Spencer), Cambridge Univesity Press, Cambridge 2002;
25. Sudre, Frédéric, *La Convention européenne des droits de l'homme*, Presses Universitaires de France, coll. Que sais-je?, Paris 1997[4];
26. Vasiljević, Tihomir, *Sistem krivičnog procesnog prava SFRJ*, Savremena administracija, Beograd 1981[3].

REGULATIONS:

Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia* N° 98/06;
Criminal Procedure Code, *Official Gazette of the Republic of Serbia* N°s72/11, 101/11, 121/12, 32/13 and 45/13;
Law Ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols Thereto, as amended, *Official Journal of Serbia and Montenegro* – International Treaties, N°s 9/03, 5/05 and 7/05-corrigendum and *Official Gazette of the Republic of Serbia* – International Treaties, N° 12/10);
Electronic Communications Act, *Official Gazette of the Republic of Serbia* N° 44/10.

JURISPRUDENCE:

Comm.HR, *H. v. United Kingdom*, 7 July 1975.
ECtHR, *Marckx v. Belgium*, 13 June 1979.
ECtHR, *Airey v. Ireland*, 9 October 1979.
ECtHR, *Minelli v. Italy*, 25 March 1983.
ECtHR, *Lutz v. Germany*, 25 August 1987.
ECtHR, *Schenk v. Switzerland*, 12 July 1988.
ECtHR, *Barberà*, *Messegué and Jabardo v. Spain*, 6 December 1988.
ECtHR, *Kostovski v. Netherlands*, 20 November 1989.
ECtHR, *Lüdi v. Switzerland*, 15 June 1992.
ECtHR, *Kraska v. Switzerland*, 19 April 1993.
ECtHR, *Van der Hurk v. Netherlands*, 19 April 1994.
ECtHR, *Allenet de Ribemont v. France*, 10 February 1995.
ECtHR, *John Murray v. United Kingdom*, 8 February 1996.
ECtHR, *Doorson v. Netherlands*, 26 March 1996.
ECtHR, *Goodwin v. United Kingdom*, 27 March 1996.
ECtHR, *Saunders v. United Kingdom*, 17 December 1996.
ECtHR, *Van Mechelen and others v. Netherlands*, 23 April 1997.
ECtHR, *Georgiadis v. Greece*, 29 May 1997.

ECtHR, *Helle v. Finland*, 19 December 1997.
EctHR, *Higgins and others v. France*, 19 February 1998.
ECtHR, *Teixeira de Castro v. Portugal*, 9 June 1998.
ECtHR, *Selmouni v. France*, 28 July 1999.
ECtHR, *Rowe Davis v. United Kingdom*, 16 February 2000.
ECtHR, *Birutis and others v. Lithuania*, 28 March 2002.
ECtHR, *Jalloh v. Germany*, 11 July 2006.
EctHR, *Šilih v. Slovenia*, 9 April 2009.
ECtHR, *Gäfgen v. Germany*, 1 June 2010.
ECtHR, *Stanimirović v. Serbia*, 18 October 2011.
CC, Už-746/2008, 17 June 2009.
CC, Už-1600/2009, 22 June 2010.
CC, Už-1157/2008, 14 April 2011.
CC, IUz-1245/2010, 13 June 2013.
Higher Court in Belgrade - Special Department, *Kv.Po1 601/13*, 13 August 2013.

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INTERNATIONAL FRAMEWORK AND INTERNAL LEGAL ORDER OF SERBIA IN COMBATING ORGANIZED CRIME

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Abstract: At the current moment it is quite clear that cooperation of the states in international community in various fields of law is inevitable. Unfortunately there are such unlawful acts that are aimed at threatening or complete devastation of the fundamental values of humanity. One of such values is the rule of law. The idea of the rule of law, which is implemented in practice in democratic political systems, contains a constant that summarizes several centuries of legal development of the phenomenon and its contemporary significance. The modern concept of the rule of law is reflected in the fact that the legal horizon takes the rule of law as an internationally recognized value as well. A serious obstacle to modern and democratic states and legal systems is organized crime. It is an extreme illegal activity – property-related crime with inherent existence of criminal organization. Organized criminal associations perform continuous economic activity by using methods of violence and corrupting power holders in order to achieve their amoral and lucrative goals. These characteristics, forming the basis for illegal methods in trying to influence the political decision-making in the state, are the ones that make organized crime opposite to the rule of law. Organized cross-border criminal groups in their actions threaten or even completely prevent human and civil rights and freedoms. Therefore, the states observing the rule of law found it necessary to have international coordination in the activities to counteract organized crime. The authors express their belief that the leading countries of the world cannot be autarchic in terms of international cooperation in the field of human rights and freedoms. However, at the national level as well it is essential to take actions aimed at protecting society against organized crime. Its highest general legal act, the Constitution (*lex superior*), defines Serbia as the state of the rule of law. It is a constitutional provision that requires its reinforcement in the practice and in the sphere of fighting organized crime. Only the internal order that boldly challenges any criminal activity, and organized crime in particular, can be a stable one. This struggle can be successful only if the national criminal law, and more and more often international criminal law with its protective functions as well, make a full contribution. Only the appropriate level of organization of the international community and the efficiency of the internal legal order may end in positive results of the fight against organized crime.

Keywords: international framework, rule of law, organized crime, internal legal order, international cooperation.

INTRODUCTION

Organized crime is the concept that attracts the attention of several sciences. It is in the focus of interest of criminologists, experts in theory and practice of criminal law, professionals in international public law, constitutional law, but also political science and sociology. The approach to the topic of this paper involves focusing first on the term of organized crime and then on its international characteristics and international legal framework for its prevention, and the level of awareness of the society in Serbia about its dangers. The authors underline that organized crime more and more acquires international dimensions and as such it is the most dangerous one out of different kinds of organized criminal activities. Its Constitution defines Serbia as the state of the rule of law and social justice, committed to universal principles and values that make up the heritage of organized international community. One of such principles and legal values is by all means also the principle of the rule of law. In Europe, and thus in the European Union as well, when it comes to organized crime there are relevant institutions with both material and human resources to fight organized crime.

CONCEPT OF ORGANIZED CRIME

"One of the most dangerous and at the same time least known types of crime is the one that we call organized crime. Insufficiently studied and scientifically explored, it is surrounded by secrets, riches and power, but also shrouded in the veil of mystery supported by the mass media."[1] Organized crime is a type of delinquency in economic sphere. According to Reckless, it is a rigid and structured form of collective criminal behavior with quite defined corporate organization, with the structure expressed in syndicates and other organized hierarchies of the criminal world. These are the definitions the contents of which are not subject to disagreements. However, it is by no means the only one, since its content is most often expanded by some of the forms of criminal associations or forms of activities.[2] At this time we would like to point out that there are two approaches to defining organized crime. The extensive approach starts from defining organized crime as activities of criminal organizations. Thus, for the existence of this type of crime it is sufficient that there is criminal organization in place. The restrictive approach to defining organized crime does not reduce its existence only to the activities of criminal organizations. "Italian author Giovanni Fiandaca gives four requirements for an activity to be termed organized crime. They are the organization element (that there is criminal organization in place, continual activities aimed at gaining and maximizing profits, business activities of criminal organizations as criminal corporations), use of violence aimed at preserving preferential or monopoly positions in order to expand profits, but also funding murders in order to prevent enforcement of laws or making political decisions detrimental for them, and also corruption of police, judiciary, political and executive authorities".[3] It is this last mentioned characteristics that makes organized crime a grave threat to the rule of law, or to the states and nations that observe the rule of law. Namely, in some cases organized criminal groups make attempts and at times even manage to get connected to the authorities as well as the representatives of financial institutions, companies and political parties. In addition to the part of the definition of organized crime that refers to the unlawfulness of the activities of criminal organizations (their organization that is hierarchical and planned by the top ranks of the organization), what is particularly emphasized in theory is the connection with authorities or parts of the state organization in order to acquire profits. In the opinion of the authors, organized crime would not even exist were it not for being guided by profit making motives. Therefore, under organized crime we do not place only the Mafia[4] and Mafia-type associations, but intentional and deliberate acting in concert and apportioning the tasks, much like labor distribution, between a number of person in order to commit crime, often using modern infrastructure, with the principal aim to attain large financial gains as soon as possible. Organized crime definitions are not given only under national laws, but also in international fora. One of the first international symposia on organized crime was held in a small French town of Saint-Cloud in 1988. The delegates adopted the definition that organized crime is any enterprise or group of persons engaged in a continuing illegal activity which has as its primary purpose the generation of profits, irrespective of national boundaries. Based on this definition it may be concluded that there is cross-border organized crime – international organized crime (to be discussed in more detail later on). However, we will first focus on defining organized crime that places a special emphasis on the status position and influence that are marked characteristics of organized criminal structures. Structures of that type are based on leadership, discipline, planning and conspiracy of criminal activities attempting to ensure a certain status and influence in political and economic-financial spheres. Along those lines, O. Boettcher believes that organized crime "is a structured joint activity of a number of persons intending to be permanently organized and aiming to obtain directly or indirectly either business covered profits or influence in public life, by obtaining and offering illicit and controlled products and services, taking over or controlling legal enterprises, committing crimes,

1 Игњатовић Ђ. Криминологија, Београд, 2008, стр. 156.
2 Бошковић М. Криминологија, Нови Сад, 2006, стр. 363.
3 Игњатовић Ђ. *op. cit* стр. 156.
4 The highest level, as it were, of criminal organization and a specific delinquent structure as well as the area of its operations within the sphere of organized forms of crime is "reserved" for the Mafia. Mafia originates from Sicily, from a secretly organized gang formed about 1860, in the period of anarchy that came in the wake of Napoleon's occupation of South Italy. Mafia has now become synonymous with all types of criminal organizations.

with the intention of maximizing proceeds, and with the tendency to establish real monopolies by illegal methods".[5]

SOME CHARACTERISTICS OF ORGANIZED CRIME

Modern times have turned our planet into the field of technical innovations where movements of people, labor, goods and capital have a vital influence on all aspects of life. Such tendencies have not missed the regions or countries that only seem to be apart. Modern criminal activities serve as a link between the modern and the anachronous. Criminal operations range from human trafficking for reasons of profit, turning people into labor force and/or objects of sexual exploitation, drugs and arms trafficking, to money laundering and financial schemes via electronic computer networks using state-of-the-art technologies.

NATIONAL CHARACTERISTICS OF ORGANIZED CRIME

The mentioned features of organized crime are characteristic for the Republic of Serbia as well. As an example we may list dubious privatization processes involving large companies that used to be socially owned, telecommunications and energy operations, misuse of bank loans and investments, of savings, foreign financial aid, smuggling oil, weapons and cars, which resulted in many wartime and peacetime profiteers amassing profits in illegal and unlawful manner. The struggle that has taken place and that is still being fought against organized criminal groups operating in the territories of several countries and that has both its normative expression and practical effect should serve as guidance for the national legislation of Serbia.[6]

TRANSNATIONAL ORGANIZED CRIME

In explaining the distinction between organized crime and transnational organized crime, some authors start from defining the size, structure, type of organization, level of cohesion, number of activities and transnational nature of criminal operations.[7] Organized crime was first understood as a type of criminal activity of internal scope, threatening the safety of people, property and goods in the territory of domicile state. Today such a view of organized crime would be one-sided, since this type of criminal activity is more and more recognized by its international dimension and as affecting the security and stability of several states within the international community. The turn of the century was the time of significant changes in the social life of individual states, but also within the international community. Traditional criminal activities were now organized globally, increasing the level of transnational connections and leading to emergence of cooperation between criminal organizations operating in the territories of different states. Through their activities, transnational criminal organizations "affect the security of states, undermine democratic institutions and slow down the economic growth of the countries".[8] In order for a criminal organization to operate internationally, it needs to have structural capacities and efficient management structure. Criminal operations in the territories of several countries actually enable criminal organizations to be successful globally. Moreover, there are some such organizations that operate primarily in the territory of one state, while their international criminal activities are more random, *ad hoc* in character, or they may have connections with criminal organizations in other countries but with no transnational branching off of the structure of such criminal entities. As Bošković stresses, transnational organized crime attempts to use all favorable conditions not only for its survival but also for expanding their criminal operations both in terms of space and in terms of invading new spheres and

5 Петровић Д. Организовање злочиначких удружења, Српско удружење за кривично право, Београд, 1996. стр. 31-32.

6 This will be discussed in more detail in the part dealing with activities of fighting organized crime within the framework of internal legal order.

7 Bassiouni M., Vetere E. Organised Crime: A compilation of UN Documents 1975-1998. New York: ICC Publishing, 1998, p. 10, as quoted in Бошковић Г., Организовани криминал, Криминалистичко-полицијска академија, Београд, 2011,стр. 15

8 Ивановски З., Глобални димензии на организираниот криминал и кризата во Република Македонија, Годишник на Факултетот на безбедност, Скопје, 2002, стр. 127.

conquering new convenient areas of social, economic and political life.[9] The Naples Political Declaration and Global Action Plan against Organized Transnational Crime were adopted at the World Ministerial Conference held in Naples, Italy, in 1994. This international conference defined the term of transnational organized crime more closely. The very same year the document from the conference was endorsed by the General Assembly of the United Nations. The document identified the following characteristics of organized crime, focusing primarily on the following: 1) criminal associations where three or more persons act; 2) the fundamental part of such criminal activities is that a group leader controls and supervises the members; 3) such control and supervision have been made easy for the leader by hierarchical organizational structure. Members of organized criminal groups use violence, intimidation and corruption in order to make profit. In criminal operations they monitor areas or markets and use unlawful activities and develop methods of criminal operations and penetration of legal economic or commercial flows. The document focuses attention also on transnational organized crime that, in addition to the above mentioned illegal activities, also has some other features that actually determine it as cross-border organized crime. The determinants for the organized crime to be termed transnational are as follows: transnational activities and cooperation with other criminal associations outside the borders of the national state; larger dimensions and larger scope of international criminal activities; diversity of forms of criminal activities in all spheres of economic life internationally; high profits; acquiring substantial financial gain. Article 3 of the United Nations Convention against Transnational Organized Crime defines this type of crime indirectly, through defining condition for the criminal offences to be deemed as transnational in nature. The Convention norms take a criminal offence to be transnational in the following cases: 1) if the offence is committed in more than one state; 2) if the offence is committed in one state, but a substantial part of its preparation, planning, direction or control takes place in another state; 3) the crime is committed in one State but involves an organized criminal group that engages in criminal activities in more than one state. The mentioned provision of Article 3 of the Convention recognizes that a criminal offence may be a transnational if it is committed in one state but has substantial effects in another state. The progress of science and technology in the first decades of 21st century influenced the changes in the structure of criminal activities, and/or organized criminal groups and their tendency to spread over large geographical areas. In the sphere of economy and finance, criminal organizations adapt most swiftly to modern economic environment and international operations. The forms of organized crime existing within the borders of a state, through cooperation of criminal organizations from the territories of different states or where the effects take place in one state and the criminal act has been committed in another, are criminal offences of extremely high level of social danger, much higher than the one related to the offences of the same kind committed within the borders of one state. Transnational organized crime appears in different forms. Therefore even terrorism may be used as a means to realize profit targets. Moreover, terrorist organizations may be supported through criminal activities which are labeled as organized. The goal for terrorists then is to obtain profits in order to be able to finance their terrorist activities aimed against constitutional order of individual states or intended to obliterate or jeopardize human rights and freedoms. International law mentions as forms or instances of organized crime, in addition to terrorism, drug trafficking as well, and also increasingly dangerous type of organized crime shrouded in the veil of secrecy and mystery – high technology crime, and also the crime that gravely assaults human dignity – human trafficking. At the beginning we can say that corruption becomes a convenient instrument for attaining various goals of criminal organized groups. European institutions adopted various resolutions or conventions with the purpose of preventing corruption and indirectly also organized crime. We point out that international criminal law instruments for corruption prevention have also been developed. "International activity in preventing corruption, along with searching for new responses to the organized crime challenge, has been intensified over the last two decades as a result for implementing instruments that would overcome the current lack of efficiency in control thereof, which is a consequence of the "symbiotic" nature of these forms of crime and involvement of political institutions, public administration, economy, media and the system of

9 Бошковић Г., Организовани криминал, Криминалистичко-полицијска академија, Београд, 2011, стр. 15.

retributive justice".[10] If we pay attention only to the European Union law, we will see that EU officials has held their focus, and still do, at least declaratively, on fighting corruption. Thus, for instance: "In order to prevent different misuses and frauds harming EU budgets and funds, the Convention on the Protection of the. European Communities' Financial Interests was adopted in 1995, and the Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union was adopted in 1997".[11]

ORGANIZED CRIME AND TERRORISM

The connection or, rather, coupling of organized crime and terrorism is of functional nature. Organized crime serves the function of funding and arming terrorism. Moreover, terrorist groups may engage in organized crime like criminal organized groups may undertake terrorist activities. Like other criminal organizations, terrorist organizations need financial support and assistance. Terrorists tend to direct their finances towards intelligence gathering activities and organizational structure and protection of their ranks, towards corrupting financial officers, obtaining ordnance, forging travel documents, training for performing terrorist actions, and finally executing them. Financial funds of terrorist organizations may be quite large, but finances for staging a terrorist attack may be rather small compared to the consequences in terms of destroying human lives and property.[12] Terrorist organizations may be said to be in a favorable position if they have permanent access to funds that are incorporated into the world financial system, and thus they can attain their goals by using branched out financial networks or organized crime. Finances are the blood in the body of modern terrorism. We are making such a statement since it is the finances that create the grounds for development and upgrading terrorist networks and efficient realization of terrorist activities. Money laundering is a convenient tool for terrorist organizations to cover their criminal tracks. It is through money laundering that finances are directed towards conducting terrorist activities. Financing of terrorism is the thread that joins organized crime, money laundering and terrorism. In that regard we can discuss the so-called sponsored terrorism. Namely, some states, or large financial corporations, with substantial resources, both human and material ones, make available large sums of money to terrorists in order to achieve their goals. Also possible is the situation where former financial magnates, blinded by some ideology, redirect all their finances towards forming or improving the organizational structure of a terrorist group activities in the territories of several states and even continents, such as was the case with Al Qaeda and its undisputed leader and one of the main financial supporters, Osama bin Laden. The other main source of financing terrorist activities is related to collecting funds for financing their organizations; committing crimes, such as different types of smuggling, drugs and arms trafficking, and similar activities, in order to obtain material gains. Organized crime acquires its more dangerous aspect where it serves terrorism. Such a type of organized crime often assumes the characteristics of transnational organized crime. When terrorist groups are engaged in organized crime, they do so in order to acquire profit that will be redirected at financing terrorist activities. The higher level of danger for the society coming from organized crime is reflected in the situation where such criminal acts are committed by organized terrorist groups. This can also take place by conducting organized criminal operations in the territory of one state, and executing terrorist attacks against the protected values of another state. This is the case of international terrorism, assisted by organized crime activities. The consequences are adverse for both states – the one in whose territory organized criminal activities take place and the state targeted by terrorist acts. Serbian Criminal Code[13], Chapter 34 dealing with crimes against humanity and other values protected by international law and its Article 391 identifies the crime of international terrorism. Common

10 Камбовски В., Корупција, међународно казнено право и заштита људских слобода и права, Зборник радова: Корупција и људске слободе – Међународни научни скуп, Тара, 2009, стр. 17-18.
11 *Ibid* стр. 19.
12 A striking example for not needing large funds to stage and execute a terrorist attack causing huge damage is the one in London in 2003. According to the data provided by Hopton, development of the bomb used in the terrorist act in the London subway cost about GBP 3,000, and the damage caused is estimated to have been somewhere in the vicinity of GBP 1 billion.
13 Службени Гласник РС, бр. 85/05. This Code was passed in 2005, and came into effect on 1 January 2006.

characteristic of all crimes dealt with in this Chapter is that they gravely violate international law norms, primarily armed conflict law and humanitarian law. Violations of such type are prohibited also by the relevant international conventions. Crimes against other values protected by international law are regulated based on the obligation stemming from the conventions that such acts are to be defined as criminal, and that their perpetrators should be punished. Thus, under the Serbian Criminal Code, a criminal offence is one of international terrorism when a person intending to harm a foreign state or international association kidnaps a person or commits other acts of violence, causes an explosion or fire, or undertakes other universally dangerous acts or threatens to use nuclear, chemical, bacteriological or other similar agents. The simple form of this crime is subject to three to fifteen years of imprisonment. If the consequences arising from this act having been committed involve death of one or more persons, then the perpetrator will be punished by prison sentence lasting from five to fifteen years. If, during the commission of this crime, the perpetrator carried out a premeditated murder, the prescribed punishment is imprisonment lasting for ten years in the least, or the so called capital punishment – the gravest criminal sanction in Serbian criminal law, which is thirty to forty years of imprisonment. One of the reasons for prescribing this criminal offence was the 1977 European Convention on the Suppression of Terrorism. For the Socialist Federal Republic of Yugoslavia the obligation of prescribing this criminal offence did not originate from the mentioned Convention, since the then Yugoslavia failed to ratify the European Convention on the Suppression of Terrorism. However, in 1990 this criminal offence was made part of the criminal legislation of the time, bearing in mind the dangers of international terrorism and the need to fight it internationally.[14] With regard to international terrorism as a crime, there is no exclusive general definition and it is very difficult to make a distinction from some other forms of violence. There are several elements to international terrorism. International terrorism comprises different forms of politically motivated violence, with the primary goal of destabilizing the given political order and taking over power by spreading fear among the population. International terrorism may be understood in a broader or narrower sense. When it comes to the broader concept, international terrorism covers all acts of political violence provided that specific international elements are included. International terrorism may also be understood more narrowly, when this type of criminal activity involves intention of harming a foreign state with the final goal of overthrowing its legal government. "The incrimination referred to in Article 391 for the most part relies on this other understanding. International terrorism threatens the interests of the international community and often also diplomatic relations between the states. This type of terrorism is one of the most important international crimes; however, it is not within the jurisdiction of the International Criminal Court. Although a dozen or so countries at the time of its establishment in Rome in 1998, proposed that this crime should also be part of the jurisdiction of the International Criminal Court, this did not come to pass due to the fears about politicizing the Court. The main characteristics of international terrorism are usually taken to be: high level of organization of terrorist organizations, which involves the presence of hierarchy, as well as both horizontal and vertical connections between the members of the organization; the secrecy in planning and executing actions, high level of specialization of terrorists, unpredictability of terrorist acts, conscious choice of innocent victims or indifference to deaths of innocent victims."[15]

FORMS OF ORGANIZED CRIME IN INTERNATIONAL LAW DRUG TRAFFICKING

Three Conventions dealing with the problem of narcotics manufacturing and distribution were passed at the level of the United Nations.[16] The first was the Single Convention on Narcotic Drugs adopted in 1961 and amended by the 1972 Protocol to the Convention. This Convention deals primarily with suppression of manufacturing, distribution and use of cannabis, cocaine

14 The 1977 European Convention on the Suppression of Terrorism was accepted and signed by our country in 2001 – Службени лист СРЈ, Међународни уговори број 10/01.
15 Стојановић З., Коментар Кривичног законика, треће допуњено издање, Београд 2009. стр. 824.
16 We underline that the former Yugoslav state – Socialist Federal Republic of Yugoslavia (SFRY) participated in the drawing up and adopting of all three Conventions.

and opium. The General Assembly members were also aware of the dangers that may be caused by emergence of new synthetic psychotropic substances. A considerable part of the Convention text was dedicated to the manner of amending thereof upon the request of some of the signatory countries. Most powers, according to the Convention, at the supranational level, were accorded to the UN Economic and Social Council and the International Narcotics Control Board (established by this Convention as an international expert body). They involved, *inter alia*, the powers related to placing or removing a substance from the narcotics list, as well as defining which quantities may be allowed for medical purposes or purposes of scientific research. By way of this act the states committed themselves to strictly control manufacture, exportation and/or importation of psychotropic substances through national authorities specialized for this type of work. Article 33 of the Convention prohibits any possession of such substances except in cases of an institution with a special permit, and even then only in quantities appropriate for the purpose that the institution was registered for. The states also accepted the commitment that any offence related to manufacturing, distribution, financing of manufacturing, or possession of narcotics, would be defined as a serious crime in their respective national legislations; moreover, the provision under which the Convention served as a specific extradition agreement between the signatory parties, unless they had signed a separate extradition agreement, was of special importance. This means that the extradition of a person charged in one of the signatory countries with a crime specified in the Convention, who is located in another country signatory of the Convention, may take place even without a special agreement between the two states.[17] After this Convention was adopted, a need was identified in early 1970s to introduce changes into this area (fighting drug trafficking), so additional Protocol to the Convention was adopted in 1972, and the Convention on Psychotropic Substances was adopted in 1971. The 1971 Convention contains a new, more elaborate and more precise definition of psychotropic substances and defines the mechanisms of their being placed on a relevant list by the Commission on Narcotic Drugs of the Economic and Social Council of the United Nations, in line with the findings and recommendations of the World Health Organization (WHO). Institutionally, the Convention on Psychotropic Substances fully relies on the mechanisms already established by the Convention on Narcotic Drugs, and they are complementary in that respect. Like in the previous Convention, the procedures being established aim to place under control of the states the manufacture and trade, and especially importation and exportation of narcotic drugs and similar substances. Depending on which of the four categories such substances belong to, their manufacturing, possession and trade are subject to lesser or greater restrictions and the licensing system. The Commission was envisaged as a body to issue recommendations to the signatory states and put in place measures that are of importance for the implementation of both Conventions. The International Board was accorded the function that is reminiscent of a supervisory body for monitoring the results of implementation. The Board my request reports on the general situation in the country concerning prevention of illegal manufacture and trade in narcotics, or reports on a special issue or problem that it identifies in an individual signatory country or in the region. The activity of International Board also involves supplying recommendations to the countries based on the reports received, aimed at more successfully fighting drug trafficking as one of the types of transnational organized crime. In 1988 the United Nations adopted yet another Convention dealing with the problem of narcotics, entitled the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This Convention was adopted because the need was felt for a more modern approach to the problem and for amending the present Conventions with new solutions. The 1988 Convention incriminates the activities that may occur during manufacturing and trade in narcotic drugs in much more detail, and it is not just a complementary text to the previous Conventions dealing with this subject matter but it is a form of a compilation of the previous Conventions and additional elaboration of all of their provisions. A number of solutions from previous conventions are repeated in the mentioned document, but actually it is the case of providing more details, i.e. further elaboration of convention norms. Thus, for instance, the obligation of the states to introduce relevant incriminations of the acts laid down by the Convention as grave crimes was nothing new, but this Convention incriminated many more actions, as well as some aspects that previously had insufficient room for elaboration

17 Article 36 of the 1961 Convention.

and quality implementation. An illustration for that may be abuse of minors in illicit activities related to manufacturing and distributing narcotic drugs and performing illegal activities near schools or other educational institutions. Elimination of declaring this type of criminal acts as political or related to politics was performed in advance. This was done so that the states could not invoke this argument in any potential refusal to extradite the suspects that happen to be in their territories. International assistance to states, joint training and other types of cooperation between the authorities of the signatory countries were also regulated in great detail. The jurisdiction of the state in relation to the offender is determined according to both territorial and personal principles. Each state undertakes the obligation to confiscate not only narcotic drugs and other harmful substances related to manufacturing and distributing narcotics, but also property (assets, things and rights) related in any way to the commission of crimes or resulted from committing thereof. The entire Convention is pervaded by the idea that already existing measures introduced by previous Conventions should be improved, modernized and made as efficient as possible. Special attention was paid to the powers and competences of the Commission and the International Board, and with a good reason it seems. Namely, under previous Conventions and also under this one, these bodies received no appropriate powers for controlling the implementation of their provisions. It may be said that their role is mostly restricted to technical and advisory one, which is by all means insufficient if the United Nations wish their fight against drugs trafficking to be resolute and thus successful as well. From the standpoint of international law and its role in fighting organized crime, the Convention made a significant improvement with regard to the cooperation of states, since those provision are quite detailed. If they should be made full use of, they could replace at the bilateral level the absence of a universal body for coordinating efforts in this area.

HIGH TECHNOLOGY CRIME AS A TYPE OF ORGANIZED CRIME AND ITS PREVENTION UNDER INTERNATIONAL LAW

Scientific and technical revolution, development of internet technology, domination of electronic communications and the possibility of committing most diverse criminal acts anywhere in the world from one computer, led to cybercrime becoming the focus of interest of the international community. The international community invests efforts into developing some basic rules that would apply to this particular group of criminal offences, highly specific in many aspects. The most important international document in this field is the Council of Europe Convention on Cybercrime adopted in 2001.[18] The Convention has three main parts. The first two parts deal with the internal issues of the state, and the third part provides for international cooperation. The first part, Chapter II, is entitled "Measures to be taken at the national level" and consists of several sections. Section 1, Substantive criminal law, specifies criminal offences that each of the signatory states has undertaken the obligation to introduce into their legislation. Every offence is determined by a general definition, but often the countries are allowed room for further and more closely defining the essence of the criminal act within the framework of terms used in the Convention. Incriminations for the following offences are envisaged: illegal access to the computer or a computer system; illegal interception of data during electronic communication; illegal damaging, deletion, or alteration of computer data; illegal system interference and damaging, deleting, or altering data contained within the system; misuse of devices. Misuse of devices is a complex criminal offence involving production, sale, procurement for use, import or developing or obtaining in any other way a device that may unlawfully harm a computer or a computer system, or in any other way provide unlawful gain for the person using it. This substantive part of the Convention envisages also other criminal

18 The Council of Europe Convention on Cybercrime came into effect in 2004. What is of interest is that the Convention was signed by some non-European countries that are, quite naturally, not members of the Council of Europe. Among them are economically most powerful countries of the world that are hit, for instance in financial sphere, particularly hard by high technology crimes. These countries are the United States of America, Japan and Canada. The Protocol to the Convention was passed in 2003 and it deals exclusively with prevention and punishment of offences of racist and xenophobic nature, committed by using computers and computer systems.

offences, namely criminal offences of computer-related forgery and fraud; criminal offences related to child pornography (producing, distributing, possessing, exchanging or offering for free or for compensation the material that depicts persons under 18 years of age). The Council of Europe Convention on Cybercrime provides provisions also concerning criminal offences that are related to infringements of copyright and related rights committed by means of a computer or a computer system. This Convention contains also the procedural law section that deals with procedural powers of state authorities in investigating criminal offences related to new technologies. In addition to general provisions, calling upon the states to incorporate in their criminal legislation the mentioned criminal offences, as well as other offences that are not contained in the text of the Convention but which may be determined to belong to this group, great attention is also paid to the manner of collecting data stored in computers or mobile devices, as well as to the protection of fundamental rights of individuals as guaranteed by the European Convention on Human Rights and the United Nations covenants and treaties concerning human rights. According to this Convention, relevant state authorities have the powers to search and seize any computer or data storage medium where incriminating materials are stored or where there are grounds to suspect that they may be stored, and also, from electronic communications provider, they may collect data that refer primarily to the use of internet and credit cards, through which they may obtain the names or IP addresses of suspected offenders. One of the probably furthest reaching provisions of the Convention concerns the so called "data interception", or some kind of internet related electronic communications eavesdropping. This is the most sensitive intervention of state authorities that invades certain human rights, since such interventions practically violate the right to privacy and the right of correspondence, and the Convention itself lacks appropriate powers and guarantees that such authorities will not be abused, except for the general restriction that in implementing all of the measures, international standards of human rights, as enshrined in the mentioned international documents, must be observed.[19] Combating organized crime internationally would not be successful without intergovernmental cooperation in such relations. The prerequisite for cooperation is appropriate normative technique within the framework of the rules laid down by certain conventions, whose subject matter involves prevention of different types of organized crime. Accordingly, Chapter III of the Council of Europe Convention on Cybercrime regulates international cooperation in prevention of high technology crime, primarily in the manner that should overcome practical obstacles in enforcing national legislations with regard to the crimes that are cross-border ones as a rule, and committed by individuals from several states. Main provisions of Chapter III deal with cooperation of the countries in sharing the data concerning potential commission of a crime related to the use of electronic communications and the possibility of extraditing perpetrators of such crimes from one signatory country to the other. The Convention also calls for the establishment of 24/7 network, available on a twenty-four hour, seven-day-a-week basis, in each of the states. This network would serve as support for law enforcement authorities, as a point of contact for all information and starting point for all requests concerning cybercrime investigations or proceedings. However, this only serves to ameliorate to an extent one of the main flaws of this Convention. Namely, the signatory countries are under no obligation to set up special authorities that would deal only with this type of criminal offences. Bearing in mind the need for specialization of police, investigative, judiciary and other authorities in investigation and proceedings, it seems that the countries will have to do more than just establish the 24/7 network in order to efficiently combat the so-called cybercrime environment. On examining the Convention as a whole, we may say that it is a highly progressive and thoroughly elaborated document. In case of full implementation of this Convention through national legislations, ideal grounds may be provided for further development of services for cybercrime prevention and punishment. When comparing Serbian law with the Convention provision, we can say that there are minor obstacles to its full implementation. They are reflected in a more pragmatic approach

19 It should be pointed out that the Convention has not been ratified yet by the so-called highly developed signatory countries. The possibility of data interception was the issue of contention for the countries to ratify this Convention. Since such an action of a state authority would infringe on the privacy of natural persons, it was deemed that ratification would be contrary to the constitution. The United States of America did not ratify the Convention since it was met with grave disapproval of some members of the Congress. The argument stressed by members of the Congress was that the Convention was contrary to the US Constitution.

to defining and incrimination of the actions that may be considered to be high technology crime. Organizationally, Serbia has come further than required by the Convention provisions. In order to have success in combating cybercrime, in Serbia for instance in this particular case, it is necessary to have education and detailed specialization of the authorities formed with the aim of fighting high tech crime.

COMBATING ORGANIZED CRIME IN SERBIAN LEGAL ORDER

In this part of the paper we will pay attention to the measures against organized crime as a phenomenon recently appearing in Serbia, and to the drafting of necessary regulations dealing with the mentioned fight against organized crime. For a long time it could have been said that the flood of organized crime in Serbia does not allow a bright look into the future in terms of a security situation. The strength of this type of criminal behavior, particularly in countries with high unemployment rate and constant economic crises, lasting in Serbia for more than two decades now, rests upon the fact that this type of crime involves quite alluring, and in some cases even incredible, monetary gains. Organized crime has the attraction of offering profitability and advantages for the participants. Serbian Constitution defines Serbia as the country of rule of law and social justice. And actually it is organized crime that undermines the general principles which make up the foundations of the rule of law. If we understand rule of law as the rule of legal order with certain features, then we can say that the laws whose subject matter is fighting against organized crime must incorporate substantial elements of fairness. Serbia cannot be a respected member of the international community if the rule of law is not understood as an internationally recognized value as well. This further entails, as a positive consequence, the cooperation of the states (first and foremost the rule of law states) in the common fight against organized crime. Thus Professor Grubač, discussing organized crime in Serbia, states that combating it will be neither simple nor easy: "In this century modern states are faced with an important and difficult task: they must create an efficient mechanism that will prevent the dominance of organized crime over democracy. The main problem is that mechanism must be such as to control this type of crime without destroying democracy. Regardless of the level of its efficiency, a mechanism that would at the same time ruin democracy is unacceptable".[20] Difficulties, complexity and long duration are the characteristics that may be attributed to the fight against organized crime. In addition, there are two levels of organizing that fight. They are the repressive and preventive levels, i.e. the measures accompanying them. Repressive measures may be: passing of a relevant 1) substantive criminal legislation; 2) procedural criminal legislation; 3) legislation concerning special organization of criminal prosecution authorities in order for them to be able to efficiently oppose the *sui generis* nature of such criminal offences and their perpetrators. Therefore, it is necessary to establish and develop the capacities of special investigation teams and to grant special investigation powers to such authorities and to establish special forms of international cooperation, all with the aim of advancing the practice of detecting and proving this type of criminal offences. When it comes to substantive legislation, it is necessary to adopt the regulations through which the state incriminates different forms of criminal association that the criminal procedure should determine whether they are operations of organized crime, and the provisions that are to prevent activities suspicious of belonging to organized crime sphere.[21] Furthermore, the norms of criminal procedural law carry great weight in combating organized crime, since traditional methods of detecting and proving criminal offences when applied to organized crime are for the most part inefficient, and the prosecution authorities are more and more often compelled to use special investigative techniques and more efficient measures of undercover surveillance. An ideally typical situation would involve sufficient preventive measures aimed at eliminating causes of organized crime or restricting the possibilities of its spreading. This means that in the future there would be no organized crime at all. This is the intention of a social community with democratic order, resting upon the fundamental principles of the rule of law such as: legality and legitimacy of the government, presence of all types of its accountability, fee and democratic elections, economic freedom and

20 Грубач М., Борба против организованог криминала у Србији – од постојећег законодавства до свеобухватног предлога реформе, Београд 2008. стр. 40.
21 Such as illegal activities in the form of extortion, drug trafficking, and money laundering.

freedom of economic operations. The countries where the rates of criminal offences with elements of organized crime are high inevitably see the deterioration or erosion of the rule of law principle. That is why the presence of numerous preventive measures that concern the functioning of different sectors of the social and economic systems is indispensable. Such measures may include the ones that are aimed at strengthening the public morals and legality, but also the measures aimed at reducing the unemployment rate. Therefore, in fighting organized crime it is impossible to ignore and neglect preventive measures in the areas of social and economic policies. Such preventive measures include also those that could be seen as reducing the demand for the so-called services of organized crime. These measures involve decriminalization of specific traditional types of organized crimes. In particular, preventive measures involve high quality and uncompromising, and also impartial control of public administration and public servants, bearing in mind the fact that without their corruption there can be no organized crime. In 2013 the Serbian Government adopted the National Anti-Corruption Strategy and issued the Action Plan for implementing the National Strategy. The overall goal of the Strategy is to eliminate corruption to the highest possible degree, as an obstacle to economic, social and democratic development of the Republic of Serbia. The consequences of the corruption are not only evident in the impoverishment of the society and the state, but also in the drastic decline in the citizens' trust in democratic institutions as well as in emergence of uncertainty and instability of the economic system, rather obvious*, inter alia*, in the drop in the investments. According to the World Economic Forum survey for the period 2011-2012, corruption was named as one of the two leading problems identified when making a decision on starting business in the Republic of Serbia. When implementing the Strategy the government and the authorities are obliged to exercise their powers in line with the following general principles: the rule of law principle implies the guarantee of legality of treatment and equality before the law and the right of all citizens to legal remedies. The Constitution of the Republic of Serbia, laws and bylaws as well as ratified international treaties and generally accepted rules of international law must be fully and consistently implemented; zero tolerance to corruption principle calls for non-selective implementation of the law in all incidences of corruption; accountability principle is synonymous with the obligation of assuming full responsibility for creating public policies and their efficient implementation, including the implementation of the Anti-Corruption Strategy and the Action Plan; the principle of comprehensiveness of implementation of measures and cooperation of entities is an expression of duty to implement measures comprehensively and consistently in all fields, to cooperate, exchange experiences and harmonize actions of relevant entities at all levels of the government with established good practices; the efficiency principle implies a duty to regularly enforce anti-corruption measures within the scope of the powers granted and to carry out continuing training for the purposes of improving efficiency in the fight against corruption; the transparency principle is a guarantee of openness in the process of adoption and implementation of decisions, and provides to the citizens access to information in accordance with the law. The mentioned principles are very important, but the theory is right in pointing that "when it comes to prevention of corruption it is necessary to undertake certain measures and activities that are not expressly stated in the Strategy and the Actions Plan. Similarly, the ones stressed as imperative should be looked into carefully. In harmonization with international standards the road to be selected is the one that takes into account the national legal system, our legal terminology, general principles and institutes of the criminal law. It is the harder but more appropriate road for implementing the norms of international law. Furthermore, it is the legitimate right of Serbia when ratifying international treaties and agreements to use the possibility of making a reservation concerning some of the provisions of international treaties".[22]

Finally, it can be said that prevention strategy involves controlling the government and the authorities, or rather their representatives and members, so they would not connect and tie in, associate with persons from organized crime sphere and abuse their power. Prevention strategy should offer the equilibrium between the human rights and liberties and the requirements of efficient functioning of the legal state and its institutions.

22 Коларић Д., Национална стратегија за борбу против корупције и измене Кривичног законика - *de lege ferenda*, Правни живот, бр. 9/2013 стр. 739-740

INSTEAD OF CONCLUSION – FORMING AWARENESS OF INCREASED SOCIAL DANGER FROM ORGANIZED CRIME

When comparing organized crime to other, conventional forms, we may state that its dangers for the society are really specific and significantly greater. In the previous decade the Serbian society became much more aware of the dangers that organized crime poses for the rule of law and democratic institutions. The awareness of society in Serbia that organized crime entails specific and greater danger was raised in view of some of its characteristics that distinguish it clearly from conventional crime forms. Through mass media, institutions of political and educational systems, but also by way of transnational cooperation of state authorities in Serbia with other countries and international institutions, the general public should be informed of those characteristics of organized crime that are clearly distinguished from conventional crime forms. Such traits involve high degree of membership organization, hierarchical in structure, where discipline may easily measure up to the one present in the military. The characteristics include the following: constant craving for financial resources, where victims of such activities of organized criminals may well include stability of the state budget as well; desire for power, i.e. infiltration into the bodies and authorities of political parties and state institutions; and worldwide presence of this type of crime that does not respect state borders and sovereignty. This was one of the reasons for modern states to consider giving up on protecting their national sovereignty and recognize the necessity of international cooperation and creation of common protective institutions. When it comes to conventional crime, it is said to be individual, sudden, often unplanned and impulsive. Conventional crime gives rise to a clash between the perpetrator of a criminal offence – an individual, and the state that applies the long-standing right – *ius puniendi*. It is well known who comes out as the winner in that case. However, when organized crime is in question, it is two organizations that clash, a criminal organization and a state one. Unfortunately, in some instances, a criminal organization is as powerful as the state. At times of state crises, organized crime becomes especially attractive and attempts to take over and replace state rule, or become an equal partner to the state. That is why organized crime has an eroding, deteriorating effect on the cornerstones of the modern state, which are the principles of the rule of law. This type of crime destabilizes, or attempts to do so, the central authorities of the executive branch, the government and the state ministries, undermines the parliamentary life, harms the trust of citizens into the institutions of the legal states and presents a typical opposite, arch-enemy to the legality. It presents a grave attack on social morals. Organized criminal groups threaten individual and collective safety, national and international security. Our view that organized crime is an attack against social morals may be justified by the following words: organized crime is at times difficult to recognize in concrete cases, and thus presenting evidence is also made more difficult. This is because in organized crime illegal operation is intertwined with other, fully legal activities. This type of crime is connected to legal activities in order to cover the criminal tracks and protect profits, proceeds of criminal activity. The financial gains obtained through organized crime are invested into companies, educational institutions, media, health care institutions and into funding some political organizations. Such disturbing facts call for responsible authorities that are organizationally capable in every segment of public administration to act on suppression of organized crime, both preventively and repressively. Particularly threatened and susceptible are the countries in transition such as Serbia. Openness of Serbia to the world and readiness to cooperate with other countries and international institutions should entail incorporation into the internal legal system of the provisions of the conventions discussed in this paper, which provide the norms and appropriate mechanisms for combating organized crime. That is the way for Serbia to confirm that it is a country with the stable rule of law and an equal member of the international community in combating all types of organized crime, and transnational organized crime in particular.

REFERENCES

1. Игњатовић Ђ., Криминологија, Београд, 2008.
2. Бошковић М., Криминологија, Нови Сад, 2006.
3. Бошковић Г., Организовани криминал, Криминалистичко-полицијска академија, Београд, 2011.
4. Грубач М., Борба против организованог криминала у Србији – од постојећег законодавства до свеобухватног предлога реформе, Београд, 2008.
5. Ивановски З., Глобални димензии на организираниот криминал и кризата во Република Македонија, Годишник на Факултетот на безбедност, Скопје, 2002.
6. Камбовски В., Корупција, међународно казнено право и заштита људских слобода и права, Зборник радова: Корупција и људске слободе – Међународни научни скуп, Тара, 2009.
7. Коларић Д., Национална стратегија за борбу против корупције и измене Кривичног законика - *de lege ferenda*, Правни живот, бр. 9/2013, Београд, 2013.
8. Петровић Д., Организовање злочиначких удружења, Српско удружење за кривично право, Београд, 1996.
9. Стојановић З., Коментар Кривичног законика, треће допуњено издање, Београд 2009.

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SIGNIFICANCE OF THE SECURITY SYSTEM REFORM OF THE REPUBLIC OF SERBIA FOR FIGHTING CRIME

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Abstract: The introductory part points out the ambient conditions in which there has been a social change in Serbia at the end of the last century. The first part describes the traditional model of organization and methods of work of the police and points out to remarks such as politicization, criminalization, bureaucratization, unprofessional attitude, etc. The following text describes the transformation of the former secret services and the establishment of Security Information Agency as contemporary services for the protection of the constitutional order, the reorganization of military security services and emphasized the role of the National Security Council, as an institution that creates a national security policy. Suppression of organized crime, terrorism, corruption and other forms of crime is highlighted as the dominant role of the Ministry of Internal Affairs (police) and the whole security sector in Serbia. Further in the text is pointed to normative and operational aspects of combating crime with a forecast of further trends, particularly in the context of the application of the Republic of Serbia for membership in the European Union.

Keywords: crime, police and security services, transformation, Serbia and the EU.

INTRODUCTION

The fall of the Berlin Wall in 1989, as a symbolic moment of the termination of the Cold War, marked the beginning of a new phase in relations between the countries on the international stage. The new architecture of relations in the international community led to the emergence of a "new world order". In such circumstances leading position in the world has been occupied by the U.S. and its allies, that are in the current constellation of international relations beyond doubt one of the leading superpower in the world, next to Russia, China and other countries.

The collapse of the socialist system did not avoid SFR Yugoslavia (SFRY), where the lack of political vision of the nineties of the twentieth century led to armed conflict in Croatia (1991-1995), Bosnia and Herzegovina (1992-1995) and small-scale conflicts in Slovenia (June-July 1991). Conflicts and disintegration of SFRY were transferred to FR Yugoslavia where occurs an escalation of terrorism in Kosovo and Metohija, followed by confrontation with the leading countries in the international community and NATO aggression on Yugoslavia.

Multiannual international isolation, economic stagnation, increased social and inter-ethnic tensions, lack of enforcement of the law and disregard of basic human rights, partially functioning of social institutions and other weaknesses have contributed to the collapse of the security system. Organized crime, corruption and lack of trust in the police has further endangered the security system of the state.

The true and democratic commitment for change came after more than a decade of conflict and civil wars when Serbian citizens in the election (2000) unanimously voted for a "new beginning". The choice of the citizens represented the only possible solution, as it has provided hope for the release of society from decades of apathy and opened perspectives for future generations.

With the arrival of the reform forces at the head of society the new internal and foreign policy objectives was proclaimed. The primary strategic objective, which enjoys high political and social support represents inclusion in the European integration process, accession and joining the European Union. In this regard, Serbia will strive for a democratic organization, the rule of

law, market economy, high standards of human and minority rights, harmonized legislation and efficient public administration.

In the process of reforms the need to harmonize internal legislation with the EU legislation was imposed. Harmonisation of legislation is necessary for legal, market and other prerequisites for the smooth flow of ideas, people, goods and capital. In addition to the legal framework it is necessary to provide existence of stable institutions guaranteeing democracy, the rule of law, respect for and protection of human and minority rights. In order to achieve these goals it is necessary to carry out the reorganization and transformation of state services in Serbia, complete depoliticization and professionalization in order to create a atmosphere of legal security for a normal life and work in the future. Consequently is extremely important reform of the security sector in which the Ministry of Interior occupies a special place. The complete de-politicization, decriminalization and creating a modern professional organization of pro-European orientation is the primary goal of the transformation Ministry of Interior of Serbia. It is necessary to transform the police into service of citizens and create a modern, technically equipped and skilled service for the maintenance of public order and to fight against crime.

THE TRADITIONAL MODEL OF POLICE ORGANIZATION - CRITIQUE

The traditional model of organization and methods of work of the police has been established in accordance with socio-political system of the former Yugoslavia, where the socialist system and communist ideology was dominant. The one-party system of government based on the authority of group of functionaries, relatively closed and non-transparent, without adequate social control and based on the socialist economy, was favorable for the development of the traditional model of organization and method of work of the police. The jurisdiction of the police was to protect the constitutional order and the other socialist values. High degree of politicization (leadership), militarization (individuals, units), centralization, closeness, strict hierarchy of relationships, lack of initiative and the criminalization of individuals characterized the interior ministry at that time. The scope of work of the police consisted in the performing of traditional police work of public safety, such as crime prevention, maintenance of law and order, traffic regulation and others. In terms of methodology police acted reactively, *post delictum* after the criminal act.

The basic form of policing was territorial - "work on the security sector", line or object. Security sectors were divided into patrolling and watching district on which they are implemented preventive and repressive forms of police work, while work of the criminal police was based on crime investigation and discovering of crime perpetrators.

In the last decade of the twentieth century, Serbia *de jure* has entered into a multi-party system, but *de facto* it has been established system of personal power and personal party nomenclature. Former socialist ideology has been replaced by a national mythology and the country entered into profound crisis and conflicts with its citizens, other nations in our region and most powerful states in the international community. The newly created system is maintained on instrumentalization of the media, police and especially secret services, which in turn is brutally misused in order to protect the ruling elite.[1]

Devastating consequences for the reputation of the police and its members were made, such as politicization, militarization, centralization, criminalization, de-professionalization and other forms of distancing from the community. A large number of uniformed police officers were involved in a partially militarized special police units that conducted security operations outside jurisdiction of their police stations and security sector. Preventive activities and partnership between police and the citizens did not exist, except in incidents (strikes, demonstrations).

The police were estranged from the citizens and the security issues in the local community, and the dissatisfaction of the citizens was very strong. The gray economy and smuggling of excise goods were the main source of enrichment of the privileged circle of people who were close to, or even kinship with individuals from government. In these circumstances, a significant increase in crime was recorded, which is expressed through the most serious manifestations

1 *Vizija za reformu MUP RS*, *Bezbednost*, Specijalno izdanje, 2003, str.7–8 i dalje.

forms. Results of the work of the police in anti-crime were depicted fictionally or feigned. Certain number of citizens' did not report criminal acts because of mistrust toward police, and the dark figure of crime was very high.

Mainly repressive role of the police and closed attitude negatively affected on its position in society. There were no valid mechanisms for civilian control of the police, and internal controls were inadequate and ineffective. Under these conditions, a number of police officers is criminalized, and accountability at all levels has been quite neglected. Regional police cooperation did not existed, which resulted in that the criminals cooperate better than police. Reforms were necessary and they included the radical changes in comparison to the previous organization and methods of work of the police.

SECURITY SYSTEM REFORM

One of the conditions for inclusion to european integrational courses is reorganisation and transformation of state departments, with special accent on the security system reform through complete depoliticisation and professionalisation in order to create surroundings of law stability for normal life and workmanship in future period.

The most important tasks of the reform of the national security system, were: a) definig the national interest, b) working on production and accepting national security strategy and defense doctrine strategy, c) reform of the existent intelligence and counter intelligence and other security services, d) adoption of new laws on the organization and operation of the intelligence-security system.[2]

The most significant law that arranges system of security is the Law of the Security Services of Republic of Serbia.[3] The law arranges the basis of security intelligence system of the Republic of Serbia, direction and coordination of security services and contol over their work. This law forseen the existence of three security intelligence services: Security Information Agency as a separate organization that represent the civil service directly subordinated to the government, The Military security agency and Military Intelligence agency, organised as governmental within the Ministry of Defense.

Security-system reform „de facto" had started with separating former State Security Department of the Ministry of Interior and the foundation of the ***Security Information Agency (BIA),*** according as specialized agency (secret service) for the protection of the constitutional order.

With the Law on the Security Information agency,[4] it is established that the BIA is specialized organization that has characteristic of legal entity and does work which refers to the protection of security of the Republic and revelation and prevention of activities addressed to depraving or disintegration the constitutional order; research, compilation, production and evaluation of security intelligence data and cognition of significance for the security of the Republic and briefing to state competent authorities about these data, like any other work determined by the law.

Regarding on the tasks, the agency represent the central security intelligence service, authorized for both intelligence and counter intellignece and security affairs. Some authorized officials of the Agency are entitled to apply police power during performance of security mission.[5] These tasks include revelation, monitoring, preventing and cutting activities of the organizations and individuals aimed at carrying out organized crime and criminal offences with foreign element, domestic and international terrorism and the most serious forms of criminal offenses against humanity and international law, against the Constitutional order and security of the Republic of Serbia.

In the agency are established specific organizational units for performing security tasks within its area. On the interior organization and systematization of working places are apllied principles for organization and systematization in ministries and special organizations, while

2 Bajagić M, Reforma obaveštajno-bezbednosnog sistema Republike Srbije, Zbornik predavanja sa IX škole reforme sektora bezbednosti, Beograd, 2007, str.69.
3 „Sl.glasnik RS" br. 116/07.
4 „Sl.glasnik RS" br. 42/02, 111/09.
5 Šire: Mijalković S, Nacionalna bezbednost, KPA, Beograd, 2011.

director with intern instructions closely regulates issues that refers to interior arrangement and gives obligatory instructions of the bussines regulation manner.

In doing work of their jurisdiction agency apllies adequate operational methods, measures and actions, as well as operational and technical means which can be achieved collection of data and information in order to prevent activities addressed to depraving or disintegration the constitutional order, endangering the security of the country, thereby take other steps and actions concerning the law and regulations enacted in harmony with law.[6] Decision on measures and methods implementation of this Article makes director of the Agency or the person he empowers. In conducting business within its area, members of the Agency are empowered to ask for and get from state authorities, legal person and natural person information, data and competent assistance of significance for explainig the facts in connection with doing jobs within agency area.

Law on Military Security agency and Military Intelligence agency[7] regulates the authorities, tasks, duties, powers, supervision and control of these agencies, cooperation and other issues referring to significance for their work.

Military Security agency (VBA) is responsible for security and counter intelligence protection of the Ministry of Defense and Army of Serbia under which it carries security, counterintelligence and other activities and tasks of significance for protection of Republic of Serbia, coherent with the law and other principles brought by under the law. In its tasks related to security protection are included: evaluation of security risk, organization and control of the security force protection, facilities and resources, planning, organization and control of the security measures in the implementation of the tasks, duties and activities, implementation and control measures for protection of the confidentiality of data, the performance of security checkouts and publishing the security certificates, doing a business of security of information systems and computer networks, connection systems and cryptoprotection, participates in security protection of other entities of defense system and performs other security tasks. Counterintelligence activity of VBA is focused on detecting, monitoring and disabling intelligence activities, subversive and other activities foreign countries, foreign organizations, groups or faces directed against the Ministry of Defense and the Army of Serbia.

Military Intelligence agency (VOA) is the professional body of the Ministry of Defense in charge of and responsible for the Military Intelligence activity. The primary task of the VOA is collection, analysis, evaluation and delivery of data and information about potential and real threats, activities and plans or intentions of foreign countries and their armed forces, international and foreign organizations, groups and individuals, that are adressed against Ministry of Defense, the Army of Serbia, souvereignty, territorial integrity and protection of the Republic.

Within its jurisdictions it collects and verifies data and information, processes them, analyses them, evaluates and delivers them to competent authorities, then cooperates and makes an exchanges of information with other services, organizations and institutions of Republic that deals with security intelligence affairs, and also with services of other countires in accordance with security intelligence policy and international agreements. Suitably with the law it preserves collected data and information and protects them from unauthorized disclosure, dispensation, use, loss or destruction. It plans, organizes and implements security of its actions, people, objects and documents and conduct other business in accordance with the law.

The work of these agencies are managed by directors who report to the Minister of Defence. On the proposal of the Minister of Defense directors are instated and dismissed on a period of 5 years, by a decree of the President of the Republic, and in case of professional military person, decision is made by the Government in accordance with the law that regulates status of civil servants.[8] According to the law, the director and deputy of the agency can be instated only person who has completed general staff accomplishment and who has at least nine years of experience in intelligence and security matters in the defense system, which practically means that civilian can not be a director of aforesaid agencies.

6 Zakon o Bezbednosnoinformativnoj agenciji, „Sl.glasnik RS“ br. 42/02, 111/09, čl.9.
7 „Sl.glasnik RS“ br. 88/09, 55/12-odluka US i 17/13.
8 Zakon o Vojnobezbednosnoj agenciji i Vojnoobaveštajnoj agenciji, „Sl. glasnik RS“ br. 88/09, 55/2012 - odluka US i 17/13, čl.37.

By adopting of the Law on the Security services of the Republic of Serbia, the ***Council for national security*** is formed. The Council is the executive body responsible for directing the work of services of security and it consists of the President of the Republic, the Prime Minister, the Ministers of Defense, Interior and Justice, the Chief of General Staff and director of security services. Council meetings are held as necessary, but at least once in three months. Council meetings are chaired by the President of the Republic, who signs the conclusions and other documents that are acknowledged by the Council. Beside the coordination and the direction of the services, this body is entitled for their control too.

For operational coordination of the services' work with the same law is formed ***Bureau of Security Service coordination***. The bureau carries out conclusions of the National Security Council, consisting of directors of services and Secretary of the Council. In the work of the Bureau may be included representatives of the Ministry of Foreign Affairs, Chief of Police and Heads of Police, State Public Prosecutor, the Director of Customs, as well as heads of other state bodies, organizations and institutions. The law once again emphasizes that the work of the security services under democratic civilian control of the National Assembly, the President of the Republic, the Government, National Security Council, and other state bodies and the public is in accordance with the law.

POLICE REFORM

The Police service reform is of the crucial significance for the development of stable democracy, market economy and political and social structures that reflects values and needs of society.[9] On the other hand, changes in modern society of XXI century, growing organized crime and other forms of endangerment of safety have shown that the model of centralized police organization with repressive methodology has been exceeded. Organized crime with its traits, economical power and trans national character represents the most dangerous threat to society in peacetime and for its successful suppression is needed international police cooperation. Normative-legal aspect in the international fighting against organized crime includes accepting specific international conventions and concluding the international contracts. Operational aspect includes measures and actions of criminalistic behaviour whose organs are heads of the national Police, security service, Interpol, Europol and other regional police organizations. Regarding to this, it has become obligatory to approach the reform of traditional model of organization and methods of work of the police and all that in acocordance with modern challenges.[10]

In accordance with that it has been actuated the initiative for public administration transformation *(European administrative space*) and police reform (*Committee on Management Reform Programme MUP*).[11] In the revision of the security system concept it is appointed to the numerous inherited problems and deficiencies, so with the participation of international (USA, OSCE), nongovernment (DIHR, LEX) and other organizations is established document with the title ***Vision for Reform MUP RS.***[12] In the material are in the integral text vision, values and mission of the Ministry. There are 14 main areas of work identified and made plan of the Reform, strategy, key indicators and other elements.

As one of the key areas of work in the document of Vision for Reform Ministry is stated a long-term strategy for community policing. In accordance to that, with the participation of the representative of the international community, it is promoted draft plan for the development and implementation of the Project of community policing.[13] For the basic goals are emphasized the training of the police and their members for a new form of working, the priority of prevention in police work, better relations between citizens and policemen, building standards in policing and improving safety state in community, for the better quality of life.

9 Reforma policije u Srbiji, Odeljenje ta sprovođenje zakona Misija OEBS u Srbiji i Crnoj Gori, 2004, str.16

10 Vidi: Simić B, Nikač Ž.:„Reforma policije u Republici Srbiji", "Harmonizacija zakonodavstva Republike Srbije sa pravom Evropske unije", Institut za međunarodnu politiku i privredu, Beograd, 2011.

11 Šire: Uputstvo o obrazovanju Odbora za upravljanje Programom reforme MUP RS, *Službeni glasnik*, br. 62/03, 65/03, 2003; Kavran, D., Evropski upravni prostor, reforma i obrazovanje državne uprave, *Pravni život*, br. 9/04.

12 "Vizija i misija", oficijelni dokument MUP RS o strateškim pravcima razvoja policije, Beograd, 2002. Izveštaji R. Monka i Dž. Slejtera, preporuke OEBS i SE.

13 Vojnović, M., Policija u zajednici, *Bezbednost*, br. 3/04, 2004, str. 431–452.

Normative-legal basis for the developing of the concept *community policing* is stated by the ***Law of the Police RS****, accepted in 2005.* on the basis of well off domestic police-legal practice, traditions, experiences and international standards. The most important novels of the Police Law are referred to the new organization, authorities, and work control of the legal working status of the employees. In the systematical terms Police has formally and legally been given the status of a ***public service*** that serves the citizens.[14] Police operations and authorities enables police activity to pass from reactive to proactive, in afterdelict to predelict and out of combat security threats in the prevention of hazards.

It has been suggested that ***the Project "Community policing"*** in Serbia initially develops in two phases as a) pilot project and b) at the national level. First phase is designed as pilot project in order to get experience and later to use it in practice. Second phase is continuing on the first – on the background of the experience to build a project community policing on the national level.

Pilot project Community policing is iniciated in mid 2002. and started with its implementation in February 2003. In programme were participating domestic and foreign partners, especially experts from Programme of Security, Safety and Accessibility of justice on Balkan (*SSAJP*). The Programme was conceived and initiated under the patronage of the Department for International Development of the United Kingdom(DFID). In the begining there were four municipalities included in the programme from different regions of the Republic of Serbia: Zvezdara (Beograd), Novi Bečej, Kragujevac and Vrnjačka Banja. The selection of municipalities was carried out on the proposal of the Ministry, on the basis of opinion of the local government and with respect to other criteria (size of the territory, the degree of industrialization, university facilities, tourist areas, etc.).

Activities that were undertaken in pilot areas have resulted in good practice, which was concluded in the Report of conducted evaluation in December 2004. by representatives of MUP, Department for international development of British government and Police Academy in Belgrade. After that, in accordance with gained experiencies and practice, on the territory of the Republic concrete activities were undertaken. In developing the concept of community policing in the RS has so far achieved good international cooperation with the OSCE, the Department for International Development of the British Government, the National Police Directorate of Norway, the Swiss Agency for Cooperation and Development and other international partners.

We remind you of the important activities of the research titled,"Perceptions of the police in Serbia", which was organized jointly by the Ministry of Interior, Mission OEBS and Agency" Partner" in order to gain insight into the attitudes, opinions, and expectations of citizens about the security issues, police as the institution and their function in community. Mission OEBS has conducted a survey of opinions of police servants about the police work in community.[15]

Numerous professional confereneces have been realized – courses, seminars, workships, round tables and conferences from different areas : police working standards, human rights, strategic management, analysis and problematically oriented police work, in order to increase awareness of the police servants about modern policing and necessity of community participation in security improving.

There is *education* in realization of annual programmes of professional development of *police officers*, in which are presented themes related to theoretical and practical aspects of police in community. It is performed education of citizens and other subjects of community about security issues in society through participation in discussions and lectures through current issues: child safety in schools, domestic violence, juvenile delinquency, drug abuse, traffic safety. Among other activities there are stated consultative meetings in local communities at different levels (municipalities, towns, streets, buildings, associations) in order to improve communication and action ***"from door to door",*** through which police servants directly communicate with citizens for the sake of security protection.[16]

Cooperation with the *media* has been improved through means of communication such as: round tables, media support through affirmation of police work in community, participating

14 „Sl. glasnik RS" br.101/05, 63/09-Odluka US i 91/11.
15 Simić B, Početna iskustva ministarstva unutrašnjih poslova republike srbije, Zbornik „Struktura i funkcionisanje policijske organizacije-tradicija,stanje,perspektive-II, str.154.
16 Ibid.

in TV and radio shows, creating audio and video materials for the newspapers etc. *Informing the public* through brochures, flyers, and posters on the rights and duties of citizens, exercising and improving contacts between citizens and the police, filing complaints on the work, safety of road participants, security of property, etc.[17] At the level of the local communities advisory bodies are formed in order to include subjects in resolving security problems, such as : advice and Security Committee, the duties of road safety, for the prevention of substance abuse, the prevention of juvenile delinquency, child safety in schools, anti-corruption teams. Besides the identification of the key security problems of the community, these bodies have been realized numerous projects, programmes and actions directed towards improving safety especially in the prevention area.

One of the projects that deserves special attention is the Project ***"school police officer"*** in which, in accordance with the evaluation, police officers are hired in schools with prominent security issues. Policemen react preventively in cooperation with school and other community subjects, and because of that there is constant education of the police officers, teachers, parents and children about different aspects of security to protect pupils and schools.[18]

Development strategy of the Ministry of Internal Affairs from 2011 till 2016. represent a document that sets the direction in which the Police reform will be moved in the specified period. The document highlights the need to introduce modern methods of strategic management, further development of the different systems of external and internal control and transparency in the work, as well as developing partnerships forms of cooperation with a large number of subjects.

In accordance with the Strategy and the intention of the police to act responsibly in partnership with communities and citizens, the Strategy of community policing in the Republic of Serbia is adopted, as the adequate framework for the operation of community policing, adjusted to security and other needs of the citizens. According to the Strategy of community policing, the development of the police will be directed to introduction on modern policing standards, strengthening the public confidence in police and developing partnerships with the community.[19] In the special focus is police operation aimed at preventing security and problem-oriented approach to security protection.

CONCLUSION

Changes in modern society, the growing influence of crime and other forms of threats to security, over time showed that the reactive activity is outdated as a model of police work. The traditional concept of organization and methods of work of the police, that has long been dominant was based on a centralized organization with prominent bureaucratic relation with the distance from the community and neglected prevention in policing. Within the classical model of police work there was a lot of anomalies such as bureaucracy, corruption, excessive repression, politics, criminalization and others.

The Republic of Serbia like other countries in transition passed through the period of democratic social change and today is at the beginning of development of a modern system of public administration. In the new social environment a change is ocured in the organization and functioning of the entire security sector.

For the purpose of consideration of the importance of the reform of security sector in the context of contemporary events in Serbia, it should be emphasized several key reasons: socio-economic change and democratic processes, strengthening the rule of law, reform of institutions, work of the police directed at the needs of citizens, increasing security and reducing the fear of crime. Police in Serbia is aware of heritage in relations with citizens and expectations of domestic and international public opinion of her as a modern service, has a goal to adapt its work to citizens' needs in accordance with the law.

Over the last few years several projects have been initiated to create a new approach to

17 Šire: Nikač, Ž., Policija u zajednici, Kriminalističko policijska akademija, Beograd, 2010.
18 Šire: Nikač Ž, Koncept policije u zajednici i početna iskustva u Republici Srbiji, Kriminalističko-policijska akademija, Beograd, 2012.
19 Šire: Strategija policije u zajednici, „Službeni glasnik RS", br. 55/05 i 71/05 – ispravka, 101/07, 65/08, 16/11, 68/12 – US i 72/12

police work and its organization, which will change the management structure to provide greater efficiency and effectiveness of policing. The adoption of the Law on Police is the tendency of the police to exercise ***democratic values and standards*** in their work, providing consistent protection of human and minority rights, respect of cultural and other differences and identities of individuals and groups, providing responsible and humane application of law with respects of the needs and demands of citizens and community and works with them by mutual agreement.

Socio-economic changes and the transition process are reflecting on personal and collective safety and lead to the conclusion that the police alone can not effectively act on crime, criminal organizations and security crisis in the traditional way, and that the "prevention" through repression is often ineffective. Public institutions in Serbia have a leading role in the development of democratic values, with the support of civil society, including the police as an institution that is ultimately responsible for the law enforcement and protection in the area of security. Security is not just a general consensus but also a personal feeling of citizens, therefore, the police should develop its role as a service adapted to the legal obligations and the needs of citizens.

REFERENCES

1. Bajagić M (2007), Reforma obaveštajno-bezbednosnog sistema Republike Srbije, Zbornik predavanja sa IX škole reforme sektora bezbednosti, Beograd.
2. Bošković M (1998), *Organizovani kriminalitet.* Beograd: Policijska akademija.
3. Kavran D (2004), Evropski upravni prostor, reforma i obrazovanje državne uprave, Pravni život, br. 9/04.
4. Mijalković S (2011), Nacinalna bezbednost, Beograd, Kriminalističko-policijska akademija
5. Nikač Ž (2003), Organizovani kriminalitet - neki normativni i operativni aspekti suzbijanja u savremenom trenutku. *Pravni život br.9/03.*
6. Nikač, Ž (2010), Policija u zajednici, Kriminalističko policijska akademija, Beograd.
7. Nikač Ž (2012), Koncept policije u zajednici i početna iskustva u republici Srbiji, Kriminalističko-policijska akademija, Beograd.
8. Reforma policije u Srbiji (2004), Odeljenje ta sprovođenje zakona Misija OEBS u Srbiji i Crnoj Gori
9. Simić B (2009) , Savremeni koncept policijskog rada u okviru zajednice, *Bezbednost,* vol. 51, br. 3, str. 157–172.
10. Simonović B(2001), Uloga policije u prevenciji kriminala na nivou lokalne zajednice, Bezbednost, broj 1/01, Beograd.
11. Simić B (2013), Početna iskustva ministarstva unutrašnjih poslova republike srbije, Zbornik „Struktura i funkcionisanje policijske organizacije-tradicija,stanje,perspektive-II, str.147-159.
12. Simić B, Nikač Ž, „Reforma policije u Republici Srbiji", "Harmonizacija zakonodavstva Republike Srbije sa pravom Evropske unije", Institut za međunarodnu politiku i privredu, Beograd, 2011
13. Strategija razvoja Ministarstva unutrašnjih poslova 2011-2016,
14. http://www.mup.gov.rs/cms_cir/sadrzaj.nsf/Strategija%20razvoja%20MUP-a%20 2011-2016.pdf pristupljeno: 24.12.2013.
15. Strategija policije u zajednici, „Službeni glasnik RS", br. 55/05 i 71/05 – ispravka, 101/07, 65/08, 16/11, 68/12 – US i 72/12.
16. "Vizija i misija". (2002), oficijelni dokument MUP RS o strateškim pravcima razvoja policije, Beograd, Izveštaji R. Monka i Dž. Slejtera, preporuke OEBS i SE.
17. Zekavica R(2005), Saradnja policije i građana u okviru koncepta „Policije u zajednici", MUP RS, „Bezbednost" Vol.1, str.83-89.
18. Zakon o policiji Republike Srbije. *Sl.glasnik RS* br. 101/05, 63/09-Odluka US i 91/11.
19. Zakon o Bezbednosno-informativnoj agenciji. *Sl.glasnik RS* br. 42/02, 111/09.
20. Zakon o Vojnobezbednosnoj agenciji i Vojnoobaveštajnoj agenciji. *Sl. glasnik RS* br. 88/09, 55/2012 - odluka US i 17/13.

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STRENGHTENING INSTITUTIONS OF RULE OF LAW AND FIGHT AGAINST CORRUPTION

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Abstract: The Republic of Serbia has been implementing successfully the legal regime the objective of which is to fight against corruption. Legal regime implies intensive legislative and institutional reforms. Intensive reforms imply previous activities which refer to the analysis of the present state *de legelata*, but also *de legeferenda* activities. When the legislative reforms are concerned in the anti-corruption field, it should be pointed out that the National Anti-Corruption Strategy in the Republic of Serbia for the period 2013-2018 has been adopted. In addition to the strategy, and at the recommendation of the Ministry of Justice and Public Administration, on August 25, 2013, the Government of Serbia brought a Resolution to adopt the *Action Plan for the implementation* of the National *Anti-Corruption Strategy* in the Republic of *Serbia* for the period 2013-2018.In the anti-corruption field, we would first point to the Law on Amendments and Additions to the Criminal Code of the Republic of Serbia from 2012. Thusthe standards set by the Council of Europe Criminal Law Convention on Corruption (Third evaluation GRECO report for the Republic of Serbia – Incriminations (ETS 173 and 1919)) have been met. The new Law on Criminal Proceedings provides for the application of special evidentiary activities for corruption-related criminal offences. Only the period to come will show to what extent the legislative reform has influenced the suppression of corruption. Other important laws in anti-corruption field have also been adopted in Serbia, such as: Law on Seizure and Confiscation of the Proceeds from Crime; Law on the Liability of Legal Entities for Criminal Offences; Law on Prevention of Money Laundering and Financing of Terrorism; Law on Financing Political Activities and Public Procurement Law. In the field of institutional regulation, we shall deal with the establishing and work of Anti-Corruption Agency, Anti-Corruption Council, Administration for the Prevention of Money Laundering, Republican Auditing Institution and other institutions important in the fight against corruption.
Keywords: corruption, legal regime, institutional capacities

INTRODUCTORY REMARKS[1]

Successfully established national legal framework for prevention and suppression of corruption includes both permanent strengthening of institutions of a rule of law, which are of crucial importance for the fight against corruption, and the establishing of normative assumptions (corresponding incriminations within criminal legislation, prevention of conflict of interest in the public sector, involvement in both regional and international fight against corruption, as well as establishing ethical standards and transparent financing of political parties). The estimates regarding how much the corruption is widespread tell us that corruption is a true problem of any modern state. Although in historical terms corruption has always existed, it has flourished sincethe introduction of the contemporary administration in 19th century. Corruptive behaviour is damaging in many ways. It endangers legality of social functions, decreases moral values, hinders public administration, and makes judiciary inefficient. However, the greatest damage reflects in the fact that corruption distorts priorities in political decision-making and is detrimental to public responsibility and social morality. According to the corruption index for 2013, Serbia is on 72nd place. These are the reasons why a comprehensive approach is required to this phenomenon, which implies a number of measures and activities directed at strengthening of legal institutions of the state. This is the only true way to protect democratic values, human rights, as well as social and economic progress.

1 This paper is the result of the work on the research project titled "The Development of Institutional Capacitites, Standards and Procedures to fight against organized crime and terrorism under the conditions of international integrations". The Project is funded by the Ministry of Education, Science and Technological Development of the Republic of Serbia (No. 179045), and the research is done at the Academy of Criminalistic and Police Studies in Belgrade (2011-2014).

SOME REMARKS RELATED TO THE NOTION OF CORRUPTION

Corruption has existed since the dawn of time as one of the worst and at the same time the most widespread forms of conduct detrimental to public affair management. Naturally, the customary, as well as historical and geographical circumstances have changed considerably over time, which has led to high sensitivity of the public to such behaviour. As a result of this, the treatment of this form of conduct by laws and regulations has also essentially changed.

Etimologically the word corruption originates from Latin *coruptio*, which has several meanings, depending on the specific circumstance, such as illegal, bad or dishonest behaviour, deviance, bribery, bribe-giving or bribe-taking, corrupt state or condition…[2]Corruption is the problem which requires multidisciplinary approach, and this is why there is not a unique definition. Depending on the aspects from which this phenomenon is observed (psychological, sociological, criminological, etc.) the meanings may differ. This is why corruption is mostly defined descriptionally, which clearly indicates possible indetermination of the concept.[3]It is hardly possible to determine the concept of corruption from the aspect of the criminal law. Considering the criminal law aspect of the problem, it is obvious that it should avoid general clauses or behaviours which represent criminal offence as much as possible and the penalties for it must be determined to the greatest extent possible (*lexcerta*). Otherwise there is great risk of interpretation of understated provisions which would reflect on the legal safety of citizens. There is no need to introduce the notion of corruption into the titles of chapters of criminal offences or to individual incriminations in order to leave the impression that appropriate measures have been undertaken in the field.[4] In Europe, French Napoleonic Code from 1810 can be considered a turning point in terms of introduction of severe penalties in order to suppress corruption in public life, including both the offences which were not contrary to the official obligations of a public servant and those that were. Criminal Law Convention,[5] although having as an objective to develop the general standards related to individual crimes of corruption, does not offer a unified definition of corruption. Multidisciplinary Group against Corruption (GMC)[6]within the Council of Europe has started its operation based on the followingtemporary definition: "*Corruption ... is bribery and any other behaviour in relation to persons entrusted with responsibilities in the public or private sector, which violates the duties that follow from their status as a public official, private employee, independent agent or other relationship of that kind and is aimed at obtaining undue advantages of any kind for themselves or for others."*[7] The purpose of this definition was to make sure nothing is left out beyond the scope of its influence. Although such a definition would not necessarily correspond to the legal definition of corruption in the majority member countries, particularly not to the criminal law definition, its advantage

2 M. Vujaklija, Leksikonstranihrečiiizraza, Beograd, 1975, str. 479.
3 N. Mrvić-Petrović, Korupcijaistrategijanjenogsuzbijanja, Temida, 4/2001, str. 21.
4 Former situation in the Criminal Code of Serbia (from 2002 until January 1, 2006), concerning crimes of corruption was proclaimed atypical in theory for many reasons. First, due to the very title of the chaper that did not relate to the protective object. Second, the description of these crimes mostly corresponded with the existing ones, which resulted in the unnecessary duplication of incriminations and serious problems in practice to delimit between newly prescribed and the existing criminal offences. If the legislator's motive was to make the penalties more sever, this could have been done by the additions to the existing solutions. Third, such casuistric approach was unacceptable concerning criminal law standards. Fourth, the term "corruption" was used both in the title of the chapter and in the title of individual criminal offences, while it was not in the legal description of individual criminal offences, and it was not defined precisely.
5 *The Official Gazette of the Republic of Serbia – International Agreements, No.* 102/2007.
6 At their XIXconference held in Valetta in 1994, European ministers of justice concluded that corruption is serious threat for democracy, rule of law and human rights. Council of Europe, as a leading European institution for the protection of the essential values, has been invited to respond to this threat. The ministers of justice recommended to the Committee of Ministers to create a Multidisciplinary group against Corruption. Within the context of these recommendations, the Committed of Ministers set up the Multidisciplinary Group against Corruption (GMC) in September 1994, which prepared the Programme of Action against Corruption (PAC), the document which attempts to cover all aspects of the international fight against this phenomenon. The reference task of this Group was to draft one or several international conventions against corruption under the responsibility of the European Committee on Crime Problems and the European Committee on Legal Co-operation. In accordance with the objectives determined by the PAC, criminal law work group within the GMC started the work on the Draft Criminal Law Convention.
7 *Criminal Law Convention on Corruption,* ETS 173, 1999, *Explanatory report.*

was in that such a definition would not put the discussion into too narrow a framework.As the draft of the Convention progressed, so the said general definition wasconveyed into several other definitions (active and passive bribery, bribery in the private sector, trading in influence, thatare all closely connected with bribery), which could be implemented into respective national legislations. The UN Convention against Corruption,[8] similarly to the previous one, does not determine the notion of corruption, but in the Chapter titled "Criminalization and Law Enforcement" it determines individual forms of corruptive behaviour.As stated in Article 1, its aim is to promote and strengthen measures to prevent and combat corruption more efficiently and effectively, to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery, and to promote integrity, accountability and proper management of public affairs and public property. Taking into account that the most important international documents in the field of the fight against corruption criminalize only certain forms of corruptive behaviours avoiding to offer a unified definition of corruption confirms the statement made earlier that it is difficult to come to the definition not only within criminal legislation but in general as well.

However, systemic combat against corruption requires the appropriate normative framework within which a starting point would be to determine a problem whose solution should be approached. Therefore, Anti-Corruption Agency Act[9] determines"corruption" as a relation based on abuse of office or social status and influence, in the public or private sector, with the aim of acquiring personal benefits for oneself or another. National Anti-Corruption Strategy in the Republic of Serbia for the period 2013-2018[10]defines corruption as a relation based on abuse of an official or social position or influence,in the public or private sector, aimed at gaining personal benefit, benefit for others, violation of aright or harming others("*abuse of power for privategain").* This concept is used in the UN Global Programme against Corruption, which has been accepted in the EU practice as well (especially mentioned by the EU anti-corruption report of 2011).[11]

NORMATIVE ANTI-CORRUPTION FRAMEWORK IN THE REPUBLIC OF SERBIA

The fact that corruption is widely discussed about in some countries, while it is not discussed at all in some other, does not suggest in any way that it does not exist in the latter since there is not a single governmental system immune to corruption. Silence referring to corruption suggests that the citizens came to terms with ever-present corruption. In such cases corruption is not experienced as unacceptable criminal behaviour which is subject to severe penalties but as normal behaviour which is tolerated.

National Anti-Corruption Strategy in the Republic of Serbia proclaims the principle of "zero tolerance" of corruption. In order to achieve it, it is necessary to establish an applicable normative framework which would, first of all, shape provisions starting from the analysis of social circumstances in the environment we live in.

Our country has adopted a set of significant anti-corruption laws and strategic documents.

First, there is National Anti-Corruption Strategy in the Republic of Serbia for the period 2013-2018. In addition to it, the Government of the Republic of Serbia, at the recommendation of the Ministry of Justice and Public Administration, brought on August 25, 2013, the Resolution to adopt the *Action Plan for the implementation* of the National *Anti-Corruption Strategy* in the Republic of *Serbia* for the period 2013-2018. The structure of the National Anti-Corruption Strategy in the Republic of Serbia for the period 2013-2018 (hereinafter referred to as "the Strategy") is such that it first states the priority field of action, there is a short description of the state-of-affairs and key problems, and then the objectives are formulated the achievement of which would remove the detected problems. The general objective of the Strategy is to remove corruption as much as possible as an obstacle to economic, social and democratic development

8 *TheOfficial Gazette of Serbia and Montenegro* – International Agreements, No. 12/2005
9 *The Official Gazette of the Republic of Serbia*, No. 97/08, 53/10 and 66/11 – Constitutional Court
10 *The Official Gazette of the Republic of Serbia, No.* 57/2013.
11 More in: National Anti-Corruption Strategy in the Republic of Serbia for the period 2013-2018.

of the Republic of Serbia. In the implementation of this Strategy, authorities and holders of public powers that areinvolved in the prevention of and fight against corruption, are obliged to exercise their powers inaccordance with the following general principles: the principle of the rule of law – a guarantee of the legality of actions (equality before thelaw and rights of all citizens to legal remedies), "zero tolerance" to corruption (ndiscriminate application of the law inall forms of corruption), the principle of accountability(an obligation to assume full accountability for creating public policies and their efficient implementation), the principle of universality of implementation of measures and cooperation of entities (a duty to implement measures comprehensively and consistently in all fields, and incooperation, as well as to exchange experiences and harmonize actions of relevant entities atall levels of the government with established good practice), the principle of efficiency(a duty to regularly conduct anti-corruption measures withinone's own powers, and to conduct ongoing training for the purposes of improving efficiencyin the fight against corruption), and the principle of transparency(a guarantee of publicity in the process of adoption andimplementation of decisions, as well as enabling citizens to access information, in accordancewith the law).Although corruption represents a phenomenon that permeates the entire society, the Strategy highlights individual areas of priority which have been recogniezed as crucial for building and strengthening of system anti-corruption mechanisms (political activities, public finances, public expenditures, public internal financial control, external auditing and protection of financial interests of the EU, legislation, police, urban planning and construction, health care system, education and sports and media).

Second, there is the Anti-Corruption Agency Act[12]which governs establishment, legal status, competencies, organization and operation of the Agency for combating corruption, rules concerning prevention of conflicts of interest in discharge of public office and property disclosure reports of persons holding public office, and introduction of integrity plans.The Agency is an autonomous and independent state body. The Agency is accountable to the National Assembly of the Republic of Serbia for performance of duties from its purview. The most important competencies of the Agency are: to rule on conflicts of interest ("conflict of interest" is a situation where an official has a private interest that affects, may affect or may be perceived to affect actions of an official in discharge of office or official duty in a manner that compromises public interest); tokeep a register of the officials; to keep a register of property and income of officials; to monitor the implementation of the National strategy for fight against corruption and the Action plan for the implementation of the National strategy for the fight against corruption; to launch initiatives for amending and enacting regulations in the field of combating corruption, etc.

Third, the Criminal Code includes provisions which are important for suppression of corruption. The Criminal Code of the Republic of Serbia meets the standards set by the international documents in the field of combat against corruption to a great extent.[13] The international sources in the anti-corruption field relevant for criminal law response are the Council of Europe Criminal Law Convention on Corruption,[14]the Additional Protocol to the Criminal Law Convention on Corruption of the Council of Europe[15] and the UN Convention against Corruption.[16] The majority of obligations taken over by the ratification of the international documents have been fulfilled by

12 *TheOfficial Gazette of the Republic of Serbia*, No. 97/2008, 53/2010, 66/2011 – Decision of the Constitutional Court and 67/2013 - Decision of the Constitutional Court

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

14 The Convention was open for ratification on January 27, 1999, and it came into force on July 1, 2002. Serbia ratified this Convention and thus undertook an obligation to harmonize the provisions of this Law with the source of law. See: *Official Gazette of Serbia and Montenegro*, International Agreements, No. 2/2002

15 The Agreement was open for ratification on May 15, 2003, and entered into force on February 01, 2005. The Additional Protocol to the Criminal Law Convention on Corruption was ratified by Serbia on November 6, 2007. See: *Official Gazette of the Republic of Serbia*, International Agreements, No. 102/2007

16 The Republic of Serbia ratified the UN Convention against Corruption. The Convention entered into force in Serbia on October 30, 2005. See: *Official Gazette of Serbia and Montenegro*, International Agreements, No. 12/2005.

Serbia in the previous period when the Criminal Code of the Republic of Serbia came into force on January 01, 2006. Criminal offences related to suppression of corruption in the Criminal Code of Serbia are classified primarily in the group of criminal offences against the official duty. These are: abuse of office (Article 359 of the Criminal Code), unlawful mediation (Article 366 of the Criminal Code), soliciting and accepting bribes (Article 367 of the Criminal Code) and bribery (Article 368 of the Criminal Code). The Code has corresponding incriminations for other criminal offences mentioned in the Criminal Law Convention of the Council of Europe and the UN Convention against Corruption, which are directed at suppression of some forms of corruptive actions, i.e. they are directed at commitment or concealing of criminal offences of corruption or other corruption-related criminal offences. These criminal offences may not be titled in the same manner as in the said conventions but their objective is the same. These offences include: money laundering[17] (Article 231 of the Criminal Code), reset (Article 221 of the Criminal Code), embezzlement[18] (Article 364 of the Criminal Code) and other. It should be particularly pointed out that all international documents in the field of the fight against corruption insist on introduction of criminal liability for legal entities. Our country has fulfilled this obligation as well when the Law on the Liability of Legal Entities for Criminal Offences was brought in 2008.[19]

Law on Amendments and Additions to the Criminal Code from December 2012[20] adopted the recommendations of the Group of States against Corruption of the Council of Europe (GRECO),[21] which were made within the third round of evaluation and which refer to criminal offences of corruption. Law on Amendments and Additions to the Criminal Code from 2012 gives the following amendments fulfilling the recommendations presented in the GRECO report.[22] First of all, Article 2 extends the possibility to apply the criminal legislation of the Republic of Serbia even in cases when criminal offence is not punishable according to the law of the country where it was committed (Art. 10, paragraph 2 of the Criminal Code). The exception from dual culpability for criminal prosecution and the application of the domestic criminal law was foreseen only in cases if there was a permission of the Republic Public Prosecutor. The suggested amendment extends this possibility to the cases provided for by the ratified international agreements, as is the case with the criminal offences of corruption. This manner of regulation would not require further amendments and additions to the Criminal Code in the future if an international agreement provides for the obligation by the Republic of Serbia to implement its criminal law although such conduct does not represent a criminal offence in the country where it was committed. Article 12 of the Law on Amendments and Additions to the Criminal Code also adds to Article 112 of the Criminal Code, which determines the meaning of the terms used in the Code. According to GRECO recommendations the meaning of the terms of official, foreign official and responsible person isdefined and extended. To that effect the provision determining the term of official has been changed to include the following: public notary, executor and arbitrar, as well as a person in an institution, enterprise or other subject who has been vested a public authority, who decides about the rights, obligations or interests of physical persons or legal entities or public interest. A foreign official is a person who is a member of a legislative, executive or judicial authority of a foreign State, a judge, a juror, a member, an official or an officer of a foreign state or international court, public official or officer of an

17 The Criminal Law Convention of the Council of Europe mentions "Money laundering of proceeds from corruption offences, and the UN Convention against Corruption mentions "Laundering of proceeds of crime".

18 The UN Convention uses the title "Embezzlement, misappropriation or other diversion of property by a public official" and particularly "Embezzlement of property in the private sector"

19 *The Official Gazette of the Republic of Serbia, No.* 97/08.

20 *TheOfficial Gazette of the Republic of Serbia, No.* 121/2012.

21 GRECO (Group of States against Corruption) is the mechanism of the Councl of Europe devised in order to improve the anti-corruption regulations and their implementation in the member countries, primarily the implementation of the Council of Europe anti-corruption conventions. Our country is GRECO member as of 2003. The main part of the GRECO work is carried out in cycles – evaluation rounds performed by qualified representatives of member countries in other member countries. Evaluation rounds cover specific themes important for the fight against corruption..

22 More details about the amendments and additions in: Z. Stojanović, D. Kolarić, Novarešenjaukrivičn omzakonikuSrbije, *Bezbednost*, br. 3/2012, Beograd: MinistarstvounutrašnjihposlovaRepublikeSrbije, str. 7-33.

international organisation or bodies thereof, judge or other official of an international tribunal. The notion of a responsible officer has also been defined differently, and the most important difference in comparison with the old solution is that the owner of a business enterprise is not automatically considered a responsible officer unless he/she performs an office and tasks which give him/her the position of a responsible officer. Therefore, a responsible officer in a legal entityis a person in acompany, institution or other entity to whom, by virtue of his/her office, invested funds are entrusted or who is authorised to perform a specific scope of tasks in respect of management of the property, production or other activity or in supervision thereof, or is in fact entrusted with the discharge of particular duties. A responsible officer shall also be the official in case of criminal offences designating the responsible person as perpetrator, when such offences are not provided in the Chapter on criminal offences against official duty or criminal offences of an official. Articles 36 and 37 of the Law, and in accordance with GRECO recommendations amend and make additions to the provisions of Article 367 and 368 of the Criminal Code, incriminating the criminal offences of active and passive bribery in such a way that these offences can be committed not only as a part of someone's power but also related to it. In addition to this, paragraph 6 of Article 368 of the Criminal Code is deleted, also pursuant to the recommendations, which used to provide for the possibility to return the bribe to the person who gave it.

It is important to point out that the Law on Amendments and Additions to the Criminal Code from 2012, when dealing with the issue of suppression of corruption, introduces also new criminal offences (criminal offences related to public procurement). Also, there were changes of some criminal offences where criminal scope was too wide, so that instead of offering more efficient criminal law protection from the offences which included some form of corruption they jeopardized some important values and interests of both the citizens and society (criminal offence of misuse of office).[23] We can conclude at the end of this part of discussion that these requirements, which refer to harmonization with Criminal Law Convention on Corruption and its Additional Protocol, have been met.

The fourth round of GRECO evaluation has started. Serbia will be in the focus of observation in December 2014. The fourth round refers to "Corruption prevention in respect of members of parliament, judges and prosecutors."

Fourth, the Law on the Liability of Legal Entities for Criminal Offences regulates the conditions for liability of legal entities for criminal offences, criminal penalties which can be given to legal entities and the rules of procedure in which it is decided about the liability of legal entities. As for the scope of criminal offences legal entities can be found liable for, our legislator could choose between the two alternatives – to itemize all criminal offences for which legal entities can be found liable or to provide for the liability for all criminal offences – and the legislator chose the latter. Therefore, Article 2 of the Law says that a legal entity may be liable for criminal offences constituted under a special part of the Criminal Code and under other laws if the conditions governing the liability of legal entities provided for by this Law are satisfied. In other words, the Law does not regulate the matter of the special part but refers to the Criminal Code of Serbia and other laws, i.e. to secondary criminal legislation. Many specific features referring to legal entities as subjects of criminal offences resulted in this matter being regulated by a separate law.This is, actually, special criminal law for legal entities.[24]It is the respect of the basic criminal law principles that influenced the adoption of the basic starting concept regarding the liability of legal entities for criminal offences, and this is derivative liability based on the liability of a natural person for a criminal offence.[25] Article 6 of the Law sets several conditions which must be satisfied cumulatively in order for the liability of a legal entity to exist. First, it is necessary that a criminal offence has been commiteed by a natural person. Second, this person must hold the position of a responsible person in a legal entity. Third condition points out that it is necessary for a responsible person to act within the scope of his/her powers. Finally, the

23 More on this in: D. Kolarić, Učinilackrivičnogdelazloupotrebeslužbenogpoložaja – jedanosvrtnačlan 359. KrivičnogzakonikaSrbije, *Pravnariječ*, BanjaLuka: UdruženjepravnikaRepublikeSrpske, Vol. IX, br. 33/2012,str. 347-365.
24 Z. Stojanović, R. Shine,*KomentarZakonaoodgovornostipravnihlicazakrivičnadjela*, Podgorica, 2007. godina, str. 15.
25 Ibidem.

fourt condition requires the existence of intent on the part of a responsible person to commit criminal offence for the benefit of the legal person. Therefore, when talking about a legal entity in relation to which the question of criminal liability is posed, we differentiate between a natural person as a source subject and a legal entity as a derivative subject of criminal liability. This concept has been adopted by the majority of contemporary criminal legislations which accepted the idea of criminal liability of a legal entity. The model of original liability would create serious difficulties in implementation when the existence of guilt should be determined, or a criminal offfence of a legal entity which, according to this model, exists independently from the criminal liability of a responsible natural person.[26] The concept of derivative liability suggests that legal entity is not liable for its own criminal offence but for the criminal offence of its responsible person. As it is pointed out in Article 7 paragraph 1 of the Law, liability of legal entities shall be based upon culpability of the responsible person. It is necessary at that for all features of a criminal offence provided for by the Criminal Code to be present, i.e. that it is the action which is labelled as a criminal offence by the law, that it is wrongful and committed with guilt.

Fifth, the Public Procurement Law[27] and the Law on Financing of Political Activities[28] have significantly increased transparency and efficiency in fighting against corruption. The new Public Procurement Law which came into force on April 1, 2013, together with the novelties of the Criminal Code referring to misuses in the procedures of public procurement, have significantly strengthened the system of prevention and suppression of corruption in public procurement. Also, the Law on Financing of Political Activities includes the anti-corruption provisions. This Law regulates the sources and manner of financing, records and control of financing of activities of political parties, coalitions and citizens' group. With the purpose of more efficient control, the contributions can be made only by payments through the donor's account, with the obligation of a political party to make records of each payment and to publish each donation exceeding at annual level one average monthly salary. The Law prohibits giving a donation to a political entity through a third party, concealing identity of donor or amount of donation.The parties must keep records and submit financial reports which are controlled by the Anti-corruption Agency and in case of breaking of law the Agency launches the procedure and undertakes the corresponding measures. There is an obligation of a political entity for the purpose of raising funds for election campaign financing to open a separate account that may not be used for other purposes. It is stated in detail that the Anti-Corruption Agency may, after conducting control of financial reports of a political entity, forward a request to the State Audit Institution to audit these reports, in accordance with the law governing competencies of the State Audit Institution.

Sixth, the Draft Law on Protection of Whistleblowers which regulates whistleblowing, whistleblowing procedure, rights of whistleblowers, obligations of the state authorities and other authorities and organizations in relation to whistleblowing, as well as other issues of importance for whistleblowing and protection of whistleblowers is in the stage of public debate.

FIGHT AGAINST CORRUPTION AND INSTITUTIONAL CAPACITIESOF THE REPUBLIC OF SERBIA

The efficient institutional approach means cooperation and coordinated activities of the most important institutions that work on prevention, detection and sanctioning of corruption. In Serbia these instutitons are: the Administration for the Prevention of Money Laundering, the Republic Prosecutor Office, the Administration for Public Procurement, the Tax Administration, the Anti-corruption Agency,[29]the Criminal Force Directorate, the State Audit Institution and the Anti-corruption Council.

The Administration for the Prevention of Money Laundering is the financial-intelligence unit of the Republic of Serbia, which is the central anti-money laundering and counter-terrorist financing body in the system. The Administration's powers and responsibilities are provided for in the Law on the Prevention of Money Laundering and Terrorist Financing. The obliged entities under the Law on the Prevention of Money Laundering and Terrorist Financing send

26 Ibidem.
27 *TheOfficial Gazette of the Republic of Serbia*, No. 124/2012.
28 *TheOfficial Gazette of the Republic of Serbia*, No. 43/2011.
29 More on the competencies of the Agency has already been said in previous presentation.

to the Administration the reports on suspicious transactions and persons; the Administration then further analyses these reports and collects the additional data about them, and if it finds reasonable grounds to suspect money laundering or terrorist financing in a specific case, the Administration then discloses such data to the relevant bodies, primarily to the competent prosecutors' offices and police. The Administration cansuspect based on its own analyses and assessments and without a prior report of suspicios transaction that a person or an organised crime syndicate launders money or finances terrorism, and then request the additional data from obligors and other state authorities. Also, the Administration can start collecting and analysing data upon the initiative of another state authority, such as the court, prosecutors' office, Security Information Agency, Privatisation Agency, Securities Commission, police, etc.

The Anti-Corruption Council was established by The Decision of The Government of the Republic of Serbia on 11th October 2001. The Council is an expert, advisory body of the Government, founded with a mission to see all the aspects of anti-corruption activities, to propose measures to be taken in order to fight corruption effectively, to monitor their implementation, and to make proposals for bringing regulations, programs and other acts and measures in this area.

The Public Prosecution for Organized Crime was established by the Law on Public Prosecution,[30] and it started its work on January 01, 2010. Law on Organization and Jurisdiction of Government Authorities in Suppression of Organized Crime, Corruption and Other Severe Criminal Offences[31] in Article 2 defines the criminal offences the public prosecution is competent for. The Law is applied for detection, criminal prosecution and processing of: 1) Criminal offences of organised crime; 2) Criminal offences against constitutional order and security of the Republic of Serbia (Articles 310 through 312 of the Criminal Code); 3) Criminal offences of the abuse against official duty (Articles 359, 366, 367 and 368 of the Criminal Code), when an accused, that is, a person receiving the bribe, is an official or a responsible person holding public office, on the grounds of the election, designation, or appointment by the National Assembly, the Government, High Judicial Council, or the State Prosecutorial Council; 4) Criminal offence of the abuse of an official position (Article 359, paragraph 3 of the Criminal Code), when the value of the acquired property gain exceeds the amount of 200,000,000 Dinars; 5) Criminal offence of the international terrorism and criminal offence of financing terrorism (Articles 391 and 393 of the Criminal Code); 6) Criminal offence of money laundering (Article 231 of the Criminal Code), when the property which is the object of money laundering originates from the criminal offences from the subparagraphs 1), 3), 4) and 5) of this Article, 7) Criminal offences against government authorities (Article 322, paragraphs 3 and 4 Article 323, paragraphs 3 and 4 of the Criminal Code) and criminal offences against judiciary (Articles 333 and 335, Article 336, paragraphs 1, 2 and 4, and Articles 336b, 337 and 339 of the Criminal Code), if they are committed in relation to criminal offences in the subparagraphs 1 through 6 of this Article.

The Public Procurement Office is set up as an independent governmental organization which supervises the implementation of the Public Procurement Law, participates in drafting the regulations pertaining to public procurement, provides consulting services in the field of public procurement, monitors the public procurement procedures, controls the application of certain procedures, manages the Public Procurement Portal, prepares reports on public procurements, recommends measures to improve public procurement system, provides consulting services to procuring entities and bidders, and contributes to creation of conditions for economic, efficient and transparent use of public funds in the public procurement procedure.In monitoring the implementation of the Public Procurement Law, all state organs and organizations, services and organs of territorial autonomy and local government, bidders and procuring entities are obliged to submit to the Public Procurement Office the requested information and documents which are in their possession or under their control within the period of time determined by the Public Procurement Office.

State Audit Institution is the highest authority for auditing of public funds in the Republic of Serbia. It was founded in 2005, by virtue of the Law on the State Audit Institution.

30 *The Official Gazette of the Republic of Serbia* No. 116/2008 and 104/2009.
31 *The Official Gazette of the Republic of Serbia* No. 42/02, 27/03, 39/03, 60/03, 67/03, 29/04, 58/04, 45/05, 61/05, 72/09.

State Audit Institution is an independent state authority.The Institution performs activities stemming from its competence pursuant to the Constitution of the Republic of Serbia, the Law on the State Audit Institution and the Rules of Procedures of the State Audit Institution, which, pursuant to the Law, defines in detail the manner and procedure for performing activities stemming from the competence of the Institution, manner of ensuring transparent operation, decision-making process and other matters significant for the work of the Institution pursuant to the Law.Audit departments are managed by the Supreme State Auditors. Audit activities are conducted by state auditors (state auditor and certified state auditor).

The activities of the Ministry of Internal Affairs in the fight against corruption at all levels, both preventive and repressive, represent crucial assumption to create conditions for efficient and effective conduct of criminal procedures against perpetrators of these crimes. The Ministry of Internal Affairs adopted in January 2011 the Strategy of the Development of the Ministry of Internal Affairs, in which one of the objectives is to "develop capacities of criminal police for more efficient and effective action."In order to strengthen police capacities in the fight against corruption, it is necessary to establish a special task force. The National Anti-Corruption Strategy points out as the main objectives the strengthened capacities of the police to conduct investigations of criminal offences with the elements of corruption and the strengthening of integrity and internal control mechanisms in order to suppress corruption within police organization.

CONCLUDING REMARKS

When the fight against corruption is concerned, both prevention and repression are equally important. In addition to repression, which primarily includes criminal law, there are also preventive means available to contemporary societies, which should take the main place in successfully set strategy of the fight against corruption. The most important fact in the field of prevention is to strengthen the rule of law, the institutions involved in the fight against corruption, transparency in decision-making and efficient normative framework. In brief, prevention is characterised by building of institutions and their integrity. Criminal law, in addition to its distinctly repressive component, has also prevention as its final objective, since sanctions tend to have influence not only on crime perpetrators but also on potential perpetrators.[32] Therefore, prevention of corruption implies successful detection, prosecution, efficient application of criminal penalties and, what is the most important, the incrimination of corruptive behaviours, taking into account at that the obligations undertaken based on the international conventions.

When we are talking about combating corruption *de legeferenda*, it should consider introducing into the criminal law a new criminal offence of illicit enrichment since it is also recommended by the UN Convention against Corruption. Also, the crime titled "failure to report property or reporting false information" in the Anti-Corruption Agency Act (Article 72 of the Act) requires certain amendments. It is necessary to establish a normative framework to protect the rights of whistleblowers, which is in accordance with the provisions of the Civil Law Convention on Corruption, but also with the European Committee Progress Report on Serbia for 2013. It is also important to prepare for the fourth round of GRECO evaluation which started in 2012, and which refers to rather sensitive areas: conflict of interest, register of property of public officials, gifts, lobbying and transparency of political processes.

REFERENCES

1. *Criminal Law Convention on Corruption,* ETS 173, 1999, *Explanatory report.*
2. Groupe of States against Corruption, *Third Evaluation Round, Evaluation Report on the Republic of Serbia-Incriminations (ETS 173 and 191, GPC 2),* Adopted by Greco at its 48th Plenary Meeting (Strasbourg, 27 September – 1 October 2010).
3. Kolarić, D; Učinilac krivičnog dela zloupotrebe službenog položaja – jedan osvrt na član 359. Krivičnog zakonika Srbije, *Pravna riječ*, Banja Luka: Udruženje pravnika

32 Z. Stojanović, Krivičnopravo-opšti deo, Beograd, 2013, strana 6.

Republike Srpske, Vol. IX, br. 33/2012.
4. Mrvić-Petrović, N; Korupcija i strategija njenog suzbijanja, Temida, 4/2001.
5. Stojanović, Z; Krivično pravo-opšti deo, Beograd, 2013.
6. Stojanović, Z, Shine, R; Komentar Zakona o odgovornosti pravnih lica za krivična djela, Podgorica, 2007.
7. Stojanović, Z, Kolarić, D; NovarešenjaukrivičnomzakonikuSrbije, Beograd,*Bezbednost*, br. 3/2012.
8. *The Official Gazette of the Republic of Serbia* No. 42/02, 27/03, 39/03, 60/03, 67/03, 29/04, 58/04, 45/05, 61/05, 72/09.
9. *The Official Gazette of the Republic of Serbia* No. 116/2008 and 104/2009.
10. *TheOfficial Gazette of the Republic of Serbia*, No. 43/2011.
11. *TheOfficial Gazette of the Republic of Serbia*, No. 124/2012.
12. *The Official Gazette of the Republic of Serbia, No.* 97/08.
13. *TheOfficial Gazette of the Republic of Serbia, No.* 121/2012.
14. *The Official Gazette of the Republic of Serbia, No.* 57/2013.
15. Vujaklija, M; Leksikon stranih reči i izraza, Beograd, 1975.

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UNLAWFUL DEPRIVATION OF LIBERTY - WITH A SPECIAL FOCUS TO THE REPUBLIC OF MACEDONIA

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Abstract: According to the Article 140 of the Macedonian Criminal Code, a person who unlawfully arrests, keeps detained or in some other way deprives or limits the freedom of movement of another, commits an unlawful deprivation of liberty. This criminal act has a specified object of protection - the freedom of movement, and for its existence, the performance must be unlawful.

Having in mind the Article 12 of the Macedonian Constitution, as well as the Article 5 of the European Convention of Human Rights and Fundamental Freedoms, the paper shall focus on the implementation of these elementary provisions in the Republic of Macedonia. Therefore, the paper shall study the statistical data with a special notice to the reported, accused and convicted perpetrators in the period 2008 - 2012, shall analyze the judgments concerning the cases against Republic of Macedonia in which the European Court of Human Rights holds that there has been a violation of Article 5 of the said Convention, and shall compare them with other relevant judgments.

Keywords: Unlawful deprivation of liberty; Criminal act; Republic of Macedonia

INTRODUCTION

Irrevocability of the human freedom is one of the basic postulates defined in Article 12 of the Constitution of the Republic of Macedonia (Macedonia).[1] Namely, no person's freedom can be restricted except by a court decision or in cases and procedures determined by law, which means that the person unlawfully deprived of his/her liberty, detained or convicted has a right to a legal redress and other rights determined by law (Article 13 Paragraph 2). Also, in this context is the Article 27, under which every Macedonian citizen has the right to a free movement on the Macedonian territory and freely to choose his/her place of residence. Further, every citizen has the right to leave and to return to the Macedonian territory. The exercise of these rights may be restricted by law only in cases where it is necessary for the protection of the Macedonia's security, conduction of a criminal procedure or protection of people's health.[2]

The Macedonian Constitution clearly sets out the foundations of the fundamental rights of the person summoned, detained or deprived of liberty,[3] that are further developed in the

1 See: Constitution of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia" No. 52/1991), and its Amendments ("Official Gazette of the Republic of Macedonia" No. 01/1992, 31/1998, 91/2001, 84/2003, 107/2005, 03/2009, 13/2009, 49/2011).

2 The Constitution also contains a general provision under which the rights and freedoms of the individual and citizen can be restricted only in cases determined by the Constitution (Article 54), and may be restricted during states of war or emergency. But, their restriction cannot be discriminated on grounds of gender, race, color of skin, language, religion, national or social origin, property or social status.
There is an additional limitation - the restriction cannot be applied to the right to life, prohibition of torture, inhuman and degrading treatment and punishment, legal determination of offenses and sanctions, as well as to freedom of belief, conscience, thought, public expression of the thought and religion.

3 Constitution's Article 12 states that a person must be immediately informed about the reasons for the summons, detention or deprivation of liberty, on his/her rights established by law and he/she shall not be forced to make a statement. Also, the person has the right to an attorney in the police and judicial procedure. The person deprived of his/her liberty, no later than 24 hours from the time of his/her deprivation, shall be brought before a court, who will decide without a delay on the lawfulness of his/her detention.

Law on Criminal Procedure,[4] Law on Police,[5] Law on Execution of Sanctions,[6] etc. Also, this path is followed by numerous international documents ratified by Macedonia, including the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention),[7] and particular the Article 5,[8] that defines the right to liberty and security.[9]

ANALYSIS OF THE CRIMINAL CODE AND THE STATISTICAL DATA

Macedonian Criminal Code (CC) systematizes the criminal acts against the rights and freedoms of human and citizen in the Chapter XV.[10] Based on their narrower object of protection, these criminal acts can be categorized into four groups: acts against the equality of freedom and rights, acts against freedoms, acts against personal rights and acts against other rights.[11] The second group or acts against freedoms includes Unlawful deprivation of liberty (CC's Article 140), that is performed by a person who unlawfully arrests, keeps detained or in some other way deprives or limits the freedom of movement of another.[12] This means that the object of protection is the freedom of movement, while the action of execution is any activity by which this freedom is taken or restricted. Specific for this act is that the legislator first enumerates the acts of execution (to arrest, to keep detained), and then uses a general clause (or in some other

4 At this moment, two procedural laws are applicable in Macedonia: Law on Criminal Procedure - LCP ("Official Gazette of the Republic of Macedonia" No. 15/1997, 44/2002, 74/2004, 15/2005 - consolidated text, 83/2008, 67/2009, 51/2011), that applies to the procedures initiated prior the start of the application of new LCP - N-LCP ("Official Gazette of the Republic of Macedonia" No. 150/2010, 51/2011) and will be completed in accordance with the provisions of the LCP. The N-LCP started to apply on 01 December 2013. Both laws contain provisions on the right to a redress and rehabilitation (person unlawfully deprived of his/her liberty, detained or convicted, has the right to a redress from the budget, has the right to be rehabilitated, as well as other rights established by law - LCP's Article 11 and N-LCP's Article 13), and also special chapters devoted to the Procedure for redress, rehabilitation and exercising other rights of persons who have been unjustifiably convicted and unreasonably or unlawfully deprived of their liberty (LCP's Chapter XXXII and N-LCP's Chapter XXXVI).
Furthermore, although the LCP regulates the rights of persons throughout the procedure, one of the characteristics of the N-LCP is detailed regulation of the rights of the person summoned, detained or deprived of liberty (Article 69), accused person's rights (Article 70), and measures to ensure the presence of the accused (particularly arrest - Article 157; deprivation of liberty - Article 158; police detention - Articles 159-162; house detention - Article 163; detention - Articles 164-180). Also, several provisions point out to the court supervision and examination of the legality of the deprivation of the liberty and the police detention (Article 162), revocation of detention (Article 173) and supervision of detainees (Article 180), examination of the legality of the actions taken in pre-investigative procedure i.e. during the execution of the police actions (Article 290).
5 Regarding the police actions, especially important are the Law on Police ("Official Gazette of the Republic of Macedonia" No. 114/2006, 6/2009, 145/2012), and the Regulations on the manner of conducting the police tasks ("Official Gazette of the Republic of Macedonia" No. 149/2007, 110/2011).
6 Law on Execution of Sanctions ("Official Gazette of the Republic of Macedonia" No. 2/2006, 57/2010).
7 Law on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the First Protocol, Protocol No. 4, Protocol No. 6, Protocol No. 7 and Protocol No. 11 to the said Convention ("Official Gazette of the Republic of Macedonia" No. 11/1997); Protocol No. 12 ("Official Gazette of the Republic of Macedonia" No. 30/2004); Protocol No. 13 ("Official Gazette of the Republic of Macedonia" No. 30/2004); Protocol No. 14 ("Official Gazette of the Republic of Macedonia" No. 30/2005); Protocol No. 14 *bis* to the said Convention ("Official Gazette of the Republic of Macedonia" No. 41/2010).
8 Analysis of this Article, see in: M. MACOVEI: *The right to liberty and security of the person - A guide to the implementation of Article 5 of the European Convention on Human Rights,* Handbook No. 5, 2003.
9 Compare to the Article 2 "Freedom of movement" of the Convention's Protocol No. 4.
10 Criminal Code ("Official Gazette of the Republic of Macedonia" No. 37/1996, 80/1999, 04/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 07/2008, 139/2008, 114/2009, 51/2011 - two changes and amendments, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013).
11 See: В. КАМБОВСКИ: *Казнено право - посебен дел (четврто, дополнето издание),* Скопје, 2003, p. 93-97. According to: Г. МИТРОВИЋ: *Кривично право: посебни део*, Београд, 1997, p. 160-161, unlawful deprivation of liberty falls under the criminal acts against the freedom of movement.
12 This criminal act can also be performed by omission.
The act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or a person or persons for whom the accused bears criminal responsibility with the intent to deprive the individual arbitrarily of his or her physical liberty (See: ICTY, *Krnojelac case (IT-97-25),* Judgment, 15 March 2002, Paragraph 115) or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty (See: ICTY, *Simić case (IT-95-9-T),* Judgment, 17 October 2003, Paragraph 64)..

way) under which all actions that are similar to the previously mentioned fall under (by which the freedom of movement can be deprived or limited).[13] In order the act to exists, the execution must be unlawful, which means that if the person voluntarily agrees to be deprived of his/her liberty - the act does not exist because the executor does not have an intention to deprive his/her liberty.[14] But, there are cases where the deprivation of the liberty is legally allowed despite the fact that the person deprived of his/her liberty does not agree with the deprivation (for example, in police detention, detention).[15] Hence, any person who is capable to use his/her freedom of movement can be seen as a passive subject of this criminal act.[16]

CC prescribes that the attempt to commit this act is punishable (Paragraph 3), while severe forms of this intentional act withdrawn a graver punishment. If fine or imprisonment up to one year is stipulated for the primary act, then the severe forms are followed by these sanctions:

from six months to three years imprisonment (Paragraph 2) - if the act is committed while performing a family violence (novelty introduced by CC's amendments in 2004),

from six months to five years imprisonment (Paragraph 4) - if the act is performed by an official person, by misusing his/her official position or authorization,[17]

from one to five years imprisonment (Paragraph 5) - if the unlawful deprivation of liberty lasted longer than 30 days, or if it was performed in a cruel manner, or if the health of the unlawfully arrested person was seriously damaged because of this, or if some other serious consequences have occurred,

at least four years imprisonment (Paragraph 6) - if the person unlawfully deprived of his/her liberty lost his/her life because of this.[18]

It derives that this criminal act applies only to one aspect of Convention's Article 5 (deprivation of liberty which is unlawful), i.e. other aspects of Article 5 are not covered by the CC's Article 140.

Concerning the annual reports for the perpetrators of criminal acts prepared by the Macedonian State Statistical Office,[19] the following situation can be established:

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13 Ђ. ЂОРЂЕВИЋ: *Кривично право - посебни део,* Београд, 2009, p. 49, notes that the third form is some other way of depriving or limiting the freedom of movement which can be performed in several different ways (e.g. removing the staircase by which a person has popped up on the roof, subtracting the crutches of a disabled person, bringing a dangerous animal under a tree where a person has climbed etc.)

14 According to: В. КАМБОВСКИ: *Казнено право - општ дел (второ издание)*, Скопје, 2005, p. 454-455, the consequence of this criminal act is deprivation or restriction of the freedom of movement, but the act has prolonged duration. Legal essence includes the prolonged maintaining of such unlawful situation that lasts along with the length of the deprivation of the victim's liberty. Hence, the prolonged act is completed in a formal sense by the causing the consequence (the detaining of the victim!), but in material sense the act is completed when the duration of unlawful situation ends!

Г. МАРЈАНОВИЌ: *Македонско кривично право - Општ дел (шесто, изменето и дополнето издание)*, Скопје, 2003, p. 114-115, estimates that the act is completed at the moment when the unlawful situation ends, so - not at the moment of the deprivation of liberty itself, with a note that the length of the unlawful situation, even when it is irrelevant to the existence of the criminal act (in its primary or severe form) has a great influence over the sentence determination.

15 Љ. ЈОВАНОВИЋ / Д. ЈОВАШЕВИЋ: *Кривично право II: посебни део,* Београд, 1995, p. 152, indicate examples where the deprivation of the liberty is permitted: detaining of a dangerous mentally ill person till his/her placement in a mental institution, a short-term detention of a minor by the parent, guardian or teacher who took it as an upbringing measure.

16 Namely, Љ. ЈОВАНОВИЋ / Д. ЈОВАШЕВИЋ: *op. cit.*, p. 151, state that it is irrelevant whether the person can move independently or with a help of technical means. This criminal act cannot be committed towards a paralyzed or an immobile person, unless his/her movement by help of others is being disallowed. Passive subject can be a mentally incompetent person if his/her freedom has not been deprived under a court order due to his/her danger to the surroundings.

17 In this case, according to В. КАМБОВСКИ: *op.cit.,* p. 109, the official position or authorization are being misused, when the official person has decided to deprive a person of his/her liberty without any legal ground, or without a previously brought legal decision, or when the official person keeps someone detained although the decision's deadline has expired.

18 The sentence was tightened in 2004 i.e. the lower threshold of punishment was increased from three to four years imprisonment.

19 See: State Statistical Office of the Republic Macedonia: *Annual report for the perpetrators of criminal offences - 2008…2012*.

Year	Act	Reported	Accused	Convicted
	Total	26409	11310	9503
2008	Chapter XV	296	244	173
	Article 140	38	32	30
	Total	30404	11905	9801
2009	Chapter XV	410	281	185
	Article 140	50	8	25
	Total	30004	11239	9169
2010	Chapter XV	500	335	217
	Article 140	53	41	37
	Total	31284	12219	9810
2011	Chapter XV	357	353	240
	Article 140	28	36	30
	Total	31860	11311	9042
2012	Chapter XV	407	330	223
	Article 140	51	32	23

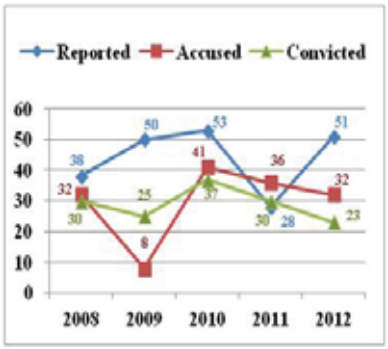

Table No. 1: Reported, accused and convicted adult persons (period 2008-2012)

Notable from the Table above, the criminal act of the Article 140 participates with a very small percentage in the total number of criminality, while concerning the criminal acts of the Chapter XV - it participates with approximately 12%. In the period 2008-2012, 220 persons were reported (average: 44), 149 were accused (average: 29,8) and 145 persons were convicted (average: 29). The most persons have been reported in 2010 (53) and the least in 2011 (28). Also, most persons have been accused in 2010 (41) and the least in 2009 (8). As for the convicted persons, once again in 2010 most persons have been convicted (37), and in 2012 the least (23).

ARTICLE 5 OF THE CONVENTION THROUGH THE CASES AGAINST REPUBLIC OF MACEDONIA

Although by the Convention's ratification, Macedonia obliged to respect its provisions, the summarization of the decisions of the European Court of Human Rights (the Court) issued in respect of Macedonia starting from 1998 till 31 December 2012, shows that 5 judgments hold that there is a violation of the Article 5 (5% of the total number of judgments with violation).[20] Given that in 2013 one more judgment was delivered, the following preview can be given:[21]

20 According to: Министерство за правда - Биро за застапување на Република Македонија пред Европскиот суд за човекови права - Владин агент на Република Македонија: *Годишен извештај за работата на Владиниот агент и анализа на предметите и постапките пред Европскиот суд за човекови права за 2012 година,* Скопје, 2013, p. 10-12, the situation for the period 1998-2012 is as follows: 91 judgments (87 with violation and 4 with non-violation), 181 decisions on friendly settlements, 45 decisions on making a unilateral declaration by Macedonia (recognition of the violation), and 47 decisions on inadmissibility of the application or striking the application out.

The 2013 report is not published yet.

21 See: http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"languageisocode":["ENG"],"respondent":["MKD"],"article":["5","5-1","5-1-b","5-1-c","5-1-c+5-2","5-1-e","5-2","5-3","5-4","5-5"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]}

No	Case	Application (number and date of submission)	Judgment	Violation
1	*Lazoroski v. Macedonia*	No. 4922/04 24 January 2004	8 October 2009 08 January 2010 (Final)	Article 5 Paragraph 1 (c) Article 5 Paragraph 2
2	*Trajče Stojanovski v. Macedonia*	No. 1431/03 18 December 2002	22 October 2009 22 January 2010 (Final)	Article 5 Paragraph 1 (e)
3	*Mitreski v. Macedonia*	No. 11621/09 20 February 2009	25 March 2010 25 June 2010 (Final)	Article 5 Paragraph 4
4	*Vasilkoski and Others v. Macedonia*	No. 28169/08 20 May 2008	28 October 2010 28 January 2011 (Final)	Article 5 Paragraph 3
5	*El-Masri v. Macedonia*	No. 39630/09 20 July 2009	13 December 2012	Article 5
6	*Velinov v. Macedonia*	No. 16880/08 19 March 2008	19 September 2013	Article 5 Paragraph 1 (b) Article 5 Paragraph 2 Article 5 Paragraph 5

Table No. 2: Cases before the Court against Macedonia regarding the violation of the Article 5

The Court concluded that has been a breach of *Article 5 Paragraph 1 (c)* in the case ***Lazoroski v. Macedonia***,[22] since the applicant's deprivation of liberty did not constitute lawful detention effected "on reasonable suspicion" of his having committed an offence. According to the Court, the applicant's detention in police custody amounted to a "deprivation of liberty" within the meaning of Article 5 Paragraph 1, but it must also be considered whether it was based, as the Government submitted, on "reasonable suspicion" of his having committed an offence. From the case file as it stands, the Court could not determine why the applicant was suspected of being involved in any alleged crime (the judicial authorities did not provide any information concerning the alleged offence - involvement in trafficking in arms). The "operative indications" of the Intelligence Service, in the absence of any statement, information or a concrete complaint, according to the Court cannot be regarded as sufficient to justify the "reasonableness" of the suspicion on which the applicant's arrest and detention were based. In addition, the Court was not persuaded that the applicant was informed of the reasons for his arrest as required under *Article 5 Paragraph 2*.[23]

In the next case - ***Trajče Stojanovski v. Macedonia***,[24] the Court was not persuaded that the domestic courts established that the applicant's mental disorder was of a kind or degree warranting compulsory confinement, or that the validity of the confinement could be derived from the persistence of such a disorder. The applicant's continued confinement was therefore manifestly disproportionate to his state of mind at that time. The Court therefore considered that the applicant's continued confinement in the hospital under the 2003 review has not been shown to have been necessary in the circumstances and was, therefore, unjustified within the meaning of *Article 5 Paragraph 1 (e)*.[25]

22 The applicant complained under Article 5 Paragraphs 1, 2 and 3 - his deprivation of liberty had not been based on any of the permissible grounds under those provisions (the fact that a gun had been found in his possession could not be held against him since he had a license) and that he had not been informed of the reasons for his arrest. See: *Lazoroski v. Macedonia,* No. 4922/04, Paragraphs 31, 42.

23 The Court noted that none of the reports submitted by the Government indicate that the applicant was informed of the reasons for his arrest. Furthermore, no report was drawn up regarding the applicant's questioning while in police custody, and there has been no other evidence, such as a statement from one of the arresting officers, that the applicant was given reasons for the arrest. See: *Lazoroski v. Macedonia,* No. 4922/04, Paragraph 47, 48, 53.

24 The applicant complained under Article 5 - his continued confinement in the hospital, as confirmed in the 2003 review, had been unlawful (the courts had wrongly based their decisions on police reports instead of on the hospital's findings), so his further stay in the hospital had therefore been pointless. See: *Trajče Stojanovski v. Macedonia,* No. 1431/03, Paragraphs 24, 25.

25 The Court noted that the confinement order was issued on 10 July 1998 in the light of the trial court's finding that the applicant was of unsound mind when committing the offences of which he was convicted. That the applicant's mental state required compulsory confinement was established by two medical opinions.

The Court pointed out that the 2003 review was initiated under the LCP's Article 483 by the hospital seeking his release

In the case ***Mitreski v. Macedonia***,[26] the Court held that there has been a violation of *Article 5 Paragraph 4* in respect of the principle of equality of arms and the absence of an oral hearing before the appeal panel. Namely, the Court noted that in proceedings in which an appeal against detention order is being examined, "equality of arms" between the parties, the prosecutor and the detained person must be ensured, and moreover the applicant should be given an opportunity to present his arguments orally before the panel.[27]

Violation of the *Article 5 Paragraph 3* was established in the case ***Vasilkoski and Others v. Macedonia***.[28] Namely, in order for people's continuous detention to be justified, the persistence of a reasonable suspicion had to be imperatively present throughout the period of detention. However, after a certain lapse of time, a mere suspicion is not enough, and in the absence of other relevant and sufficient reasons for keeping people detained, they have to be released. The applicants had been arrested in November 2007 on suspicion of abuse of office and detained in view of the risk of absconding, reoffending and interfering with the investigation. Their detention had been extended several times on different grounds. However, after 15 February 2008, the only reason given by the courts for continuing to keep them in custody had been the potential risk of them absconding. The courts had not pointed to any specific aspect of the applicants' character or behavior which could have demonstrated that they might abscond if released. Nor had they explained why alternatives to detention had not been applied, despite the law having provided such possibilities. The courts had limited their assessment of the applicants' situation to repeating the same brief formula, using identical words, when extending their detention. Hardly

on condition that he undergoes compulsory psychiatric supervision. The request was based on the applicant's good behavior and his good relations with the personnel and other patients in the hospital. The hospital's opinion was that the applicant's mental deficiency was permanent, that there had been no disturbance of order and had been treated with mild drug therapy and that - subject to continuing psychiatric supervision - he could be released.
The domestic courts dismissed this request on the basis of information provided by the police regarding the applicant's behavior outside the hospital and the local inhabitants' perceptions of him. They disregarded the hospital's opinion as not binding on them.
The Court considered that there was no evidence before the domestic court of a risk that the applicant would reoffend if released. It was only the villagers' fears that stood against and prevailed over the applicant's conditional release from the hospital.
See for more: *Trajče Stojanovski v. Macedonia,* No. 1431/03, Paragraphs 28, 32, 33, 35, 36, 37.
Compare to: *Puttrus v. Germany*, No. 1241/06; *X v. the United Kingdom*, No. 7215/75; *Van Droogenbroeck v. Belgium*, No. 7906/77.

26 The applicant complained under Articles 5 - the panel had not given reasons for detaining him in prison and that the latter's decision of 14 February 2009 had been given in private following the public prosecutor's appeal, which had not been communicated to him. This procedural failure (not serving the public prosecutor's appeal on him) had violated the principle of the equality of arms, and as a result of it - he could not have requested the panel to notify him of the date of the hearing. See: *Mitreski v. Macedonia,* No. 11621/09, Paragraphs 17, 26.

27 The public prosecutor filed an appeal against the decision of the investigative judge of 13 February 2009 to place the applicant under house detention. The panel, sitting in second instance, quashed the impugned decision and replaced it with the order for detention in prison. The appeal, as conceded by the Government, was not served on the applicant. The Court considered that procedural failure prevented him from effectively participating in the proceedings before the panel.
Furthermore, the panel decided at a hearing held in private. Since the applicant was heard by the investigative judge, there would be no need, in principle, for his repeated examination at second instance. However, the Court noted that the panel replaced the initial house detention, as a more lenient security measure, with the detention in prison. That decision entailed a change in the nature of the place of detention, from a private home to a public institution, as well as a substantial change in the conditions of detention. In such circumstances, the Court considered that the panel's decision of 14 February 2009 is to be regarded as a fresh detention order, different from the initial house detention, which required the applicant to be given an opportunity to present his arguments orally before the panel. Being unaware of the public prosecutor's appeal, the applicant was unable to avail himself of the right provided for in the LCP's Article 200 Paragraph 8.
See for more: *Mitreski v. Macedonia,* No. 11621/09, Paragraphs 29-31.
Compare to: *Labita v. Italy,* No. 26772/95; *Reinprecht v. Austria*, No. 67175/01; *Nikolova v. Bulgaria*, No. 31195/96; *Niedbała v. Poland,* No. 27915/95; *Mancini v. Italy,* No. 44955/98.

28 The applicants specified their complaints under Article 5 - there were no legal grounds for their detention; the domestic courts, using stereotyped forms of words, had not given concrete and sufficient reasons for their detention; the review procedure of their detention was ineffective. Further, the applicants submitted that they had repeatedly challenged the detention orders by requesting the domestic courts to terminate them or replace them with a more lenient measure. The higher instances had rejected the appeals, simply reiterating the Abstract formula given at first instance, which had undermined the effectiveness of the review procedure. See: *Vasilkoski and Others v. Macedonia,* No. 28169/08, Paragraphs 36, 41.
The Court found that the applicants' detention was compatible with the requirements of Article 5 Paragraph 1 (c). See: *Vasilkoski and Others v. Macedonia,* No. 28169/08, Paragraph 49.

any regard to the personal situation of the applicants had been made, given that their detention had been extended by means of a collective decision. In view of the above, the Court found that, at least from 15 February 2008, the authorities had prolonged the applicants' detention without assessing their individual situation, in violation of Article 5 Paragraph 3.[29]

Several violations of the Convention were noted in the case ***El-Masri v. Macedonia***,[30] among which breach of Article 5 - the applicant's detention in the hotel for twenty-three days was arbitrary (the abduction and detention amounted to "enforced disappearance"), the respondent State was responsible for the applicant's subsequent captivity in Afghanistan, and also failed to carry out an effective investigation into the applicant's allegations of arbitrary detention (procedural aspect of Article 5). The Court found that the Macedonian Government was responsible for violating the applicant's rights under Article 5 during the entire period of his captivity. There had been no court order for his detention, no custody records of his confinement in the hotel, and he did not have access to a lawyer, nor was allowed to contact his family or a representative of the German Embassy. He had been deprived of any possibility of being brought before a court to test the lawfulness of his detention, having been left entirely at the mercy of the officials holding him. Finally, having regard to its finding that there had been no effective investigation into his complaints of ill-treatment, the Court held that, for the same reasons, there had been no meaningful investigation into his allegations of arbitrary detention, in further violation of Article 5.[31]

In last case ***Velinov v. Macedonia***,[32] the Court found three violations of the *Article 5*, thus

29 The applicants were arrested in November 2007, and were detained in several police stations in Skopje. They were brought before the investigative judge who, by two separate decisions, remanded them in detention on suspicion of abuse of office. In the period up to 28 January 2008, the applicants' detention was extended on two occasions. The collective detention orders were based on all three grounds enumerated in the LCP's Article 199 (risk of absconding, reoffending and interference with the investigation). The reasons given to justify the orders, for all the applicants, were the seriousness of the offence and the potential penalty.

"The possibility of reoffending" and of "interfering with the investigation" remained the grounds on which the detention orders were based until 1 February 2008 in respect of one group of applicants, and until 15 February 2008 in respect of another group of applicants. Initially, the risk of reoffending was excluded only in respect of those applicants who presented valid proof of their dismissal from work.

After that date the applicants' detention was extended on several occasions, based only on the risk of their absconding. Only four applicants who had submitted special requests for release were subsequently released. Until 28 November 2008, the date of the applicants' release, the domestic courts consistently relied on the gravity of the charges and the potential penalty as the decisive elements warranting further extensions of the applicants' detention. Subsequently, the need to secure their attendance at the trial was also included among the grounds for their detention.

See for more: *Vasilkoski and Others v. Macedonia,* No. 28169/08, Paragraphs 58-65.

Compare to: *Letellier v. France,* No. 12369/86; *Muller v. France,* No. 21802/93; Yağcı and Sargın v. Turkey, No. 16419/90 and 16426/90; *Korchuganova v. Russia,* No. 75039/01; *Stögmüller v. Austria,* No. 1602/62; *Dolgova v. Russia,* No. 11886/05.

30 The applicant complained under Article 5 - he had been detained unlawfully and kept *incommunicado*, without any arrest warrant having been issued; he had never been brought before a judge; the respondent State bore direct responsibility for his entire period of captivity between 31 December 2003 and his return to Albania on 28 May 2004; the absence of a prompt and effective investigation by the Macedonian authorities into his credible allegations that he had disappeared for an extended period as a result of a joint operation by Macedonian and US agents; the Macedonian Government was also responsible for his prolonged disappearance during his subsequent detention in Afghanistan. See: *El-Masri v. Macedonia,* No. 39630/09, Paragraphs 149, 224, 225.

31 On 31 December 2003 the applicant was taken off the bus on entering the territory of Macedonia and was questioned by Macedonian police officers. He subsequently disappeared and was thereafter not seen until he returned to Germany on 29 May 2004. The applicant was held in the hotel under constant guard by the Macedonian security forces between 31 December 2003 and 23 January 2004, when he was handed over, at Skopje Airport, into the custody of the US authorities. On the latter date he was flown on a CIA-operated flight to Afghanistan, where he was detained until his return to Germany.

See for more: *El-Masri v. Macedonia,* No. 39630/09, Paragraphs 234-243.

Compare to: *Aksoy v. Turkey,* No. 21987/93 ; *Bitiyeva and X v. Russia,* No. 57953/00 and 37392/03; *Gisayev v. Russia*, No. 14811/04; *Kadirova and Others v. Russia,* No. 5432/07; *Chitayev and Chitayev v. Russia,* No. 59334/00; *Othman (Abu Qatada) v. the United Kingdom,* No. 8139/09; *Babar Ahmad and Others v. the United Kingdom,* No. 24027/07, 11949/08 and 36742/08; *Storck v. Germany,* No. 61603/00; *Medova v. Russia,* No. 25385/04; *Rantsev v. Cyprus and Russia,* No. 25965/04; *Varnava and Others v. Turkey,* No. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90; *Ilaşcu and Others v. Moldova and Russia,* No. 48787/99.

32 The applicant complained on three grounds concerning the Article 5 - he had been unlawfully deprived of his liberty when imprisoned on 28 October 2002 (he had not been obliged to provide the trial court with a copy of the payment slip; he denied that the court's warning letter of 14 November 2001 had been correctly served on him; there was no proof that it had been delivered to his son); he had not been informed of the reasons for his imprisonment; he had not received any compensation for the alleged unlawful imprisonment. See: *Velinov v. Macedonia,* No. 16880/08, Paragraphs 43, 46, 58, 61, 67.

Paragraph 1 (b), Paragraph 2 and *Paragraph 5*. The Court considered that the applicant's detention in Štip Prison was contrary to Article 5 Paragraph 1 (b) (first violation) since the applicant already paid the fine for the conviction of minor offence (he paid the fine after the deadline, but he did not inform the court), further the applicant was not informed of the reasons for his arrest (second violation), and did not receive a compensation for his unlawful arrest (third violation).[33]

CONCLUSION

The structure of criminal act Unlawful deprivation of liberty, as an act against freedom of movement, and the sanctions prescribed for its primary and severe forms, show its satisfactorily legislative defining. Although this act participates with a very small percentage in the total number of criminality (reported, accused and convicted persons), the lower numbers must not be neglected. In addition, the six judgments that note a violation of the Convection's Article 5, represent a lesson that Macedonia must learn in the following period - as a Contracting Party to the Convention must respect the engagements, and must reaffirm the profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend.

REFERENCES

1. Constitution of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia" No. 52/1991), and its Amendments ("Official Gazette of the Republic of Macedonia" No. 01/1992, 31/1998, 91/2001, 84/2003, 107/2005, 03/2009, 13/2009, 49/2011).
2. Criminal Code ("Official Gazette of the Republic of Macedonia" No. 37/1996, 80/1999, 04/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 07/2008, 139/2008, 114/2009, 51/2011 - two changes and amendments, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013).
3. ЂОРЂЕВИЋ, Ђорђе: *Кривично право - посебни део,* Београд, 2009.
4. http://hudoc.echr.coe.int.
5. http://www.icty.org/action/cases/4.
6. ЈОВАНОВИЋ, Љубиша / ЈОВАШЕВИЋ, Драган: *Кривично право II: посебни део,* Београд, 1995.
7. КАМБОВСКИ, Владо: *Казнено право - општ дел (второ издание),* Скопје, 2005.
8. КАМБОВСКИ, Владо: *Казнено право - посебен дел (четврто, дополнето издание),* Скопје, 2003.
9. MACOVEI, Monica: *The right to liberty and security of the person - A guide to the implementation of Article 5 of the European Convention on Human Rights,* Handbook No. 5, 2003.
10. МАРЈАНОВИЌ, Ѓорѓи: *Македонско кривично право - Општ дел (шесто, изменето и дополнето издание),* Скопје, 2003.

33 The applicant was convicted for a minor offence (driving an unroadworthy bus) and ordered to pay a fine within fifteen days of the judgment becoming final. Since he failed to pay, the fine was commuted into a two-day prison sentence. When he was served with the detention order in February, the applicant paid the fine, but did not inform the court about the payment. He was arrested on 28 October 2002 and released on the following day, after he had submitted a copy of the payment slip.
In the Court's view, the applicant's failure to notify the trial court that he had paid the fine cannot release the respondent State from the obligation to have in place an efficient system of recording the payment of court fines.
The Court concluded that the applicant had not been informed of the reasons for his arrest (in the compensation proceedings the trial court established that the police officers who had arrested the applicant in his house had had the arrest order in their possession, but they had failed to hand it over to the applicant).
See for more: *Velinov v. Macedonia,* No. 16880/08, Paragraphs 51-57, 64, 74.
Compare to: *Winterwerp v. the Netherlands,* No. 6301/73; *Osypenko v. Ukraine,* No. 4634/04; *Lolova-Karadzhova v. Bulgaria,* No. 17835/07; *Włoch v. Poland (No. 2),* No. 33475/08; *Korneykova v. Ukraine,* No. 39884/05.

11. Министерство за правда - Биро за застапување на Република Македонија пред Европскиот суд за човекови права - Владин агент на Република Македонија: *Годишен извештај за работата на Владиниот агент и анализа на предметите и постапките пред Европскиот суд за човекови права за 2012 година,* Скопје, 2013.
12. МИТРОВИЋ, Гордана: *Кривично право: посебни део,* Београд, 1997.
13. Law on Criminal Procedure ("Official Gazette of the Republic of Macedonia" No. 15/1997, 44/2002, 74/2004, 15/2005 - consolidated text, 83/2008, 67/2009, 51/2011).
14. Law on Criminal Procedure ("Official Gazette of the Republic of Macedonia" No. 150/2010, 51/2011).
15. Law on Execution of Sanctions ("Official Gazette of the Republic of Macedonia" No. 2/2006, 57/2010).
16. Law on Police ("Official Gazette of the Republic of Macedonia" No. 114/2006, 6/2009, 145/2012).
17. Law on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the First Protocol, Protocol No. 4, Protocol No. 6, Protocol No. 7 and Protocol No. 11 to the said Convention ("Official Gazette of the Republic of Macedonia" No. 11/1997); Protocol No. 12 ("Official Gazette of the Republic of Macedonia" No. 30/2004); Protocol No. 13 ("Official Gazette of the Republic of Macedonia" No. 30/2004); Protocol No. 14 ("Official Gazette of the Republic of Macedonia" No. 30/2005); Protocol No. 14 *bis* to the said Convention ("Official Gazette of the Republic of Macedonia" No. 41/2010).
18. Regulations on the manner of conducting the police tasks ("Official Gazette of the Republic of Macedonia" No. 149/2007, 110/2011).
19. State Statistical Office of the Republic Macedonia: *Annual report for the perpetrators of criminal offences - 2008…2012.*

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POLICE ROLE IN BUILDING COMMUNITY SAFETY

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Abstract: Police is one, but very important and crucial segment in the prevention of crime. Arguments lay in the facts that police is protector of basic human rights and freedoms, maintain public order and peace in society, which is the basis for community safety. Also, the police have a great role in fear of crime reduction among citizens and in crime and victim reduction, as well. Based on that, the police have a major contribution in the prevention of crime, not only in the suppression of crimes, detection and apprehension of the offenders, but also in terms of identifying and reducing the causes that influence the occurrence of crime, which are located in the local community.

Hence, the police acts not only on the removal of the consequences of crime, but also can exert great influence on the causes. These activities, in their unity, constitute preventive function of the police.

This paper opens a theoretical discussion on several key issues and dilemmas: whether the community safety is only police responsibility? Whether police can ensure community safety and how? In the attempts to give appropriate responses, we advocate the thesis that community policing concept allows efficient interagency approach in order to maintain community safety.

Main objective of this paper is to awake the academic community to accept community policing as a better way to address and understand crime, its causes and consequences.

Keywords: police, prevention, community safety, crime

INTRODUCTION

The main function of the police is to protect and respect for fundamental freedoms and human rights and freedoms guaranteed by the Constitution of the Republic of Macedonia, laws and international agreements, protection of the legal order, prevention and detection of offenses, measures to prosecute the perpetrators of such crimes and maintenance of public order and peace in society.[1] Citizens require and expect that kind of police function, and therefore, the police faced many challenges and temptations in the exercise of their basic police tasks. Especially, in regards with the keeping up safety in the community, few issues and dilemmas are raising that are the subject of this paper: **if community safety is responsibility of the police, if the police can provide it and how?**

Before we answer the above questions, primarily is to understand the essence and meaning of the term community safety, and we will give a brief elaboration.

COMMUNITY SAFETY: DEFINITION AND BASIC FEATURES

The community safety is becoming current topic of public, political, scientific debates and it goes together with prevention of crime as an issue of the police and the criminal justice system. It is a complex concept that is difficult to define, but in trying to explain the concept of community safety, we'll use a few definitions.

The term "community safety" in the **SAGE Dictionary of Criminology** is described as a strategy that requires the involvement of many stakeholders from the community, including the police in order to improve safety in the community not only from committing crimes, but from the damage caused by all sources. As a broader strategy to tackle community problems, community safety occurs due to the failure of the criminal justice system to deal with crime and, at the same time, implies a holistic and systemic approach, social responsibility and participation

1 Law on police, Official Gazette of the Republic of Macedonia, No. 114/2006

of many stakeholders in the creation of community safety.[2] In addition, the SAGE Dictionary gives a broader approach in explaining the safety as a concept that means "lack of damage, regardless it is caused by human factor or by other means (vis major).[3] That's why; the strategy is more directed towards reducing damage than just to the prevention of crime.

In **The Annual Report** for 2010 of the International Centre for Prevention of Crime based in Montreal, Canada community safety is associated with improved quality of life in communities through social interaction and social cohesion. The safety in the community is dealing with harmful consequences and effects of crime and it depends on the ability of the community and the citizens who live in it to act and respond. According to the broader explanation, the community safety is ideal for co-existence of different cultural, social and political groups.[4]

According to the **United Nations Development Program (UNDP)**, the safety of the community requires to "operationalize human security, human development and state-building paradigms at the local level. The contemporary concept of community security, narrowly defined, includes both group and personal security. The approach focuses on ensuring that communities and their members are "free from fear".[5]

Peter Squires, who writes about the concept of "community safety" in Britain as an adopted national strategy for dealing with crime, says that community safety policy as a new approach to tackling and preventing crime begins in the late 80's. According to him, the origin of the concept of "community safety" lies in the clearly expressed views of politicians on the left who hold the view that the problem of crime is not a property only of the police, but also of other social actors outside the police and other security structures of the state. Crime is a product of many factors, many of which are beyond the control of the police. Given the fact that safety includes a wide range of risks, such as risks of harmful products, environmental risks (pollution), there is a need to mobilize other competent institutions (public and private) for implementation of broader social security strategy.[6]

However, we accept the opinion that prevails in the criminological literature, according to which notion safety is associated with risks and factors related to crime and other deviant behaviors. From that point, the community safety should provide quality of life of citizens, especially through measures of primary and secondary prevention, at national and local level, that addresses social risks[7] and other risk factors (domestic violence, parental neglect). The main emphasis should be placed on inter-agency approach which should include public, private and civil sector to develop policies which are community based for dealing with crime.[8]

Based on the abovementioned, we agree that the concept of community safety includes several aspects: dealing with the risks and factors that cause crime and other deviant behavior and attitudes, dealing with problems and factors relating to the local community, which reduce quality of life and increase the crime fear of the citizens, dealing with the crime and its consequences, and the protection of vulnerable people and the people who are in a state of risk. **The main objective** of this approach is to improve the quality of life in the communities in which citizens, individually and collectively will be protected from threats and fear as a result of crime and other negative social behaviors. It includes economic, social and cultural changes not only locally, but also on a social level and, therefore, the safety of the community should be part of a broader national strategy that touches the crime and safety in society.

2 The Sage dictionary of criminology (2001), compiled and edited by Eugene McLaughlin and John Muncie, SAGE publications, p.42-43

3 For example, damages caused by elementary casualties, natural catastrophes (earthquakes)

4 International Report on Crime Prevention and Community Safety: Trends and Perspectives (2010) International Centre for the Prevention of Crime, Montreal, p.34

5 Available at Wikipedia, Free Encyclopedia, http://en.wikipedia.org/wiki/Community_Safety_and_Security

6 Squires, P. (2006) Community Safety: Critical Perspectives on Policy and Practice edited by, Policy press, UK, p.125-126

7 According to the Law on social protection, Official Gazette of the Republic of Macedonia, No148/2013, social risks are: risks to health (diseases, harm and invalidity), risks to ageing (mature and survival), risks for maternity and family, risks from unemployment and isolation (exclusion) from the social environment

8 Squires, P. (1997) Criminology and the 'community safety' paradigm: safety, power and success and the limits of the local, The British Criminology Conferences: Selected Proceedings. Volume 2, The British Society of Criminology, retrieved 10.11.2013 http://britsoccrim.org/new/volume2/012.pdf

THREATS TO COMMUNITY SAFETY

Before we make analysis of the policing as one of the bases for safety in a community, it is necessary to consider the questions: **what depends on and what endangers the safety of the community**? In this part of the paper, we will try to give a short answer to the second question.

Crime, disruption of public order and fear of crime are basis threats that jeopardize community safety.

Taking them as starting points in the control of crime and fear of crime, it is crucial first to define them and to be understood by all parties involved in the control process.

Crime is not just statistics in the criminal justice system. Even less, crime can not be perceived only as individual human behavior that is criminalized in penal legislation.[9] Putting limits only to the legal elements of the crimes (place, time, manner of execution) means looking only at certain situational factors and techniques that affect the performance of the crimes and by which they are executed. Also, putting the focus only to the offender and his responsibility, deliver short-term results in terms of disabling him to commit crimes until he is detained in custody and deprived of his liberty. But his punishment and imprisonment, does not solve the problem, but it leaves it aside. And, while we thinking that the criminal justice system can reduce crime alone, the crime is growing. This is in line with the new criminological theories, primarily radical criminology and peacemaking criminology that start from the thesis that the traditional criminal system is violent and causes suffering. "Specifically, the repressive policy of penal systems expressed through repressive measures of social control through formal and rigorous court proceedings proved that the sentences do not reduce crime, actions are stigmatizing the offender and do nothing for the victim."[10]

So, the problem of crime is much more complex. Its consequences are not only specific damage or actual victim. They are much more. Crime creates feelings of insecurity, fear, disrupts social harmony and order in a community. And if the criminal justice system can not deal with crime, that undermines citizens' trust in institutions, which also has further negative consequences.

Besides dealing with the **consequences,** even more important approach to understanding crime is turning to its **micro[11] and macro[12] reasons.**

Fear, on the other hand, is an important indicator for the security or insecurity in a community. Although it is a feeling, it can be caused by different sources. It means that the increased rate of crime doesn't mean increased fear of crime. In some cases, there is discontinuity or inversely relationship between the rate of crime and the fear of crime. For example, official U.S. statistics show that between 1995 and 2005 the rate of violent victimization and property offenses gradually decreases, and the rate of fear of crime is reduced.[13] Or sometimes, reduced crime in a neighborhood does not encourage citizens to go on the street and walk around freely. This tends to support the thesis that crime is not just a number, and that crime and the fear of crime should not be equated, but to examine and explore separately.

Taking into account the abovementioned, it seems that the stakeholders that are responsible for the community safety need to address all the circumstances connected with the crime. In this network of control mechanisms, the police have an important place, which, as the executive authority in every country, is most responsible to handle the threats to the safety in the community.

But, whether the **police can address the crime, its causes and consequences**?

9 In the Criminal Code of the Republic of Macedonia, Official Gazette of the Republic of Macedonia, No 19/2014, criminal act is illegal act that is prescribed as criminal act and whose characteristics are prescribed in the criminal code.

10 Stefanovska, V. (2010) Peacemaking (mirotvorna) kriminologija: relanost ili zabluda", Godisnik na Fakultetot za bezbednost, Skopje, p. 273-281

11 Those are reasons related to the narrow social environment of the offender such as family, school, free time

12 Those are macro-factors which do not influent crime directly, but support it, such as economical, political system in one society, war, industrialization, migration, urbanization.

13 Cordner, G. (2010) Reducing Fear of Crime, Strategies for police, US Department of Justice, office of community oriented policing services

Detection of the crimes and the prosecution of perpetrators are police functions which, as part of the fight against crime, are mainly on the police agenda. In order to achieve these goals, police, within the traditional model undertakes: increased patrols, arrests, rapid response, providing clues and evidence and other measures in the implementation of police and judicial investigations. However, these measures are short-term actions that are being undertaken to address the immediate execution of a crime or crimes, known as "**stopping the bleeding"**.[14] Also, in order to appease "the situation" immediately after the event, police, depending on the circumstances, often undertakes additional controls, raids, gathering information.

As an extended arm of the investigators (the public prosecutor and the courts which investigate the criminal case), we can agree that providing evidence and clues for further processing of the case is part of a professional police job and is not subject to debate.

The issue is quite different. **Whether the police can be successful in tackling and preventing crime, if we limit it to professional and traditional model of policing and whether that model, as it is set (organizationally, with human resources and institutionally), gives the expected results i.e. is effective in the implementation of police tasks and activities?**

PROFESSIONAL POLICE MODEL IN CRIME PREVENTION

In this part of the paper we will present the development of American police and its shift from professional policing model to a model of community policing.

The American experience shows that professional model known as crime fighter model, which was developed after the Second World War, according to **Anthony Braga**[15] has three basic components: patrolling, rapid response of the police upon the reported crimes and their resolving, or collecting evidence for further prosecution within the court trial. **Weisburd, Eck and Sherman**, the effectiveness of the police in the prevention and reduction of crime evaluate by using five indicators, that besides to patrolling, rapid response and police investigation, give special consideration to the number of police officers and the number of arrests by the police.[16]

The aforementioned indicators are studied within many undertaken projects, usually at the local level in the United States. The obtained data varies i.e. sometimes results are divergent. So often cited Kansas City Preventive Patrol Experiment conducted in 1974 tested variations in the level of **motorized patrols** and fear of crime among citizens. The results proved that changing police patrol on various locations does not affect fear of crime and the rate of victimization, nor the citizens of Kansas City have noticed changes in police patrol.[17]

Rapid response also does not reduce the crime rate, but increases the number of reported crimes, which has increased by 3% with the introduction of such police measures. It is considered that in the period of calling to the police for a committed crime is not calculated "the interval between the commission of a crime and the time it is discovered; and the interval between discovery and the time the citizen calls the police".[18]

The police investigation of the crime has a limited contribution to solving the crime, in general, because, according to **Cordner**, crime control depends more on the Public prosecution and the court, while the police is just one link in a chain that has to solve the case. Police arresting and depriving the offenders of their liberty and providing evidence for the crime, open the criminal proceeding[19], but further investigation goes to the other organs of criminal justice system. One of the indicators for the limited effect of the police is the fact that many of the reported crime does not end with the verdict.

14 Nicholl, Caroline G (1999).Community Policing, Community Justice, and Restorative Justice: Exploring the Links for the Delivery of a Balanced Approach to Public Safety, Washington, DC: U.S. Department of Justice, Office of Community Oriented Policing Services, p. 27

15 Braga Anthony A. (2002) Problem-oriented policing and crime prevention, Criminal Justice Press Monsey, New York, U.S.A.

16 Weisburd David & John e. Eck, What Can Police Do to Reduce Crime, Disorder, and Fear?, The Annals of the American Academy of Political and Social Science (Impact Factor: 1.01). 01/2004

17 Cordner, G. (2010) Reducing Fear of Crime, Strategies for police, US Department of Justice, office of community oriented policing services

18 Braga Anthony A. (2002) Problem-oriented policing and crime prevention, Criminal Justice Press Monsey, New York, U.S.A.

19 Ibid

Addition to the above, much of the researches in the U.S. show that focused approach to police so-called **hot spot policing has the best preventive effects**[20]. Thus, the meta-study of **Sherman**, that has tested well established eight hypotheses, on the question "what works in crime prevention" within the police work, concludes that as more focused the police strategy is, the likelihood of preventing crime the greater[21]. In fact, he refers to the analysis of Minneapolis Hot Spots Patrol in 1995 which proved that the deterrence effect of police patrol may be caused by the 15 –minute police presence at "hot spots".[22] Also, **Braga and Kennedy**, have made evaluation of nine projects related to the effectiveness of the hot spot policing, and according to the received data, have concluded that the focus of the police force at high risk crime places have good effect in preventing crime.[23]

In spite of this, the aforementioned limited effects of the professional model of policing in reducing crime caused thinking to change the style of policing, i.e. to introduce other innovative elements and techniques. In fact, one of the innovations, taking into account the **theory of routine activities**, according to which for the occurrence of a crime, it is necessary to meet the three elements: a motivated offender, a suitable victim and the absence of a capable guardian, was the tendency to put greater emphasis on situation and situational preventive measures. Strong advocates of this approach is **Lawrence Sherman, Ronald Clark and John Eck**, who are committed to measures that hinder access to the target and increase the risk offender to be caught.

Those measures, according to **Sherman** are increased police presence and numerous arrests etc. police crackdowns.[24]

On the other hand, **Eck**, who analyzes the possibilities that enable perpetration of crimes, in 1987 has developed a concept of how to solve the problems faced by the police in reducing crime.[25] He considered that deep understanding of police problems is crucial and, for that reasons poses several questions: What are the problems? What causes problems? How can we find effective ways to solve problems? And what we can learn by solving problems? According to him, the offender has criminal behavior because those who can prevent his behavior a) don't learned about the events, b) chose not to act, and c) can not effectively operate. So, **Eck** puts emphasis on the capable custodian i.e. on the controller, as well as on those (supervisors) who are responsible to "observe" the offender. We need to learn from successful attacks of the offender, because according to **Pease**, they indicate the so-called "virtual recidivism" that occurs when offenders, learning from their successful attack on a victim, proceeds to attack victims with similar characteristics. Conversely, failing to attack a victim, offender avoids attacking other victims that have similar characteristics. It is a process of generalization and networking for offenders who, based on their own experience and the experience of other offenders, learn how to act further.[26]

Braga gives similar comments, which points that crime tends to be concentrated around a few places, few victims and few offenders. Thus, he says that 10% of victims make up about 40% of the total victimization[27], 10% of offenders about 50% of the total crimes committed and 10% of the places where the crimes occur are 60% of all criminal hot spots[28]. Indicated numbers provides an excellent foundation for guiding police strategy to the motivated offenders, suitable victims and attractive opportunities.

20 Weisburd David & John e. Eck, What Can Police Do to Reduce Crime, Disorder, and Fear?, The Annals of the American Academy of Political and Social Science (Impact Factor: 1.01). 01/2004

21 Sherman Lawrence W., et al. (1997) Preventing Crime: What Works, What Doesn't, What's Promising, Report to the U.S. Congress. Washington, D.C.: U.S. Department of Justice, p.621

22 Ibid, p.628

23 Braga Anthony A. & Kennedy John (2008) Police Enforcement Strategies to prevent crime in Hot Spot Areas, Crime Prevention Research Review, U.S. Department of Justice, Ofice of Community Oriented Policing Services, DWI Resource Center, p.24

24 Homel Ross, Can police prevent crime? In K. Bryett & C. Lewis (Eds.), Unpeeling tradition: Contemporary policing, Macmillan, Australia. http://www.griffith.edu.au/__data/assets/pdf_file/0006/188727/can-police.pdf

25 Eck, John (2003) Police Problems: the complexity of problem theory, research and evaluation, Crime Prevention Studies, vol. 15 (2003), pp. 79-113.

26 Ibid, p.93

27 Victimization defined as process for becoming a victim

28 Braga Anthony A. (2002) Problem-oriented policing and crime prevention, Criminal Justice Press Monsey, New York, U.S.A

Everything we previously mentioned has a short, ad hoc effect. As **Nichol Caroline** stated that "the response to the event without having to try to discover the contributing problems are seen as a fire alarm without having to try to learn how to prevent other fires."[29]

And again we approved the conclusion that the problem of crime is a complex issue and the fight against it, if we target only the offender is partial and gives limited results in reducing the level of crime and its harmful consequences.[30]

Therefore, concentrating only on the offender and his crime on the one hand, and on the way how the police undertake police tasks for their detection, on the other hand, has no great impact on community safety. In that sense, the professional approach of the police, as a key factor in the community, has limited contribution for safe environments. Professional model has an important function to solve specific crimes and to calm the situation, post delictum, and in this respect, the professional approach gives effective results, but the problem of unsafe communities can continue to stay because the crime can not be solved out of context of the reasons that led to his occurrence. Also, neither the rapid response of the police, nor the efficient detection of offenses, based on numerous studies, have a deterrence effect against potential offenders in terms of discourage them from committing crimes.

The increase in crime rate, if the numbers of criminal acts are analyzed alone and isolated from other factors, strengthens demands of the citizens and police for tougher treatment and approach to offenders. At the same time, the fear of crime is increasing and citizens search for tougher penalties, frequent arrests, detentions of "criminals". Thus, the reliability of the public of the criminal justice system increases. However, many times is confirmed that more rigorous penalties do not improve safety in the community. According to certain criminological theories and movements which tend to improve the system of criminal sanctions (radical theory, abolitionist movement),[31] small number of offenders are convicted, inmates learn how to act criminally in prison, prisons are often called "universities of crime" and a large percentage of inmates are repeat offenders. Renowned criminologist **Clemer**, in his first sociological study of prisons came to the acknowledgment that in the prisons two different processes are appearing: the process of institutionalization, with the adoption of standardized regime in prisons and criminalization process, which means acquiring criminal attitudes and behaviors, as a result of the fact that inmates most of their free time spend together, in one specific prisoner society, with their own sub cultural norms of behavior which are contrary to the norms of the formal system.[32]

Along with the increase of crime, private insurance industry increases its advertising for insurance of private life and property of citizens. Often, public campaigns through the messages they deliver intensify the fear and uncertainty among the public, and sometimes those advertisements, create fortress mentality that enhance feelings of fear, creates anxiety and increases the need of the citizens to purchase alarms, security locks, cameras and other measures in order to secure their property.[33] Also, increased street crime isolates citizens in their homes and instead to encourage, situational measures often discourage them to participate in community programs for the prevention of crime. The aforementioned situational preventive measures may protect property from attacks or may help to detect and catch the offender easily, but they do not solve the problem of burglaries.

As a consequence, the failure of the police to deal with crime and the non-participation of the community in crime prevention leads to increased crime and the circle is closed again without solution and exit.

Hence, we can conclude that over-reliance on police and the opinion that the police alone can solve the problems of crime creates a vicious circle, and instead to reduce, crime problems do not change. And it raises the question of **how to get out of the circle?**

29 Nicholl, Caroline G (1999).Community Policing, Community Justice, and Restorative Justice: Exploring the Links for the Delivery of a Balanced Approach to Public Safety, Washington, DC: U.S. Department of Justice, Office of Community Oriented Policing Services, p. 28

30 Ibid, p. 45

31 Ignjatovic, D. (2008) Kriminologija, Pravni Fakultet, Univerziteta u Beogradu, p.123

32 Howard Jones: Open prisons, Routledge and Kegan Paul, London, 1977, p. 53

33 Cordner, G. (2010) Reducing Fear of Crime, Strategies for police, US Department of Justice, office of community oriented policing services

HOW TO GET OUT OF THE CIRCLE?

Shifting the focus of interest of criminologists and practitioners in the field of criminal policy towards crime prevention and their strong search for effective preventive measures usually is appearing as a result of the failure of traditional repressive measures to deliver the expected results. Or, restless spirit of researches in their ever eternal pursuit for better solutions change the focus of interest, dig deep into the issues and causes and set new theoretical foundations, concepts, assuming that the "new" approach is always better and offer better results than "old" approaches in the fight against crime.

Do "new" is really better than "old"?

In terms of policing, it is about proposing a new approach called "community police". In efforts to impose as a better concept, a few key things are important: first, change the notion of "policing" as just an exclusive right of the police, but of other, non-police stakeholders[34]. According to **Michale Rowe**, policing is not only what professional police does. It is much more than crime fighting.[35] It is one of the means for achieving democracy, "which can provide safety in the community, and that suggests shared social responsibility for crime control and for overcoming the crime fear among citizens. It includes informal shared control mechanisms which involve citizens in policing.[36] That is a process of decentralization of policing, which means not only delegation of the responsibility and decision-making power to lower police structures, but also sharing the responsibility and the control of crime with the community and with the citizens. The police are part of the community and therefore should not be viewed in isolation as a separate and independent control system. Police was created to protect and to care for the citizens, and will succeed to achieve that only with joint efforts and cooperation with the community. It is the essence of the community policing concept, which means changes at few levels: change of the way of thinking (philosophy of policing), change of the manner of police work (the practice of policing), and change the system of values.[37]

However, the concept raises many questions, doubts, arguments pro and cons its performance, various aspects of its implementation and forms of cooperation. The discourse for these issues is not the subject of this paper, because it will require additional study. For the purposes of this paper, in the explanation of the concept, we accept the view that community policing means changes in the philosophy of policing, in the approach how to solve crime, shared responsibility and amendment of the organizational structure of the police.

It does not mean introducing innovative content in the traditional model of policing, but significantly altered model that does not abandon professionalism in preventing crimes. Increased and shared responsibility does not mean avoiding responsibility by the police. The main change is from reactive to proactive style of policing with public participation and participation of other social services in the community. As **Alderson (1979)** points out that the community policing should be the **first and primary strategy** in general crime control.[38] The **second level** of policing related to police interventions and other tasks for certain events are inevitable and essential support (back-up) of the community policing in dealing with the problems of crime. Detection of crimes is the **third level** of policing that needs to get more help from the community.[39]

So, professional police is always present when there is a need to detect the offender, the crime and to ensure proves for the committed crime. Those are professional and special departments that possess knowledge, expertise, skills and resources to do that. But, primary and first response and action should be a community policing model. Or, in other words, the police that work with local citizens and other stakeholders in the community (local government, schools, churches,

34 Although, for the notion „policing„ there are many explanations.
35 Rowe Michale (2008) Introduction to policing, Sage Publications Ltd, retrieved 30.12.2013 http://www.sagepub.com/upm-data/19049_01_Rowe_Ch_01.pdf, p.7
36 Nicholl, Caroline G (1999).Community Policing, Community Justice, and Restorative Justice: Exploring the Links for the Delivery of a Balanced Approach to Public Safety, Washington, DC: U.S. Department of Justice, Office of Community Oriented Policing Services, p. 17
37 Nikac, Z. (2009) Policija u zajednici, Kriminalisticko-policijska akademija, Beograd, p.49
38 Mackenzie Simon &Alistair Henry (2009) Community policing: a review of the evidence, Scottish government social research, Crown Copyright, Edinburgh, p.15
39 Ibid, p.15

community organizations, business sector, citizens), but not only as sources of information, but as equal partners in solving the problems in order to secure safe places. They can offer a solution, and thus they are part of the solution. The introduction of the concept also requires a change in philosophy for policing by the police structure, not just partially. Police community is not and should not be considered as a single acquaintance with citizens by organizing joint meetings, handing out flyers, giving advice, visit the schools. These are just some of the forms of cooperation and serve as a tool to get familiar with the community and its citizens.

Hence, the concept of community policing is not and should not be kept and ended by forming additional bodies at national and local level (such as for example, local councils for prevention) and by training certain police officers for communication and collaboration with the community (no matter how they are called, whether liaison officer, community officer or officer for prevention). As **Mackenzie and Henry**, stress out that the success of community policing concept is more than a function of those police officers who have been selected to be included in a particular community program for crime prevention.[40]

But at the same time, it must not be forgotten that in the part of the community it also means a change of consciousness among citizens that safety is their concern, understanding that the community should be involved in solving problems. Keeping eyes shut and the removal of the problem does not solve the problem. We must not be passive observers, but to be part of the social justice and common responsibility.

Based on the foregoing, we agree that the exit of the closed circle should be searched in the support and active participation of the community.

CONCLUSIONS

Problem with security, crime, victimization, fear of crime is a problem that affects all citizens in a society and that affects their quality of life and wellbeing. As the shape of the crime is changing, the shape of prevention is changing too, along with the increased responsibility for its control.

In terms of the issue who are the stockholders of the preventive actions, undoubtedly their successful implementation involves interagency approach, cooperation and coordination among many stakeholders, such as citizens, representatives from social services, schools, the business sector, non-governmental organizations in partnership with local authorities and the criminal justice system. In this network, the police are only one, but very important and crucial segment. Neither police, nor other institutions within the criminal justice system on their own can not cope with crime. Even if it is required to do that, they can not cope with the crime, because they have limited capacities and resources.

Therefore, community policing is a responsive approach in addressing crime, its causes and consequences, only if it is understood and implemented by whole police structure.

REFERENCES

1. Braga Anthony A. & Kennedy John (2008) Police Enforcement Strategies to prevent crime in Hot Spot Areas, Crime Prevention Research Review, U.S. Department of Justice, Ofice of Community Oriented Policing Services, DWI Resource Center
2. Braga Anthony A. (2002) Problem-oriented policing and crime prevention, Criminal Justice Press Monsey, New York, U.S.A.
3. Cordner, G. (2010) Reducing Fear of Crime, Strategies for police, US Department of Justice, office of community oriented policing services
4. Eck, John (2003) Police Problems: the complexity of problem theory, research and evaluation, Crime Prevention Studies, vol. 15 (2003), pp. 79-113.
5. Ignjatovic, D. (2008) Kriminologija, Pravni Fakultet, Univerziteta u Beogradu

40 Mackenzie Simon &Alistair Henry (2009) Community policing: a review of the evidence, Scottish government social research, Crown Copyright, Edinburgh, p. 32

6. Homel Ross, Can police prevent crime? In K. Bryett & C. Lewis (Eds.), Unpeeling tradition: Contemporary policing, Macmillan, Australia, available at: http://www.griffith.edu.au/__data/assets/pdf_file/0006/188727/can-police.pdf
7. Howard, J. (1977) Open prisons, Routledge and Kegan Paul, London
8. Mackenzie Simon &Alistair Henry (2009) Community policing: a review of the evidence, Scottish government social research, Crown Copyright, Edinburgh
9. Nicholl, Caroline G (1999).Community Policing, Community Justice, and Restorative Justice: Exploring the Links for the Delivery of a Balanced Approach to Public Safety, Washington, DC: U.S. Department of Justice, Office of Community Oriented Policing Services
10. Nikac, Z. (2009) Policija u zajednici, Kriminalisticko-policijska akademija, Beograd
11. Rowe Michale (2008) Introduction to policing, Sage Publications Ltd, retrieved 30.12.2013 http://www.sagepub.com/upm-data/19049_01_Rowe_Ch_01.pdf
12. Sherman Lawrence W., et al. 1997. Preventing Crime: What Works, What Doesn't, What's Promising. Report to the U.S. Congress. Washington, D.C.: U.S. Department of Justice, p.621
13. Squires, P. (1997) Criminology and the 'community safety' paradigm: safety, power and success and the limits of the local, The British Criminology Conferences: Selected Proceedings. Volume 2, The British Society of Criminology, retrieved 10.11.2013 http://britsoccrim.org/new/volume2/012.pdf
14. Squires, P. (2006) Community Safety: Critical Perspectives on Policy and Practice edited by, Policy press, UK
15. Weisburd David & John e. Eck, What Can Police Do to Reduce Crime, Disorder, and Fear?, The Annals of the American Academy of Political and Social Science (Impact Factor: 1.01). 01/2004
16. Stefanovska, V. (2010) Peacemaking (mirotvorna) kriminologija: relanost ili zabluda", Godisnik na Fakultetot za bezbednost, Skopje, p. 273-281
17. International Report on Crime Prevention and Community Safety: Trends and Perspectives (2010) International Centre for the Prevention of Crime, Montreal
18. Law on police, Official Gazette of the Republic of Macedonia, No. 114/2006
19. Law on social protection, Official Gazette of the Republic of Macedonia, No148/2013
20. Criminal Code of the Republic of Macedonia, Official Gazette of the Republic of Macedonia, No 19/2014
21. The Sage dictionary of criminology (2001), compiled and edited by Eugene McLaughlin and John Muncie, SAGE publications

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CONSTITUTIONALIZATION OF THE CRIMINAL PROCEDURE LAW

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Abstract: The basic values of democratic constitutionality in Serbian law are based on explicit constitutional references to European principles and values. Therefore stems a obligation of the state to create a national legal framework that provides a functional legal certainty in criminal law and the protection of the rights specifically provided through the European Convention on Human Rights (Convention). One of the most important legal documents that fulfill positive obligations of the state in this sense is the Code of Criminal Procedure. On the one hand, that are procedural obligations of effective criminal prosecution and the imposition of criminal sanctions toward to perpetrators of criminal offenses through the criminal justice apparatus that interferes in fundamental human rights and freedoms. Material obligations on the other side, represent the border to that repressive character. This is realized through the establishment of appropriate norms of the criminal procedure law. The legal framework of criminal proceedings guarantee to every individual that government will not arbitral and unjustifiably violate freedom and rights, and that he would be provided with the minimum rights of defence and other procedural guarantees of a fair trial.

Because of the tendency of the state to be more successful oppose organized crime, corruption, terrorism and other serious crimes, tongue on Justice Scales are often more tilted to the side of efficiency, at the expense of the protection of fundamental rights of the defendant from measures and actions of government, endangering the legal certainty citizens in criminal. Because that it was started with balancing these two obligations, by intensified constitutionalization of criminal procedural law, where the branches of positive law synchronizes with the Constitution through decision of the Constitutional Court and the European Court of Human Rights. These two courts evaluate the compliance of the criminal procedure law with the Constitution and the Convention, through the process of normative control, they terminate decisions in criminal cases where the violation of legal certainty is resulted from the constitutional or convention law, and decision of the Constitutional Court and the European Court have binding effect to the legislature, the courts and other body, i. e. *erga omnes*.

Constitutionalization of criminal procedure law is implemented through specific control of the constitutionality of the decision making about constitutional appeals against decisions of the criminal courts, which the Constitutional Court has repeatedly quashed, regardless to the model of the criminal proceedings and whether he discussed the old or the new Code of Criminal Procedure. Critics of these decision disregard that the Constitutional Court of Serbia is not part of the judicial authorities, nor a court of full jurisdiction (jurisdiction). His constitutional powers also include constitutional protection when making decisions about injury or denial of human and minority rights and freedoms of individuals guaranteed by the Constitution.

Any other constitutional interpretation would lead to a Constitutional Court in a superior or subordinate position of judicial authority.

Decisions of the Constitutional Court of methods described herein represents the protection (the achievement) of constitutional guarantees of fundamental freedoms and human rights, through evolutionary and / or dynamic interpretation the provisions of the Constitution and institute criminal procedure, in order to ensure legal certainty in criminal proceedings.

Keywords: European principles and values, constitutionalization, protection of human rights in criminal proceedings.

INTRODUCTION

Social and political ultimatum for enhanced and efficient fight against organized crime, corruption and other particularly serious crime demanded by the legislator in the area of criminal justice reform that is being implemented through the adoption of a new model of criminal procedure with the reorganization of the government authorities in that area. In this way, they were sacrificed and some good, traditional values of the criminal proceedings, many of which have not been adequately transferred into the new concept of the criminal proceedings, while some of the innovative solutions were totally foreign to our criminal procedural tradition, the existing judicature and doctrinal views, and thus the current prosecutorial and judicial knowledge and experience.[1] Improper solutions will be corrected not until next legislative novella, but until it is determined exactly all deficiencies of currently relevant laws of the criminal procedure law system, proposed changes are ahead and should be accepted and implemented because *dura lex sed lex*.

Transformation of the Serbian criminal proceedings based on the foundations of the Code of Criminal procedure of the Court of the Kingdom of Yugoslavia in 1929., through the Law of ex Yugoslavia in 1977. and the Code of Criminal Procedure in 2001. That was innovated several times, and most important 2009th year, she went to the adoption of the Constitution of the Republic of Serbia 2006th and the new Code of Criminal Procedure of the 2011th in a large (r)evolutionary phase. Although the reform was announced in 2006. The adoption of the Code of Criminal Procedure, which was adopted a prosecutorial investigation, the legal text has never really come to life, but its implementation was delayed several times, the law is transformed into a. sleeping law[2], to the adoption of the Law on Criminal Procedure 2011th, all previous laws on criminal procedure were putted out of force. The tripartite division of the preliminary procedure by previous solutions where the state prosecutor demands criminal prosecution, the investigating judges collect evidence, and the defense attend investigative actions since 2011. is left in legal history. This model of Serbian criminal procedure is changed with the introduction of different solutions, and the most important are the consequences related specifically to Inquisition attitude of public prosecutor to criminal prosecution and investigations, new attitude to the principle of true and complete adversial construction of the main trial.

Despite these changes, the norms of the criminal procedure law is now directly or indirectly, can be found in a number of law as a result of not only the appearance of new types of new and serious crime, but also the internationalization and Europeanization of the criminal justice order. Criminal proceedings still have the same goal: to make the detection and punishment of offenders, and to provide protection to the citizens of possible unjustified (illegal) punishing or restriction of fundamental rights and freedoms by state authorities. Relationship between the individual and the state government exactly reflects through the criminal procedure law, which is to Roxin[3] seismograph constitutionally guaranteed individual rights of citizens, which still has to be accepted only conditionally! Because the existence of constitutional guarantees of human rights and freedoms in criminal proceedings now means that the Constitution of the Republic of Serbia[4] is source of criminal procedural law and has direct legal effect (Article 18, paragraph 1 of the Constitution). Constitutional Standards arising from Article 1 and certificates to European principles and values, related criminal law contained in several provisions relating to the right to liberty and security (Article 27 of the Constitution) guarantees relating to the treatment of persons deprived of their liberty and additional rights if the deprivation of liberty has been no court decision on the matter (Article 28 and 29), procedure with persons whose rights to liberty and security is limited or who are detained (Article 30 and 31), the right to a fair trial

1 Skulić, M., Ilic, G., The new Code of Criminal Procedure Serbia – How did Reform fall, What to do? Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, 2012., Belgrade

2. Pavlovic, Z., The public prosecutor as a the subject of crime prevention, the criminal law and crime prevention , ed. Kron L., Institute for Criminological and Sociological Research, 2008th, Belgrade, p.172. et al. The author emphasizes that reforms can not avoid with delays..

3 Roxin, C., Strafverfahrensrecht, 25. Aufl.,C.H.Beck, Munchen, 1998.,str. 9

4 The Constitution of the Republic of Serbia was published in the Official Gazette of RS No. 98/2006.

(Article 32) and special rights of the accused (Article 33), or in other words a fair process in an efficient judicial system through the effective protection of the rights and freedoms. Particular importance is given to the decision referred to in Article 34 Constitution - Legal certainty in criminal law, which, along with other constitutional provisions are determined as the Magna Carta libertatem of the modern era.[5]

Such constitutionally conceptualized the fundamental rights and freedoms and their protection in criminal law can be grouped so in three areas: the rights and freedoms of man and citizen, the basic principles of organization of the judiciary and other issues that are of direct relevance to the relationship of constitutional law and criminal procedure law.[6]

Besides adopting a new model of criminal proceedings, criminal procedure law in recent years in Serbia was marked with another feature, in the context of the criminal procedure law and the Constitution, emerged from the process of harmonization of criminal procedural law with the Constitution through decision of the Constitutional Court and the European Court of Human rights, on which abolishes unconstitutional statutory provisions and judicial decisions in criminal proceedings. This characteristic, or by Ilic[7]phenomenon is referred to as the constitutionalization of criminal and criminal procedural law. Constitutionalism seeks establish the borders of state government, assent to the rule of law and protection of fundamental rights.[8]

The Constitutional Court and the European Court, through the decisions they making, in case of exceeding the limits of state authority and violation the rule of law and fundamental rights and freedoms in the field of criminal law, in a concrete way they conducting constitutionalization. It should become an effective mechanism for harmonizing Serbian criminal procedural law with European values of protection of fundamental human rights and in general in the criminal proceedings.

Increasing criticism of the ordinary courts in the work of the Constitutional Court's decision in the context of the constitutional complaints and their effects, the Constitutional Court of Serbia in several of its decisions in the same way commented. It is a process of decision-making and conflict that has been recognized in other jurisdictions, such as in Italy, Germany, France and other countries, until recently, purely traditional continental criminal procedure. According to paragraph USS under the jurisdiction of the ordinary courts is to determine the existence of specific reasons relating to the basis for such determination or extension of detention measures. It is not part of the task of the Constitutional Court to determine or to reviewing those reasons, nor to replace the regular courts that decides on the detention of the constitutional complaint. But, The Constitutional Court of Serbiais responsible according to reasons relating to the detention given to the decisions of the ordinary courts and the facts that the applicants constitutional complaints suggest, chooses whether or not in this particular case there was a violation of the constitutionally guaranteed rights.[9]

Decision in the case *Loizidou* ECtHR said that the European Convention on Human Rights is a constitutional instrument of European public order, as a set of imperative, mandatory legal rules, as *ius cogens*. It is a word about undisputed right, whose violation and protection will bee briefly touched in further text.[10]

5 Some authors still determines the Constitution as the source of the side of the criminal procedure law, in. Grubač, M. Criminal Procedure Law, Belgrade, 2009., Faculty of Law of the University Union and the Official Gazette, p. 51

6 Thus and Bejatović, S., Criminal Procedure Law, Second edition, Official Gazette of the 2010th, Belgrade., Page 57

7 Ilic, PG, Effect of practice of the Constitutional Court of Serbia to the standards of human rights in criminal proceedings, the role and importance of the Constitutional Court in safeguarding the rule of law from 1963 to 2013., Belgrade 2013th, p. 181-209

8 Rosenfeld, M., CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY, October 25, 1994. p. 4; Duke University Press | ISBN-10: 0822315165

9 The Constitutional Court of Serbia, No Už. 670/2011 from 18. 07. 2012. year

10 ECtHR Loizidou v. Turkey, 23. 03. 1995. paragraph 70, 75 Dimitrijevic, V. et al, International Law of Human Rights, Belgrade Centre for Human Rights, Belgrade, 2006, p. 128-129.

CONSTITUALIZATION OF FUNDAMENTAL RIGHTS AND FREEDOMS IN CRIMINAL PROCEEDINGS IN SERBIA

In the modern organization of the criminal procedure law there are three main features: the principle of separation of authorities, the principle of legality and the constitutionalization of fundamental rights and freedoms. The principle of separation of authorities (Article 4 of the Constitution of RS) between the legislative, judicial and executive, enables that prosecution functions, and prosecution being entrusted into the hands of the state prosecutor, as a special state body, ensuring that the judicial authorities to concentrate on the objective and impartial (and intrinsically and personally independent) deciding on the conduct of criminal proceedings.

The principle of legality has a role to play to ensure everyone is equal in application of the rules of criminal procedure law. This is not about any of the rules, but only on those that are based on legal norms legislative power (Article 16, paragraph 1, Article 287 et al of the Code of Criminal Procedure of 2011). Therefore, Some theoreticians the principle of legality of criminal procedure referred to as a rule *nullus actus sine lege, nulla poena sine iure*, as a counterpart to the principle of legality of substantive criminal law *nullum crimen, nulla poena sine lege*. The principle of legality in criminal proceedings is not a sign that all the accused in the process equal in their rights, but it does not allow the implementation of discriminatory acts on the basis of origin, race, religion, political beliefs, etc. The differences that appear are resulting from different stages of the criminal proceedings, as well as various process steps in the proceedings.

Finally, the constitutionalization of criminal procedure (and the criminal procedure law) means that the norms of the Code of Criminal Procedure which elaborate constitutional provisions on the rights and freedoms of citizens must be harmonized with the constitutional provisions. In the process of constitutionalization of criminal procedure law and with the obligation of direct application of the Constitution, the ordinary courts begin to interpret laws by their own starting with the Constitution.[11]

Intense constitutionalization of criminal procedure law is achieved through specific control of the constitutionality of the decision-making on constitutional appeals against decisions made in criminal cases quashed by the Constitutional Court. The European Court of Human Rights in its judgment Vinčić and others against Serbia according to the complaint 44698/06 and others, from 01.12.2009. Found that the constitutional complaint in the legal system of Serbia, an effective remedy. Decisions of the Constitutional Court concerning the protection of the fundamental, constitutionally guaranteed human rights and freedoms threatened or injured with court decisions in criminal proceedings. According to its contents, following the constitutional structure, Ilic[12] divide them to the right to liberty and security, right to a fair trial and a hard core of human rights (in relation to Article 15, paragraph 2 of the European Convention on Human Rights), while example. Krapac in this context systematize the constitutional decisions to decisions on detention and to decisions about applications of procedural principles at constitutional level in criminal proceedings.[13]

Regardless of the the criteria of systematization, constitutionalization, with decisions of the Constitutional Court has a duty to set the rules for the implementation of fundamental human rights and freedoms in criminal proceedings that have no effect only in the specific procedure *inter partes*, but have a purpose to be respected from legislators who will going to change and unconstitutional law provisions, and the validity of the decision to placed *erga omnes*, what for now is not a case.

11 V.Nenadic M.B., On some aspects of the relations between constitutional and ordinary courts, Journal role and importance of the Constitutional Court in safeguarding the rule of law from 1963 to 2013., Belgrade 2013th, p. 94 Thus and Pajvancic M., who argued that direct application of constitutional provisions is not in dispute. V. Article 142 and 145 Constitution of Serbia: Courts rule in the first place to the Constitution.

12 Ilic, P.G., State *versus criminality and Human Rights Standards*, Journal and state reaction: phenomenology, opportunities perspectives, Belgrade, 2011., ed. Kron., L., Knežić, B.

13 Krapac, D., Criminal Procedural Law, the first book: Institutions, Zagreb, 2011. Official Gazette 38-45.

The existence of constitutional and ordinary courts on the field of protection of human rights and fundamental freedoms at the moment has the characteristic that there is no clear distinction between their functions, especially in the field of human rights. The immediate application of human rights is in the regular courts, so there should be no doubt as to whose mandate in this regard is primary, so through the dialogue between regular courts of jurisdiction, here the Supreme Court and the Constitutional Court should find a rational way out of the conflict that occurs from time to time between them.

For the Republic of Serbia is extremely important in the context of the European system of human rights, based on the European Convention on Human Rights, where international supervision of the implementation of the Convention carries the European Court of Human Rights, and recently primary Constitutional Court of Serbia took over that role. Decisions of the Constitutional Court of Serbia are the *ultima ratio* of the unconstitutional encroachment on the basic freedoms and human rights, setting the standard in criminal proceedings which are binding for all three branches of government.

THE RIGHT TO LIBERTY AND SAFETY (DECISION ON DETENTION)

In proceedings on constitutional complaints against court decisions rendered in criminal proceedings, the Constitutional Court of Serbia has made more decisions that are based from one side on the spirit of the European Convention on Human Rights with reference to its provisions and judicial decisions of the ECtHR and on the other side, on its own practice.

The regularity of the detention decision, the Constitutional Court in the context of errors in the interpretation and application of legal provisions of the criminal procedure law regarding prerequisites for detention and its duration. Standard of reasonable suspicion to determine custody implies not only the presence of a certain state of facts (which may not be at the level of such facts as are necessary to justify a conviction)[14], but it is necessary that the facts and circumstances on the basis of reasonable arguments can be listed under Article 5 Paragraph 1 (c) of the ECtHR under some of the articles of the Criminal Code relating to criminal offences which the accused is charged. In other words refers to the legality of the detention. [15]

A review of the available decision The Constitutional Court of Serbia (CCS) published in the Official Gazette of the RS in the period 2009-2013. Years, we conclude that the answers to certain questions of interpretation of legal standards for the application of detention basis (with respect to the determination and continued detention of accused person) the Constitutional Court seeks to ECtHR practice. That call is more often, when some constitutional matter is complex, or more intensive, in its domain in terms of the limitations of the basic right to liberty and security.

That's exactly CCS in the constitutional complaint with an 893/2008 in its decision of 22 juna 2010.by solving the issue of violation of Article 30 Paragraph 2 Constitution is held principles from the decision ECtHR decision Vrenčev V. Serbia.[16] The applicant of the constitutional complaint by the detention was not brought before the competent court within 48 hours of his detention, and despite the fact that at the time of the decision on custody was not available to the court, it does not mean that the legal and constitutional deadline may be extended for another 16 days in the specific case of reconsideration of detention, regardless of whether there was a final decision on detention.

The Constitutional Cases The 5461/11 of 12 07 2012th USS decided that the provisions of Article 30 Paragraph 3 Constitution guarantees the defendant that his appeal of the custody will be decided by a competent court, and the decision will be sent within 48 hours.[17] In this case, an

14 The European Commission on Human Rights, Murray v. United Kingdom, 14310/88, 28. October 1994., para. 55.

15 ECtHR, Wloch v.Poland, 27785/95, 19. October 2000. year, para.109.

16 ECtHR, Vrenčev v. Srbija, 23. September 2008. year, para. 67,68.

17 See. Constitutional Court of Serbia (CCS) No Už 39/2007, 16. July 2009., Už 1254/2009, 08. October 2009. year. Specifically, deciding in case Momcilovic, CCS No Už 5509/2011, 26. September 2012. The Constitutional Court said that a decision on the appeal against the decision on detention and its delivery must be resolved in the constitutional period of 48 hours, requiring emergency. It is also a violation of the right guaranteed by Article 27 Paragraph 3 of the Constitution.

appeal against the decision of counsel on detention competent court decided only nine days after the receipt of complaints lodged and, contrary to the general principle of urgency in detention cases.

One of the common conclusions of the USS constitutional complaints about the measure of custody refers to the violation of the constitutional right to a period of detention, as guaranteed by Article 31 of Paragraph 1 and 2 Constitution, if the court keeps giving identical and stereotypical reasons for the Decision on the extension of detention, and without having a detailed explained the reasons for the continued detention is necessary. Omissions of courts without proper justification and individualization of reasons, according to the principle of proportionality, evaluate the adequacy, appropriateness and necessity of further detention, the complainant is violated the cited constitutional right.[18] The Constitutional Court held that in each case the court has an obligation to explain in detail the reasons why it considers lawful and legitimate purpose of detention still exist. Such failure of the courts led to the excessive interference of custody of the fundamental right to liberty and security!

The adoption of constitutional grievances GM-decisions Už No (Constitutional Appeal) 8802/2013 Day 04 12 2013th The Constitutional Court found a violation of the limited duration of detention guaranteed by Article 31 Paragraph 1 Constitution. Appellant acknowledged the violation of his constitutional rights arising from the liability of the competent court that the existence of reasonable suspicion must specifically explain the reasons for detention in each case. These reasons must be relevant, sufficient and substantiated, and must not be arbitrary.[19] Extension of detention measures can be justified only by the existence of such circumstances that justify the public interest and outweigh the right of respect for individual liberty.[20] Legal basis from point 4) of paragraph 1 of Article 211 of the Code of Criminal Procedure to determine the extension of the detention measure as such is recognized by the ECtHR, that in exceptional cases, certain criminal offenses because of their particular gravity and public reaction to them, they can justify detention, at least for a while.[21] But in this case the USS found that the competent court for extensions of detention failed to specify and explain the specific facts and circumstances indicate that indeed there was a disturbance of the public and to correlate with the severity of the offences that the complainant was placed on burden. The Constitutional Court in its decision noted that the courts when deciding on the imposition or extension of custody must take into account the approach that requires the European Court of Human Rights, and that the disturbance of the public can not be based only on the severity of the potential punishment of the crime neither in circumstances existed at the time, which was before deciding on a new extension of detention . On that occasion, the Constitutional Court concluded that there had been a violation of the limited duration of detention under Article 31 Paragraph 1 Constitution. It is necessary, in accordance with the European Court in such a situation, to identify the cumulative conditions for continued detention: first, whether the reasons justifying it remains relevant and sufficient and second, whether the authorized official acted with great care. Only the fulfilment of both conditions is considered that the time spent in custody was the shortest possible time.[22]

On such legal argument, the Constitutional Court decided on the occasion of the constitutional complaint with an 3231/2013, finding that the extension of the measures the applicant's detention violated the right guaranteed by Article 31 Paragraph 1 Constitution of Serbia.[23] The Constitutional Court held that the competent courts express lack of caring attitude towards custody because of the risk of escape, without paying enough attention to the dynamic

18 The Constitutional Court of Serbia No Už1514/09 Decision from 02. 11. 2011.;ECtHR Mansur c. Turska, 08. 06. 1995. article 55, Kay v. Great Britain from March 01. 1994., Article 31, Kurt v. Turska, 24276/94 from 25. 05. 1998. and Bayorkina v. Rusija, 69481/01 from July 27. 2006. year.

19 The Constitutional Court of Serbia here referred to the judgment of the Court in Kay. United Kingdom from 01 March 1994., § 31, at Kurt. Turkey, 24276/94 of 25 05 In 1998. and in Bayorkina. Russia, 69481/01 of 27 July 2006th the

20 ECtHR judgments in the cases of W. v. Switzerland of 26 01 In 1993. paragraph 30, Solmaz v. Turkey of 16 01 2007a. § 38, and the USS Už Decision 4940/2010 of 31 03 2011th, paragraph 5

21 Judgments Letellier vs. France from 26. 06. 1991., article 51.,Kemmache v. France, 27. 11. 1991., article 52.

22 Judgements Matznetter from 10. 11. 1069., paragraph 12., Letellier from 26. 06. 1991. paragraph 35, Shiskov from 09. 01. 2003. paragraph 58 and other.

23 The Constitutional Court of Serbia No Už 3231/2013 Decision from 03. 10. 2013., Constitunional appeal by Miroslav Miskovic.

approach, which requires the ECtHR in the evaluation of sufficient and relevant circumstances, or changed circumstances, especially those related to the course criminal proceedings. Based on these arguments and the European Court of Human Rights, the Constitutional Court found that when the only remaining reason for continued detention is risk of escape, it must be ordered his release before trial, if guaranties that the complainant will appear can be provided.

IMPLEMENTATION AND OBSERVANCE OF PRINCIPLES OF PROCEDURE IN CRIMINAL PROCEEDINGS

Regard constitutional complaints where the applicants stated disregard of procedural principles in court, there are highlighted decisions relating to the presumption of innocence principle in *Dubio pro reo*, the right of access to court, *Ne bis in idem*, the position of the victim and the right to trial within a reasonable time and other.

Violation of the presumption of innocence of the accused was the basis for the decision of Constitutional Court with the 1327/10 dated 20th of October 2011, where it was determined that there was a violation of the presumption of innocence guaranteed by Article 34 Paragraph 3 Constitution of Serbia, when the investigating judge issued a decision on custody, on the grounds that the suspect is a special returnee, although it was not the person has previously been convicted legally (as previous - criminal proceedings had not been validly ended at this point). And according to the practice the ECtHR presumption of innocence requires that a judge deciding in a particular case does not depart from the premature assumption that the defendant committed the crime. The Constitutional Court in the case Dimović[24] deciding a constitutional appeal found that the violation of presumption of innocence was the result of what is taken as an established fact that the applicant of the constitutional complaint has committed a criminal offence with which he was charged, although the case is still in the investigation stage, and not validly ended. In the Cases The 227/2008 Constitutional Court of Serbia in its decision to accept the allegations of the complainant that the court make its conclusion on reasons for continued detentions found in collected evidence finding that those facts are established, thus violating the presumption of innocence of the complainant G. K's[25] According to Ilic[26] principle stands of Constitutional Court of Serbia is that the criminal court must remain within the limits of reasonable doubt until the final facts were not discussed at the trial, and the proceedings ended legally. Otherwise violate the presumption of innocence of the accused. The presumption of innocence of the accused may be violated and by the reputation actions.[27] It is enough to prematurely express an opinion by example if court found that the defendant is guilty, which would inevitably according to ECtHR constitute a violation to the presumption of innocence.[28]

In the verdict case Lavents. Latvia (2002nd, paragraph 119, 127), in commenting on the occasion of the members of the panel told reporters that it was strange that the defendant pleads not guilty, because the court will decide opposite, the European Court of Human Rights decided that there was word about circumstances in the objective sense of guilty declare in advance of the defendant. Closely related to this is another problem with the presumption of innocence, which is excessively publicity. It is a phenomenon of a criminal trial in the media, when it is necessary to determine whether news reporting acted in good faith or not!

Regardless of what they do not match, it is certain that the presumption of innocence and the principle of[29] *in dubio pro reo* at least partially touching. In fact, similar to the presumption

24 The Constitutional Court of Serbia No Už 746/2008 from 17. 06. 2009.
25 The Constitutional Court of Serbia, No Už 227/2008 from 19. 03. 2009. year
26 Ilic, P.G, The impact of the Constitutional Court of Serbia on the human rights standards in criminal proceedings, Journal, op.cit. p. 199
27 ECtHR Minelli v. Switzerland, decision of 25 03 1983, par. 34 et al. through public statements by the authorized official, to detection and prosecution. Similarly, and in Allenet de Ribemont c. France judgment of 10 02 1995th par. 35th-41st
28 ECtHR, Matijasević v. Serbia, 19. 09. 2006th., paragraph 46.
29 Although the contents are different, equally use the term principles and rules. Principles are management ideas, and they do not have the essential character of the building process and are used to solve a particular situation. See. more at Lazin, Đ. Unconstitutional provisions of the new Criminal Procedure Code in 2006. The Branic, 1-2/2007, p. 76.77.

of innocence, the rule in Dubio pro reo in deciding court allocates risk lack of evidence of the material facts in favor of the defendant. This rule, although not independent of evidentiary rules under Article 6 ECHR implies that the court in criminal proceedings shall decide the verdict in a way that is favourable to the accused, if after conscientious assessment of evidence, does not give remove doubt about the existence or non-existence of some facts that will constitute a criminal offence or on which depends the application other provisions of the Criminal legislation. However, just to prove the material facts (i.e. the determination of the truth) has become one of the stumbling blocks in the implementation of the Code of Criminal Procedure of the 2011th, not only in theory, because in practice, and on this occasion heard different opinions.[30]

The passive role of the court with such legal solution under Article 15 CPC hardly to represent the traditional principle of truth, which the court has an obligation to strive as a primary task of the criminal proceedings. In this legal dogmatic and conceptual issue here we can not enter.

The right to a fair allocation of Justice (Article 6, paragraph 1 of the ECHR) is the result of the acquis of the European Court of Human Rights, which is based not on the formal, but the real right of access to court..

It is a case of Golder v. United Kingdom (1975) and Airey v. Ireland (1979), [31] where the focus of the decision based on violation - denial of the right of access to court under Article 6 Paragraph 1 Convention.

The Constitutional Court, in light of the expiration of the right to appeal in Cases The 3651/2012 decided that the procedural law applied arbitrarily, because the defendant as a timely deadline for submitting an appeal is not accepted the first working day after the non-business day, which the court described as a violation of the to a fair trial under Article 32 Paragraph 1 Constitution of the Republic of Serbia, as an element of the right of access to court.[32]

In light of the right to a fair trial is necessary to mention the position of the victim in criminal proceedings,[33] because they recognized him guarantees of Article 6 ECHR, and therefore under Article 32 Constitution of the Republic of Serbia. In cases *Vencl*[34] and *Vukicevic*[35], The Constitutional Court found a violation of the rights of the injured party to a trial within a reasonable time, due to the occurrence of absolute obsolescence of criminal prosecution, because of inefficient and ineffective treatment court, which made it impossible for the aggrieved party the realization of their rights. The provision of Article 22 Paragraph 1 Constitution establishes the right to judicial protection and the right to the elimination of the consequences arising from the violation.[36]

In deciding a constitutional complaint with an 4527/2011 of 31 01 2013th The Constitutional Court of Serbia is solved exactly in terms of the criminal proceedings , the right to a fair trial under Article 32 Paragraph 1 concerning the right to life under Article 24 Paragraph 1 Constitution of the Republic of Serbia . Specifically , in the case of the murdered guards in front of the council Serbian Constitutional Court found the constitutional complaints of parents Jakovljevic and Milovanovic , due to failure of the competent authority in order to clarify all the circumstances surrounding the murders of their sons DJ and D. M. , and specifically the detection and prosecution of the offender . The rule of law and legal certainty in this particular case, questioned, because after nearly a decade since the death of their Children, pre-trial proceedings , which was supposed to answer the question under what circumstances they were killed , who would be responsible was not completed. The Constitutional Court ruled that there was a violation of the procedural terms of the right to life under Article 24 Paragraph 1 Constitution, within which is evaluated and a violation of Article 32 Paragraph 1 of the Constitution.

30 Article 15 Paragraph 4 CPC in this way is in our opinion just leads to uncertainty in treatment, and, consequently, the application of the rules in Dubio pro reo. Of the court should be based on the fundamental principle of truth (or material truth). See more about the truth (even of this principle) in Jovancevic, N., principles of truth in the new CPC since 2011., Juridical Life (in serbian) 9/2012, p. 845-859., and Majic, M., Myths and Realities about truth in criminal proceedings, the Supreme Court Bulletin 2/2013., Belgrade, p. 141-169.

31 Gomien, D., Short guide to the European Convention on Human Rights, Belgrade, in 1996., P.32.

32 The Constitutional Court of Serbia No Už 3651/2012, 08. 11. 2012. year.

33 Pavlovic, Z.S., Some specificity the injured party as a subsidiary prosecutor the Criminal Procedural Law of the Republic of Serbia, Journal of Law Faculty Split 49, 3/2012, p. 615-632.

34 The Constitutional Court of Serbia No Už 261/2007 from 25. 12. 2008.

35 The Constitutional Court of Serbia No Už 3504/2011 from 22. 12. 2011.

36 Pajvancic, M., Comment of the Constitution of the Republic of Serbia, Belgrade 2009, p. 33-35.

This decision according to Ilic is a confirmation of the unbreakable bond between fundamental freedoms and respect for human rights.[37]

In relation to the prohibition of ne bis in idem (Article 34, paragraph 4, of the Constitution - Legal certainty in criminal law, Article 4 of the CPC), we conclude there were given the current model, an important role, in accordance with Article 4. Protocol 7 the ECHR. Prohibition of keeping the new process in the same things she had far more access to the ECtHR, in the case of Sergey Zolotukhin v. Russia (GC 14939 10th 02.2009.), Franz Fischer v. Austria (no. 37950/97) and others. The European Court of Human Rights has held that it is a limitation that does not apply just to the right not to be punished twice already applies to the right not to be prosecuted or tried twice on the same matter.[38]

Since the time of Aristotle, justice is linked to respect of the law and for lack of personal interest and bias. right to fair trial guarantees the right to trial an independent and impartial tribunal (Article 6 § 1. ECHR, Article 32 paragraph. 1 of the RS), where the European Court of Human Rights casuistic developed criteria for assessing the independence and impartiality. According to these criteria, the judge's impartiality is ensured if the decision reasonably excluded the possibility that the judge could be affected by the knowledge that had come out of the courtroom. In Piersack in. Belgium (in 1982., Paragraph 30) the ECtHR impartiality defined negatively, as *absence of prejudice or bias*. Therefore, the existence of impartiality is measured by subjective criteria corresponding to the reasons for exclusion – *iudex inhabilis*, i.e. reason to disqualify judges – *iudex suspectus*.[39] In resolving the issue of the independence of our legal system involving all relevant stakeholders, and so on complaint of a judge that he had been compromised the independence of the influence of the President of the Court in its operation decided the High Judicial Council.[40]

INSTEAD OF A CONCLUSION

Constitutional law today more intensely affect the criminal procedure law, as a the legal area of classic examples of disagreement state government with the fundamental rights of citizens. This interference began primarily in the area of so-called detention rights in criminal proceedings. It has not been the case in our constitutional jurisprudence, and the Constitutional Court dealt primarily abstract control laws and regulations. This situation is a result of decision by the Constitutional Court on constitutional complaints. The Constitutional Court of Serbia with its decisions on constitutional appeals relied on legal opinions and methods of interpretation of the European Court of Human Rights on the rights guaranteed by the ECHR and the Constitution of RS. At the same time, the Constitutional Court silently assumes case oriented approach of the European Court of Human Rights, and the USS provides interpretations of constitutional guarantees for the promotion and protection of fundamental rights and freedoms of citizens.

From our point of view, at the moment through described constitutionalization of criminal procedural law come to the affirmation of the right to a fair trial standards related to personal liberty and security and the effective protection of human rights in the criminal courts. In this way, the criminal process is becoming more efficient instrument providing the necessary legitimacy and protection of society against organized crime, corruption, terrorism and other particularly serious crime with one hand, and the protection of fundamental rights of the accused of the measures and actions abatable repressive government in criminal law from the other side. Legal Framework (constitutionalizated) criminal proceedings is guarantee to each individual that the state government will not unjustifiably violate freedom and rights and that he would

37 Ilić, P.G, Influence of practice, op.cit.

38 In this context v. Decision in case *Maresti v. Croatia* from 26. 06. 2009., which Croatia were convicted for violation of the provisions of Article 4 Protocol 7 to the ECHR. The review decision of Constitutional Court of Serbia, we met with the injury of the rule *ne bis in idem* in the practice of domestic courts.

39 Thus in the Code of Criminal Procedure, Article 37 The exemption-Reasons exemption.

40 The applicant of complaint to the High Judicial Council stated that he had a discussion with the President of the Court regarding its decision to temporarily return to the defendant's travel document, which is considered kind of pressure on its independence. Through the media the public is informed about the decision Constitutional Court of Serbia, while the same is not yet published. See www.rts.co.rs, Downloaded 18. 01. 2014. u 10,00AM.

be provided with the minimum rights of defence and other procedural guarantees of a fair trial. This primarily refers to the right to liberty and security (the standards relating to detention *ergo* detention), the right to a fair trial and the protection of fundamental human rights in criminal proceedings.

Constitutionalization of criminal procedure law is the control of the constitutionality of the functions of the judiciary, according to will of writers of the Constitution, i.e. the harmonization of judicial decisions to the Constitution as a fundamental and the highest legal act of the country. Number of decisions of the Constitutional Court of Serbia on constitutional appeals regarding decisions of the ordinary courts in criminal proceedings is in exponential growth.[41] Therefore, the Constitutional Court in its decision in relation to interpretive mistakes, legal (criminal) law relevant to liberty and security or the right to a fair trial gives two clear messages: that the Constitution of the RS is source of law for which there is a mechanism for its immediate implementation, but also gives a signal to author of this Law for changes legislation, etc..

Republic of Serbia can not be excluded from European integration process, and therefore of the European system of human rights and its constitutional order that through constitutionalization of criminal procedure law aims to create an efficient mechanism to combat crime and the integrated protection of human rights, regardless of model of criminal procedure. Opening 23 chapter regarding the start of accession negotiations for EU integration process will constitutionalization process of criminal procedure law even more emphasize, requiring from legislative power new reforms, in order to have the quality and equal protection of all parties in front of the court. Changes to the constitutionalization of criminal procedure law and changes to the law should establish a *pro future* and professional responsibility of judges, public prosecutors and police officers for violation of the ECHR and the Constitution. A repeat violation indicates the need for such, with increased systemic education on constitutional and conventional law and practice.

REFERENCES

1. Bejatovic, S., Criminal Procedure Law, Second edition, Official Gazette of the 2010th, Belgrade
2. Dimitrijevic, V. et al, International Law of Human Rights, Belgrade Centre for Human Rights, Belgrade 2006th
3. Gomien, D., Short guide to the European Convention on Human Rights, Belgrade, in in in 1996.
4. Grubac, M. Criminal Procedure Law, Belgrade, 2009., Faculty of Law of the University Union and the Official Gazette
5. Ilic, PG, Effect of practice of the Constitutional Court of Serbia to the standards of human rights in criminal proceedings, in Journal role and importance of the Constitutional Court in safeguarding the rule of law from 1963 to 2013., Belgrade, 2013
6. Ilic, P.G., State *versus* criminality and human rights standards, Proceedings Crime and public reaction: phenomenology, possibilitiesperspectives, Belgrade, 2011., ed. Kron., L., Knezic, B.
7. Jovancevic, N., principles of truth in the new CPC since 2011., Juridical Life (in serbian) 9/2012,
8. Krapac, D., Criminal Procedural Law, the first book: Institutions, Zagreb, 2011. OG
9. Lazin, DJ. Unconstitutional provisions of the new Criminal Procedure Code in 2006. The Branič, 1-2/2007
10. Majic, M., Myths and Realities about truth in criminal proceedings, the Supreme Court Bulletin 2/2013., Belgrade

41 Data from the work of Constitutional Court of Serbia says that 2009. Were received in 2843 a constitutional complaint, in 2010. year 5555, the 2011th year. 6928, and the 2012th year. 5,173. constitutional complaint. In January - June 2013th year 5173 constitutional appeal were admitted (the total number of appeals stated, without separation of the groups). www.ustavni.sud.republike.srbije.rs , also Nenadic, B., op. cit. Journal 2013th the.

11. McBride, J., Human Rights in Criminal Proceedings - The European Court of Human Rights, Council of Europe, Office in Belgrade, Belgrade, 2009.
12. Nenadic M.B., On some aspects of the relations between constitutional and ordinary courts, in Journal, Role and importance of the Constitutional Court in safeguarding the rule of law from 1963 to 2013., Belgrade, 2013.
13. Pajvancic, M., Comment of the Constitution of the Republic of Serbia, Belgrade 2009
14. Pavlovic Z., The public prosecutor as a the subject of crime prevention, the criminal law and crime prevention, ed. Kron, Institute for Criminological and Sociological Research, 2008th, Belgrade
15. Pavlovic Z.S., Specificity the injured party as a subsidiary prosecutor the Criminal Procedural Law of the Republic of Serbia, Journal of Law Faculty in Split .49, 3/2012
16. Rosenfeld, M., CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY, October 25, 1994. p. 4; Duke University Press | ISBN-10: 0822315165
17. Roxin, C., Strafverfahrensrecht, 25. Aufl.,C.H.Beck, Munchen, 1998.
18. Skulic, M., Ilic, G., New Law about Criminal procedings of Serbia, - How did Reform fall, What to do? Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, 2012., Belgrade

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THE MAIN PROBLEMS AND CHALLENGES IN THE ESTABLISHING THE LEGAL ACCOUNTABILITY OF POLICE[1]

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Abstract: The paper analyses the concept of a legal accountability of police and the purpose of control of its functions. The authors highlight the fact that it is essential to establish an effective system of accountability and control of police in a legal and democratic state in order to prevent and, if necessary, sanction any misconduct in the functioning of police. This is due to the fact that legality of the state administration is an absolute priority in the system ruled by law, and especially refers to legal work of police as a legitimate state authority in charge of the use of force and other powers which could be potentially harmful to the fundamental rights and freedom of citizens. The authors place particular emphasis on basic problems and challenges encountered during efforts of democratic societies to render operations of police transparent and accountable. Some of them are of a general (principled) nature while others are related to advantages and disadvantages of certain mechanisms of control of functions of police, the specifics of police subculture and its basic characteristics, as well as the nature of discretionary authority and a number of police tasks which are often not and cannot be controlled effectively. Following this analysis, the authors offer suggestions de lege ferenda for a successful development of a system which would ensure accountability of police. This allows for a significant contribution to the overall objective of institutionalisation of the rule of law in our society which ultimately determines the effectiveness of prevention of crime.

Keywords: legal accountability, police, rule of law, control.

INTRODUCTION

One of the main principles of the rule of law is the responsible and controlled functioning of the government. From its conception until today, the idea of the rule of law implies that state power is limited by law. According to the ancient political and legal theory, the rule of law encompassed the rule of law based on reason. Therefore, not just any rule but the rule of reason. In relation to that Aristotle states that "to demand the rule of law is to demand the rule of God and laws; and to demand the rule of man is to allow animal to rule because passion is somewhat animalistic and passion spoils the best of people when they are in power. Therefore, the law represents reason without demands."[2] The founder of modern theoretical concept of rule of law - Albert Ven Dicey, points to the requirement of the absence of arbitrary and discretionary decision-making authority as the first essential characteristic of the rule of law.[3] Even in later times, this requirement is emphasis unequivocally as *conditio sine qua non* of the rule of law. The need for government to be limited to its own laws is particularly pronounced in the area of administrative authority, although it does not exclude the area of legislative power. However,

1 This paper is the result of the realisation of the Scientific Research Project entitled „Development of Institutional Capacities, Standards and Procedures for Fighting Organized Crime and Terrorism in Climate of International Integrations". The Project is financed by the Ministry of Scince and Technological Development of the Republic of Serbia (No. 179045), and carried out by the Academy of Criminalistic and Police Sudies on Belgrade. The paper is also result of the realisation of the Scientific Research Project „Position and rule of Police in Democratic Society". The project financed by Criminalistic and Police Akademy in Belgrade (2012-2014).
2 Aristotel, *Politika*, Nolit, Beograd, 1975, 1287a
3 Dicey, A.V.: *Introduction to the Study of the Law of the Constitution*, Macmillan&Co LTD, London, 1931, p. 198.

administrative authority in a daily contact with the public much more often than the legislative power, and is therefore more frequently faced with decision regarding demands and needs of citizens. This is particularly applicable to police which regularly makes decisions about rights and interests of the public. In addition, police has the capacity to limit legal rights and freedom of its citizens by application of its powers. These limits are essential for the existence of the rule of law. This renders the function of police in society not only legal but also legitimate.

In order to assure this, the work of police must be controlled, and police must be accountable for its actions. The establishment of accountability of government bodies is a process which consists of several basic phases. The first represents a definition of normative standards of action which allow for the comparison of normative (expected) and actual state of affairs. In order to achieve this phase the work of government bodies must be transparent and open to control. This control provides a basis for a comparison and appropriate decision-making. The last phase entails the implementation of measures contained in such decisions.[4] To render police accountable, therefore, means to make it subject to control by various state and social actors, those which lie within police organization and those which lie outside of it. These state actors have the opportunity to demand from police all necessary explanations for actions taken or decisions made and, above all, the possibility of evaluation of its work and applications of sanctions in cases of irregularities.[5] In a wider and theoretically more general context, the responsibility of police can be defined as harmonization of its behavior with goals of the community.[6]

Many democratic societies face challenges and problems during the process of establishment of the accountability of police where those challenges are non-judicial in nature, that is they are not normative-legal and institutionally conditioned. The purpose of this paper is to point out these challenges and problems. It should permit one to understand the complex processes of the establishment of police accountability, and to identify their key issues. The resolution of those issues could determine the success of the strategy aimed at the establishment of police accountability. Some of those issues are of a general and principled character while others are related to advantages and disadvantages of certain mechanisms of control of police work, the specifics of police subculture and its basic characteristics, the nature of discretionary power and a number of police tasks that are often not and cannot be controlled efficiently.

THE MAIN PROBLEMS AND CHALLENGES IN THE ESTABLISHING OF THE LEGAL ACCOUNTABILITY OF POLICE

The complete independence of police is in direct conflict with the purpose and the idea of police accountability. However, it is this very aspect that reveals some of the key challenges which occur during the process of adjustment of the role of police to the demands of the rule of law.

Namely, many democratic countries strive toward the independence of police operations, reinforcement of police and the expansion of its powers particularly with the aim to oppose successfully any contemporary challenges of national and global security such as terrorism and organized crime. This contradiction was observed as early as 1962, and it was described in a report of the British Royal Police Commission as follows: *"The society wants an effective police force in the protection of public safety and the prevention of crime but it also requires it to be controlled and regulated so as not to interfere with personal freedoms of the people. The result of this is compromising. Police needs be strong but not violent, it needs to be efficient but not intrusive, it should be an impartial force in the body politic of society, but also needs to undergo*

4 Tomić, Z: *Upravno pravo*, Savremena administracija, Beograd, 1988, str. 72; Fisher, E., *The European Union in the Age of Accountability*, Oxford Journal of Legal Studies, Vol. 24, No.3/2004, p. 497.

5 Schlenker, B.R., Britt, T.W., Pennington, J., Murphy, R., and Doherty, K.: *The Triannglе Model of Resposibility*, navedeno prema: Chan, J. B.L.: *Governing police practice: limits of the new accountability*, British Journal of Sociology, Vol 50, No.2/1999. p. 253.

6 Bayley, D.: *Patterns of Policing – a Comparative International Analysis*, New Brunswick: Tuthers University Press, 1990, p. 160.

a certain degree of control by those who are responsible for the supervision of police but are impartial."[7] Similar demands were repeatedly found in reports of various other commissions which aimed at finding ways to establish successfully accountability of police. For example, one of the key conclusions found in the report and proposals made by the judge Wallace Oppal to the Canadian police in 1994 is tantamount to a request to establish a balance between the independence of the police and its responsibilities as the primary task of any democratic state.[8]

Efforts to establish this balance can be viewed as a tendency to establish a balance between the demands for expansion of the power of police in order to achieve efficiency of its operations and requirements to protect basic human rights and freedoms. These are the two legitimate demands that democratic societies require from their police. However, it is a challenge to achieve both of these demands with an equal degree of success, and at the same time achieve other, primary aims contained within them. Consequently, democratic societies face the problem of principle which Jerome Skolnick was one of the first to describe. According to him, the essence of the problem is reflected in the fact that police in a democratic society is in charge of maintaining order, among other things, and achieves that task in accordance with the rule of law. As such, members of police are civil servants and represent therefore part of the state bureaucracy. However, the ideology of the democratic bureaucracy is based primarily on the initiative of civil servants, rather than on a strong tendency to follow rules and procedures. In contrast to that, the rule of law emphasis individual rights of citizens and it also emphasis limits of initiatives of civil servants. This tension between the operational consequences of the idea of order, efficiency and initiative on the one hand, and laws on the other, represents a principal problem of the police as a democratic and legal organization.[9] As Skolnick points out, the law is a primary instrument in the preservation of social peace and order. By applying the law, police maintains order, but at the same time this law often imposes restrictions on the efficient maintenance of order as a primary task of police. Skolnick was among the first to point to one of the specific characteristics of the police function, which is reflected in the aspect of value of its internal divisions (efficiency-legality) in the context of a broader analysis of the role of police in a democratic society.[10]

The way in which modern states establish the aforementioned balance and generally, the way in which they solve the problem of control of its police, is certainly not unique. For example, the reform of the police force in the United Kingdom is largely based on the successful establishment of a balance between the expansion of its authority and its powers, and finding ways to make its power and authority accurately defined in legal terms, and thus reduce to a minimum possibilities of their abuse. With the institution of the *Police and Criminal Evidence Act 1984* in the United Kingdom, the UK police force was provided with a significant expansion of its powers within the legislative framework defined in the Act but it was also provided with strict codes of practice for the exercise of those powers. This approach caused much controversy and debate about the extent to which the legislation will be prevented from violation and further expansion of powers of police authorities in the UK, and it raised the issue of the influence of law on the police practices and its real power to profile it according to the requirements of the rule of law.[11]

This dilemma has gained importance in the last decade and has become recognizable in many countries, especially after the terrorist attacks on the United States in 2001 when terrorism was officially declared a global problem and social evil. A demand for an effective fight against terrorism as a global problem, has led to almost uncontrolled expansion of police in many countries. This is justified by the need to effectively combat terrorism however, it has led to serious violations of freedom and human rights. Changes to national legislation aimed at solutions that are undoubtedly controversial from the standpoint of protection of freedoms and

7 *Royal Commision on the Police*, navedeno prema: Skolnick, J.: *Justice Without Trial*, p. 10.
8 v. Oppal, T.W.: *Closing the Gap – Policing and the Community, Commission of Inquiry into Policing in British Columbia* www.pssg.gov.bc.ca/police_services/publications/oppal/ClosingTheGap.pdf
9 Skolnick, J.: *Justice Without Trial*, New York: Wiley, 1966, p. 6.
10 v. Kesić, Z. i Zekavica, R.: Pravne i etičke dileme policijske profesije, –u: *Suprostavljanje savremenom organizovanom kriminalu i terorizmu – Edicija ΑΣΦΑΛΕΙΑ knjiga V* (Mijalković S., ed.), Kriminalističko-policijska akademija, Beograd 2011, str. 247-262.
11 See: Reiner, R.: *The Politics of the Police*, Brighton: Wheatsheaf Boks, 1985, p. 176-183; Dixon, D.: *Legal Regulation and Policing Practice*, Social Legal Studies 1992; 1; pp. 515-541.

human rights, raised the issue of control of work of police and the extent of its authority, including the work and authority of other security services. Let us mention one of the first, and certainly the most controversial anti-terrorism laws – the *USA Patriot Act* (***U**niting and **S**trengthening **A**merica by **P**roviding **A**ppropriate **T**ools **R**equired to **I**ntercept and **O**bstruct **T**errorism*). This Act quickly became a subject of serious public criticism. The criticism particularly applies to the second chapter of the Act which approves of tapping and exchange of gathered information between authorities within the judicial system in cases where this is not of criminal procedural importance. In addition, the most serious doubts regarding the adoption of this law were related to the increasing power of the government to monitor activities of their citizens.[12] The law allowed the arbitrary detention of immigrants, covert searches during which law enforcement bodies could search premises without the presence or knowledge of owners. This law also led to the expansion of the use of the so called *National Security Letters* on American citizens and foreigners even when a belief about concrete, perpetrated crimes has been unfounded.[13]

Apart from the aforementioned, the successful achievement of the control of police faces various other challenges and problems. Some of them stem from the very nature of police functions and its powers. The American author Lundman identifies four problems that arise from the efforts to achieve the control of police. The first problem arises from the fact that police is a state agency that possesses an exclusive right to use coercion but, according to Lundman, that very authorization is essentially unlimited. In addition, the establishment of an effective control of police is further complicated insofar as unlawful conduct within police can occur as a result of external social environment over which police cannot have effective control. Lundman also argues that the emergence of police misconduct is due to organizational rather than individual factors. Therefore, the control should be primarily directed toward police as an organization and toward control of organizational and structural conditions which can cause unlawful operations within police. Finally, Lundman points out that police would not tolerate control being ceded to the general public due to the belief that people cannot always demonstrate a high level of understanding for police work, its nature and dilemmas and challenges it faces.[14]

Lundman's list about the control of the police force is not exhaustive. Another one to add to it would be the inability to control many decisions made by police on a daily basis because they are considered decision of so called *low visibility decisions*. Decision-making that occurs in the operational context is often far from the public eye and from those who have authority to control them. Consequently, it is difficult to control such decisions and possibly sanction them. A key prerequisite that underlies the basic meaning of control is missing in such situations, that is, an insight into decisions or actions that need to be controlled.[15] To overcome this challenge, many countries have introduced various mechanisms within their police operational framework which allows them to make the work of the police more subject to control and therefore more transparent. One of the most common ones is the in-car-video which entails the use of video cameras in police patrol cars in order to record daily activities of the police.

However, as this way of control with video surveillance systems has been introduced only recently in some countries, while it is in early, experimental stages in others, it is difficult to provide reliable information about its success rate and possible challenges in its implementation. In this respect, observations by Leslie Holmes regarding risks and obstacles in the implementation of system of control is very important. They are the following:

Bad software design

Inadequate number of well-trained people who would use the installed technology

Resistance by police officers toward such surveillance systems if they are not sufficiently and clearly explained and justified

Improper use of technology, especially aspects that concern police officers' rights to privacy.[16]

12 White, J.H.: *Terrorism and Homeland Security*, Thomson Wadsworth, USA, 2006, p. 296.
13 National Securiy Letters are actually a type of command that is used by the FBI, which is primarily related to the ability to collect various information from private entities in function criminal prosecution.
14 Lundman, R.: *Police and Policing - an Ingroduction*, New York, 1980, pp. 170-174.
15 v. Kesić, Z.: Lice i naličje diskrecione ocene u radu policije –u: *Položaj i uloga policije u demokratskoj državi* (Đorđević, Đ., ed.), Kriminalističko-policijska akademija Beograd, 2013, str. 155-175;
16 Holms, L.: *Korupcija i policijski rad* –u: Uputstva za očuvanje policijskog integriteta, The Centre for the Democratic Control of Armed Forces (DCAF), Geneve, 2012, p 54.

It is also important to note that the data collected with the use of these devices can later be manipulated and misused and the privacy of citizens who underwent the intervention by the police would thus be compromised. It is therefore very important to regulate this activity legally whereby it would be clearly specified that purpose of audio and video surveillance devices is strictly for internal use (e.g. the analysis of certain police interventions for educational purposes and for improvement of its work; for the control and review of the conduct of police officers). Consistent with stipulations about the internal use and the utmost importance about the protection of privacy, public disclosure of the recorded material should be considered as misuse, and as such it should be adequately sanctioned. By the same token, in order to prevent this misuse it is necessary to regulate the processes of production and storage of the data.

In addition, one should be aware of certain characteristics of police subculture that may have some influence on the efficiency of control of police and its actions.[17] As Reiner points out, police subculture can be defined as a set of values, norms, perspectives and policies which arise as an expression of the specifics of the law enforcement profession. Reiner identifies eight key characteristics of police culture: a sense of mission, cynicism, suspicion, collegial solidarity associates with social isolation, conservatism, machismo, racial prejudice and pragmatism.[18] Thus, for instance, social isolation of police officers, informal codes of conduct such as the code of silence, collegial solidarity and principled animosity of police toward the public and the need of the public to get to know the nature of the work of police, represent some of the key circumstances that can have a crucial impact on the tendency of police officers to ignore 'minor' violations of its colleagues and also provide protection for one another from external forms of control.

In general terms, the success of the strategy of instituting police accountability may depend on the choice of the means of control and indiscriminate determination of responsibility which implies that the control must include all forms of unlawful police work, as well as levels of the police structure. The choice of certain means of control in most countries is based on a combination of both external and internal aspects of control. The differences that emerge from this issue are reflected in the fact that some countries stress the importance of certain ways of control over some others. According to Bailey's research, countries that typically place the emphasis on external means of control are the United States of America and India, as opposed to Japan, Germany, France and Norway which, Bailey states, consider internal control to be more important. The United Kingdom applies an intermediate solution with an equal emphasis on both internal and external means of control. In addition, some countries like the United States and a number of European countries place emphasis on the control of police by government institutions, while some, such as the United Kingdom and Japan consider that this control should be performed by ad hoc non-governmental bodies. Variations in the strategies of control of police and security of its responsibilities are therefore many and varied. It is the existence of these variations that Bailey considers to be one of the basic and logical characteristics of a modern democratic society.[19]

When choosing the right strategy to control police and make it accountable, one must be aware of advantages and disadvantages of certain means of control. Literature suggests that a basic advantage of internal controls of police lies in the fact that it is more varied, more thorough and more subtle than external controls insofar that it allows for the recognition of differences and nuances, and those in charge of this kind of control tend to be better informed.[20] On the other hand, external controls provides more certainty that the work of police is objective and fair. Consequently, this increases mutual confidence and closeness of citizens and police, and increases a sense of responsibility within police. One of the key weaknesses of internal controls is the inability to establish an increased trust of the public in police which the gap between the two entities. As for the weaknesses of external controls, they are considered to be more repressive than preventative which has a negative influence on the work of police, and leads to

17 See: Zekavica, R. i Kesić, Z.: Karakteristike policijske subkulture i njihov uticaj na odnos policije prema pravu i ljudskim pravima – u: *Suprotstavljanje savremenom organizovanom kriminalu i terorizmu – knjiga III* (Mijalković S., ed.), Kriminalističko-policijska akademija, Beograd, 2012, str. 59-74.
18 Reiner, R.: *The Politics of the Police,* Oxford University Press, 2000, pp. 85-101.
19 Bayley, D.: *Patterns of policing-a comparative International Analysis* p. 173.
20 Ibid, p. 177.

a loss of confidence in decisions made by police, including officers of the highest ranks.[21] As Bailey points out, external controls evoke doubt about the credibility of police as an institution therefore displaying a lack of public confidence in its professionalism which tarnishes its pride and honor. The external controls basically represent controls through intimidation and is, as such, counterproductive insofar as it undermines the pride of police and a level of discipline associated with it.

In light of the disadvantages of the external controls described above, it is not surprising that there is a level of animosity among police toward the external controls in general, as well as a lack of confidence in its quality and objectivity. Consequently, police is often more willing and inclined to accept mechanisms of internal controls as useful and efficient in the establishment of legal accountability over its operations in general. The animosity mentioned is especially expressed toward the Court and the Court's role in controlling the legality of police. The reasons for this are many and varied. One of them is a common belief of police that the Court does not have sufficient understanding of the complexity of the work of police, and the fact that it is the Court that is authorized to give the final judgment on the validity and merits of evidence on which an indictment or bill of indictment is based. As argued by Egon Bittner, the relationship between the police and the judiciary is often a love-hate relationship. On the one hand, they are part of a single criminal justice system and have a similar purpose from a social aspect, and on the other hand, the ability if the Court to support or oppose the work of police (especially the strength of collected evidence) represents a potential source of antagonism and latent conflicts between police and the judiciary.[22] Refusal of certain evidence in the proceedings is very often a way in which the judiciary punishes a lax stance of police on what are regarded as strict rules of legal procedures.

The existence of this animosity was observed in the survey of members of the Serbian Police Force, that is, members of the Belgrade Criminal Police Directorate. Thus, for instance, on the question about the need for external controls of the police only 29% of respondents expressed that it was absolutely necessary, 40% of respondents considered it necessary but that the internal controls was more important, while 31% were of the view that it was unnecessary and that the means of internal controls were sufficient. When it comes to the role of the Court (as the most important body of the external legal controls of police) in establishing the legality of police work, the results indicate that 59% or respondents believe that the role of the Court in this matter is important but not vital, 20% of respondents consider that the Court has no role in this matter, and 21% is of the view that the role of the Court is crucial.[23]

Bearing in mind the above-mentioned advantages and disadvantages of certain types of controls, the only logical solution for achievement of police accountability is a balanced application of both internal and external types of control. However, the acceptance of such a solution and its application in practice is not simply a matter of choice. The decision to ensure accountability of police is influenced by numerous factors that drive the choice of strategies for control of police, and also explain the aforementioned variations and differences between individual countries and the ways in which they exercise control of its police forces. Bailey points out a few basic ones: the level of trust of a society in its institutions and its attitude toward them; the psychological capacity of a society for self-regulation; a degree of homogeneity; tradition; the level of work-discipline and so on. For example, the reason for the emphasis on the mechanisms of internal controls in Japan and Germany according to some authors is due to a very high degree of confidence that these companies place in government institutions, as well as a high level of work ethic and discipline. On the other hand, the distrust of the US citizens in their government institutions has led to the establishment of external forms of control in this country.[24]

It is therefore clear that that when choosing the right strategy for the control of police, one must bear in mind broader social and political environment, as well as the characteristics of a

21 Langworthy, R.H., Lawrence, P.T.: *Policing in America*, Prentice Hall, New Jersey, 1994, p. 417.
22 Bittner, E.: *The Functions of the Police in Modern Society*, Gunn&Hain Publishers, Cembridge 1980, pp. 22-27.
23 See: Zekavica, R., Pravna odgovornost policije kao pretpostavka vladavine prava, Zbornik radova „Suprotstavljanje savremenom organizovanom kriminalu i terorizmu", KPA, Beograd, 2011, str.77-79; Zekavica, R., *Stavovi pripadnika kriminalističke policije PU Beograd o najznačajnijim pitanjima demokratske reforme policije-rezultati istraživanja*, Bezbednost, godina LII, broj 2, 2010.
24 Bayley, D.: *Patterns of policing-a comparative International Analysis,* pp. 182-183.

society in which police operates. Generally speaking, a choice where there is a right balance between both types of control is the best solution for achievement of accountability of police.

Particular attention should be paid to strengthening the mechanisms of internal controls. The application of the means of internal controls is the first step toward achieving accountability of police. The accomplishment of this goal largely depends on the effectiveness of the resources of internal controls. Hypothetically speaking, if the internal controls was fully effective and efficient, the need for other means of control would be reduced to a minimum. The degree of maturity of police as an institution in a democratic society is measured by the degree of effectiveness of mechanisms of internal controls that represent self-regulating mechanisms of the police. Their main purpose should be to establish lawfulness in the work of police, and that implies effective, preventative and repressive action of these mechanisms. The efficiency of police is measured not only by the number of criminal charges and successful accomplishment of other tasks as defined by the legislation of the tasks of the police, but also by the effective opposition to all forms of unlawful work within police. In this way, police can prove that its primary mission to enforce laws in society is focused both externally and internally. Only in this way can such a mission be realised.

According to Berkeley, the success in the use of internal controls is based on the fulfillment of several basic criteria:

It must be adequate, efficient, strict and fair;
Internal controls system should be open to public; and
All operations should be maximally visible.[25]

Herman Goldstein, on the other hand, lists a few key steps that the police needs to make in order to create an effective system of control that is also acceptable to the general public. Firstly, it is to promote a positive approach, that is, to adequately reward lawful behavior and to promote appropriate behavior patterns. Secondly, consideration of individual failures as failures of the broader organization, not those of individuals. Thirdly, continuous monitoring and identification of misconduct. Fourthly, identification of officers who display tendencies toward unlawful activities. Fifthly, adequate training of police officers which include a discussion on the topic of unlawful activity, and sixthly, ensuring the trust and support of citizens.[26]

In addition, the success of the mechanism of internal controls depends on the level of professionalism as one of the main characteristics of modern policing. High level of professionalism is based primarily on good education of officers, the promotion of positive values of society and police service as a highly ethical profession, as well as the achievement of an efficient management of the police by application of modern management techniques. According to the authors who view professionalism of police as a key characteristic of modern police force, such an approach inevitably leads to higher standards of behavior and, therefore, to a reduction of unlawful occurrences to a minimum.[27]

CONCLUSION

Based on the aforementioned, it can be concluded that a successful strategy in the establishment of accountability of police is based on a balanced use of internal and external means of control, particularly on the efficient and professionalapplication of internal controls (and a generally professional approach). The significance of the means of external controls is undoubtedly important and their main purpose is a correction of possible deficiencies in the system of internal controls and safeguards against arbitrariness of police misconduct. It should not be understood as a mere punishment and disciplining of police, but as an additional corrective mechanism whose function is not in the interests of the community but also in the interest of police.

25 Berkley, G.E.: *The Democratic Policeman*, Boston, Beacon Press, 1969, p. 136.
26 Goldstein, H.: *Policing a Free Society*, navedeno prema: Langworthy, R.H. Lawrence, P.T. *Policing in America*, p. 416.
27 v. Lundman, R.: *Police and Policing - an Ingroduction*, p. 175-176.

Finally, a major contribution to the controls of police and the adaptation of its role to the demands of the rues of law is awarded by international bodies for the protection of human rights. International mechanisms for the protection of human rights are still a very important corrective tool in the achievement of legal accountability of the police, particularly its responsibility for violations of human rights. Even in cases where protection measures stipulated by national legislation fail and citizens are affected by illegal actions of the police and unfair decisions of judicial authorities, there is a possibility to achieve adequate protection and compensation before international bodies, primarily through the European Court of Human Rights. Therefore when considering the attitude of police toward human rights, the decision of this Court together with the provisions of the international instruments which define and protect human rights and freedoms, represent a starting point in determining generally accepted standards of police behavior and its relation to human rights.

REFERENCES

1. Aristotel, *Politika*, Nolit, Beograd, 1975, 1287a.
2. Bayley, D. *Patterns of Policing – a Comparative International Analysis*, New Brunswick: Tuthers University Press, 1990.
3. Berkley, G. E. *The Democratic Policeman*, Boston, Beacon Press, 1969.
4. Bittner, E. *The Functions of the Police in Modern Society*, Gunn&Hain Publishers, Cembridge 1980
5. Chan, J.B.L. *Governing police practice: limits of the new accountability*, British Journal of Sociology, Vol 50, No.2/1999.
6. Dicey, A.V. *Introduction to the Study of the Law of the Constitution*, Macmillan&Co LTD, London, 1931.
7. Dixon, D. *Legal Regulation and Policing Practice*, Social Legal Studies 1992; 1
8. Fisher, E. *The European Union in the Age of Accountability*, Oxford Journal of Legal Studies, Vol. 24, No.3/2004.
9. Holms, L**.** /2012/: *Korupcija i policijski rad* –u: Uputstva za očuvanje policijskog integriteta, The Centre for the Democratic Control of Armed Forces (DCAF), Geneve, 2012, pp. 21-56.
10. Kesić, Z., Lice i naličje diskrecione ocene u radu policije –u: *Položaj i uloga policije u demokratskoj državi* (Đorđević, Đ., ed.), Kriminalističko-policijska akademija Beograd, 2013, str. 155-175;
11. Kesić, Z. i Zekavica, R.: Pravne i etičke dileme policijske profesije, –u: *Suprostavljanje savremenom organizovanom kriminalu i terorizmu – Edicija ΑΣΦΑΛΕΙΑ knjiga V* (Mijalković S., ed.), Kriminalističko-policijska akademija, Beograd 2011, str. 247-262;
12. Langworthy, R.H. Lawrence, P.T. *Policing in America*, Prentice Hall, New Jersey, 1994.
13. Lundman, R., *Police and Policing - an Ingroduction*, New York, 1980.
14. Oppal, T.W. *Closing the Gap – Policing and the Community, Commission of Inquiry into Policing in British Columbia* www.pssg.gov.bc.ca/police_services/publications/oppal/ClosingTheGap.pdf
15. Reiner, R. *The Politics of the Police*, Oxford University Press, 2000.
16. Skolnick, J, *Justice Without Trial*, New York: Wiley, 1966.
17. Tomić, Z. *Upravno pravo*, Savremena administracija, Beograd, 1988.
18. White, J.H. *Terrorism and Homeland Security*, Thomson Wadsworth, USA, 2006.
19. Zekavica, R. Pravna odgovornost policije kao pretpostavka vladavine prava, Zbornik radova „Suprostavljanje savremenom organizovanom kriminalu i terorizmu“, KPA, Beograd, 2011.

20. Zekavica, R. Stavovi pripadnika kriminalističke policije PU Beograd o najznačajnijim pitanjima demokratske reforme policije-rezultati istraživanja, Bezbednost, godina LII, broj 2, 2010.
21. Zekavica, R. i Kesić, Z.: Karakteristike policijske subkulture i njihov uticaj na odnos policije prema pravu i ljudskim pravima – u: Suprotstavljanje savremenom organizovanom kriminalu i terorizmu – knjiga III (Mijalković S., ed.), Kriminalističko-policijska akademija, Beograd, 2012, str. 59-74.

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ESPECIALLY VULNERABLE WITNESS[1]

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Abstract. The system of witness protection in the Republic of Serbia recently has been widened by introducing the new Criminal Procedure Code and the new kind of procedural protection of especially vulnerable witness. This legal institute was first introduced into Serbian legislation by the 2006 Criminal Procedure Code, which has been put out of force by further law amendments. Bearing in mind high importance of protection of especially vulnerable witnesses for both the secondary victimization prevention and ensuring the quality of witness testimony, the paper deals with the issues of objective and subjective circumstances that crucially impact the acquiring of the status of especially vulnerable witness. The attention will be paid to both the substantive and formal requirements, i.e. procedure of acquiring of the status of especially vulnerable witness. Although the establishment of this institute means a step forward in harmonizing of national legislation with international standards some issues still remain. For instance, the exceptional possibility of confrontation of especially vulnerable witness with the defendant is particularly controversial. A critical review of the appropriateness of this regulation will be made with consideration of comparative legislation and Strasbourg standards. The paper will also discuss some additional issues including those relating to a right of especially vulnerable witness to the presence of a person of trust, as well as those considering the way of cross-examination of a witness.

Keywords: especially vulnerable witness; criminal procedure; examination; confrontation; Republic of Serbia.

INTRODUCING REMARKS

Introduction of an institute of especially vulnerable witness in Serbian criminal procedure legislation presents a significant step forward in procedural protection of witnesses.[2] The institute was primarily introduced by 2006 Criminal Procedure Code.[3] However, this law has been put out of force by further law amendments while the provisions relating to especially vulnerable witness have been repealed.[4] The category of especially vulnerable witness encompasses victims/injured parties and witnesses who are particularly sensitive with regard to their age, gender, state of health, nature, the manner or the consequences of the criminal offence committed, deserving a special treatment in a criminal proceeding for the purpose of prevention of their secondary victimization in the first hand, and providing valid evidence in criminal procedure, in the second.

The normative foundations of this institute regulation comes from numerous international - universal and regional legal regulations relating to the measures of procedural and extra-procedural protection of witnesses and victims. There are many international documents

1 This paper is the result of a scientific research project entitled „ Development of Institutional Capacities, Standards and Procedures for Fighting Organized Crime and Terrorism in Climate of International Integrations". The Project is financed by the Ministry of Education, Science and Technological Development of the Republic of Serbia (No 179045), and carried out by the Academy of Criminalistics and Police Studies in Belgrade (2011−2014). The leader of the Project is Associate Professor Saša Mijalković, PhD.
2 The 2011 Serbian Criminal Procedure Code, "Official Gazette of the Republic of Serbia", nos. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013.
3 "Official Gazette of the Republic of Serbia", nos. 46/2006, 49/2007 and 122/2008.
4 The Law on Amendments of the Criminal Procedure Code, "Official Gazette of the Republic of Serbia", no. 72/2009.

establishing legal standards in protection of witnesses and other participants in criminal proceedings. Among significant regional documents several recommendations of the Committee of Ministers of the Council of Europe should be noted, including: Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defense, Recommendation No. R (85) 4 on violence in the family, Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, Recommendation No. R (87) 21 on assistance to victims and the prevention of victimization, Recommendation No. R (91) 11 concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults and Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice. Among the universal documents, particularly important are 1966 International Covenant on Civil and Political Rights[5] and European Convention for the Protection of Human Rights and fundamental Freedoms from 1950.[6] Additional international documents relevant in terms of establishing the standards of protection of witnesses and other participants in criminal proceedings are Rome Statute of the International Criminal Court from 1998,[7] the Council of Europe's Criminal Law Convention on Corruption from 1999[8] and United Nations Convention against Transnational Organized Crime from 2000.[9]

According to accepted international standards, there are principally two mechanisms of witness protection – the first one relates to measures of protection, and the other one refers to the witness protection program. As it is stipulated in the Appendix to CoE Recommendation Rec(2005)9, "protection measures" include *all individual procedural or non-procedural measures aimed at protecting the witness or collaborator of justice from any intimidation and/ or any dangerous consequences of the decision itself to cooperate with justice*. The application of procedural protection measures requires existence of special rules of evidence relative to examination of participants in criminal proceedings, as well as appropriate procedural protection of vulnerable witnesses aimed to prevention of their secondary victimization. The specificity of non-procedural measures of protection is that they are applied to participants in criminal proceedings and persons close to them, while, as a rule, the judicial organs are authorized to decide on that.

In Serbian law, the protection of witnesses, defendants and other participants in criminal proceedings that may face a danger in the case of giving testimony or information, has two basic aspects: the first one refers to the measures of procedural protection of those persons, while the other one covers the mechanisms of their non-procedural protection. The measures of procedural protection are stipulated by the Criminal Procedure Code, encompassing the basic protection, protection of especially vulnerable witness, and measures relating to protected witness.

Generally, there are two sets of measures among non-procedural measures of protection of participants in criminal proceedings and persons close to them: the non-procedural protection measures in a narrow sense, and protection programs. The non-procedural protection measures in a narrow sense basically boils down to the protection through which the state ensures the realization of human rights and fundamental freedoms on its territory. This protection is performed through implementation of measures taken by the police with the aim of protection of a victim or other person (and persons connected with them) who has given or may give information important for the criminal procedure if they face a danger from the perpetrator of a criminal offence or other persons. At another hand, the program of protection of participants in criminal proceedings and persons close to them is stipulated by a special law containing the regulations on conditions and procedure of providing protection and assistance to these persons,

5 The Law on Ratification of the International Covenant on Civil and Political Rights, "Official Gazette of SFRY", no. 7/1971

6 The Law on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, with additional protocols, "Official Gazette of Serbia and Montenegro – International Agreements", nos. 9/2003, 5/2005 and 7/2005 – corr. and "Official Gazette of the Republic of Serbia – International Agreements", no. 12/2010

7 Law on Confirming the Rome Statute of the International Criminal Court, "Official Gazette of FRY – International Treaties", no. 5 /2001

8 Law on Confirmation of Criminal Law Convention on Corruption, "Official Gazette of FRY - International Treaties", no. 2/2002 and *Official Gazette of Serbia and Montenegro – International Agreements*, no. 18/2005.

9 Law on Confirmation of the UN Convention against transnational organized crime, "Official Gazette of FRY - International Treaties", no. 6/2001

who are exposed - by giving testimony or information significant for proving in criminal procedure – to a danger to life, health, physical integrity, freedom or property.[10]

PROTECTION OF ESPECIALLY VULNERABLE WITNESS IN SERBIAN LAW

As it has been mentioned before, the institute of especially vulnerable witness, that is the special rules on examination of especially vulnerable injured parties and witnesses were primarily introduced by the 2006 Criminal Procedure Code (Article 110 CPC/2006). Under the notion of "particularly sensitive injured parties and witnesses" CPC/2006 considered the injured parties and witnesses whom the authority in charge of the proceedings has assessed as particularly sensitive in view of their age, experience, lifestyle, gender, state of health, nature or consequences of the criminal offence or other circumstances of the case, requiring the special rules on examination in order to prevent harmful effects on their mental and physical state. The special rules on examination of particularly sensitive injured parties and witnesses included the possibility of examination in their dwelling or other premises or in an authorized institution/organization professionally qualified for examining very vulnerable persons. During the examination, the questions should be asked only indirectly, i.e. through the authority in charge of the proceedings, which will address this injured party or witness with special care, trying to avoid any harmful effects of the criminal proceedings on his/her person and physical and mental state. If it was considered necessary to prevent any harmful effects of the criminal proceedings on his/her person and mental and physical state, particularly sensitive injured party or witness might been examined with the assistance of a psychologist, social worker or some other expert. Further, the authority in charge of the proceedings might decide to use picture and sound transmission devices in the examination of this person, without the presence of parties and other participants in the proceedings in the room where the injured party or witness is situated, so that the parties, defense lawyer and persons who have the right to ask questions shall do so through the authority in charge of the proceedings, psychologist, pedagogue, social worker or some other expert. The court might also decide to examine the injured party or witness in a closed session, in which case all data on the identity of this person should constitute an official secret. When the authority in charge of the proceedings deemed it necessary for providing assistance to particularly sensitive injured party or witness, a legal representative to the said persons during the hearing was appointed. There were no obstacles for identification of the defendant by the injured party or witness in all phases of a criminal proceeding – however, there were legal obligation to perform this identification in such a way that would completely prevent the defendant from seeing and hearing the injured party or witness.

Particularly significant regulation of the CRC/2006 was that one relating to the prohibition of confrontation of particularly sensitive injured party or witness with the defendant. Confrontation with other witnesses was possible only at their own request. According to this Code, no special appeal was allowed against the decisions made by the authority in charge of the proceedings on the basis of the provisions of the Article 110, i.e. the rules for the examination of particularly sensitive injured parties and witnesses.

After a short period of absence of normative regulation of the institute of especially vulnerable witness, the Criminal Procedure Code from 2011 (CPC/2011) establishes it again (Articles 103-104) almost identically defined. Namely, the especially vulnerable witness is a witness who is especially vulnerable in view of his/her age, experience, lifestyle, gender, state of health, nature, the manner or the consequences of the criminal offence committed, or other circumstances (Article 103, para. 1). It is noticeable that the legislator has omitted "injured party" when cited persons that may acquire the status of especially vulnerable witness, which has been probably done only for legal-technical reasons. In essence, the institute of especially vulnerable witness is primarily established with the aim of preventing of secondary victimization of a victim/

10 Ilić, P.G., Majić, M., Beljanski, S., Trešnjev, A., *Komentar Zakonika o krivičnom postupku, Prema Zakoniku iz 2011. godine sa izmenama i dopunama iz 2011. godine,* "JP Službeni glasnik", Beograd, 2012, pp. 285-286

injured party as a witness. Yet, the status of especially vulnerable witness may be also acquired by an "ordinary" witness, being especially vulnerable due to specific subjective or objective circumstances.

An important difference makes the précised authorization of the authority conducting proceedings to designate the status of an especially vulnerable witness either *ex officio* or at the request of parties or the witness himself. Unlike the former legislative solution, the legislator now explicitly foresees the duty of issuing the ruling determining a status of an especially vulnerable witness. Such ruling shall be issued by the public prosecutor, president of the panel or individual judge – depending on the phase of the criminal procedure. No special appeal is allowed against these rulings (Article 103, paras. 2, 4).

A significant step forward in protection of legal status of especially vulnerable witness has been made through the regulation that stipulates a possibility of appointing a proxy for the witness for the purpose of protecting the interests of an especially vulnerable witness. The authority for issuing the ruling appointing a proxy is the same as in the case of determining a status of an especially vulnerable witness, and the public prosecutor or the president of the court will appoint a proxy according to the order on the roster of attorneys submitted to the court by the bar association competent for designating court appointed defense counsels (Article 103, para. 3). Bearing that the former law had guaranteed the right to a proxy only during the hearing, it appears that the intention of actual regulation was to widen witness protection extending the additional form of protection during the criminal proceeding.

The new Criminal Procedure Code also stipulates the rules on examining an especially vulnerable witness (Article 104). Obviously, the legislator decided to adopt identical solutions analogous to those embraced by CPC/2006. Namely, the special rules on examining encompass the possibility of conducting the examination of the witness with the assistance of a psychologist, social worker or other professional, which is decided by the authority conducting proceedings.[11] It is also possible to examine an especially vulnerable witness by using technical devices for transmitting images and sound, without the presence of the parties and other participants in the proceedings in the room where the witness is located. An especially vulnerable witness may also be examined in his/her dwelling or other premises or in an authorized institution professionally qualified for examining especially vulnerable persons while in such cases, the authority conducting proceedings may also order carrying the examination out by using technical devices for transmitting images and sound. It is emphasized the obligation of indirect examination of the witness, that is, only through the authority conducting the proceedings, who will treat the witness with particular care, endeavoring to avoid possible detrimental consequences of the criminal proceedings to the personality, physical and mental state of the witness. No special appeal is allowed against rulings on these matters, so the above rulings may be challenged only in the appeal against the first-instance judgment.

The Criminal Procedure Code forbids a confrontation of especially vulnerable witness with the defendant, *unless* the defendant himself requests this and the authority conducting proceedings grants the request, taking into account the level of the witness's vulnerability and rights of defense (Article 104, para. 4).

A CRITICAL REVIEW OF CURRENT LEGISLATIVE SOLUTIONS REGARDING ESPECIALLY VULNERABLE WITNESS

One of controversial issues referring to an especially vulnerable witness is the possibility of his/her confrontation with the defendant. Although the legislator has mainly accepted the former solutions concerning the regulation of this institute, some difference refers to the rules on confrontation. The present Code stipulates the *relative prohibition* of confrontation of especially vulnerable witness with the defendant, bearing that the confrontation may be allowed if explicitly requested by the defendant. Keeping in mind the international standards on protection of witnesses, comparative legal experience as well as the legal practice of the European Court of

11 We assume that the formulation "in the presence of a psychologist, social worker or other professional" would ensure a higher level of protection of these persons.

Human Rights, it should be concluded that this regulation is in direct opposition with the essence of the especially vulnerable witness institute. *Ratio legis* of this institute is exactly the need to ensure the security and the respect for fundamental rights and freedoms of particular categories of witnesses that is reached by implementation of special measures during their examination. With that regard, the Serbian legislator stipulates special ways of taking testimonies from these persons in order to ensure more humane treatment, but also aiming to achieve a higher degree of credibility of their testimonies. Thus, it is hard to understand why the legislator has adopted the regulation on relative prohibition of confrontation of especially vulnerable witness with the defendant, annulling its own achievements in the field of witness protection.[12]

Besides, it should be emphasized that Serbian legislation also contains different solutions with regard to this issue. So, the Law on Juvenile Criminal Offenders and Criminal-law Protection of Minor Persons[13] treats particular categories of minor persons as especially vulnerable, prescribing absolute prohibition of their confrontation with the defendant. These categories include minor witnesses who, due to the nature of the criminal offence, consequences or other circumstances are particularly vulnerable or are in particularly difficult mental state.

In comparative law, minors fall into the category of witnesses being approved a status of especially vulnerable witnesses. The Law of England and Wales includes into the category of vulnerable witness children under 18, and any witness whose quality of evidence is likely to be diminished because they are suffering from a mental disorder, have a physical disability or are suffering from a physical disorder, or have a significant impairment of intelligence and social functioning.[14] The court must take account of the views of the witness in determining whether a witness may be regarded as vulnerable by virtue of a disorder or disability. A special category of witnesses are intimidated witnesses, that is, persons whose quality of evidence is likely to be diminished by reason of fear or distress. In determining whether a witness falls into this category, the court should take account of some circumstances, including: the nature and alleged circumstances of the offence, the age of the witness, his/her social and cultural background and ethnic origins, his/her domestic and employment circumstances, religious beliefs or political opinions, any behavior towards the witness by the accused, members of the accused person's family or associates or any other person who is likely to be either an accused person or a witness in the proceedings.[15] Complainants to sexual offences and witnesses to certain offences involving guns and knives automatically fall into this category unless they wish to opt out. There are also prescribed the special measures available to vulnerable and intimidated witnesses, with the agreement of the court, including: using the screens, live link, evidence given in private, video-recorder interview, examination of the witness through an intermediary etc. The intention of all these measures is to provide for quality evidence in term of their completeness, coherence and accuracy.[16] Importantly, sections 34 and 35 of the 1999 Youth Justice and Criminal Evidence Act prevent the accused from cross-examining in person a witness who is the complainant in a case involving sexual offences, or a child witness where the offence is of a violent or sexual nature.

12 Particularly worrying is the fact that there are still examples of confrontation of human trafficking victims with the defendants. As noted by Drobnjak, the victims face the situation to stand directly opposite from the defendant and look him directly in the eye, simultaneously being expected to repeat parts of their testimony. It was recorded the case where the victim felt sick during the confrontation with the defendant, was taken out from the courtroom and the ambulance was called. Drobnjak, T. *The Position of Trafficking Victims in Court Proceedings - The Analysis of Judicial Practice through Monitoring of Trials and Court Judgments.* pp. 10-11. Document available at: http://www.astra.org.rs/eng/wp-content/uploads/2008/07/LegalAnalysisASTRA2011.pdf (31.12.2013)

13 "Official Gazette of the Republic of Serbia", no. 85/05

14 Youth Justice and Criminal Evidence Act 1999, Section 16.

15 Witnesses who might be regarded as intimidated include: (1) victims and witnesses in cases that involve domestic violence; racially motivated crime; crime motivated by reasons relating to religion; crime motivated by reasons related to disability; homophobic and transphobic crime; violent crime, particularly that involving guns or knives; gang related violence; (2) victims and witnesses who have experienced past or repeat harassment or bullying, and (3) victims and witnesses who are elderly and frail. *Vulnerable and Intimidated Witnesses: A Police Service Guide,* Ministry of Justice 2011, p. 6. Document available at: http://www.justice.gov.uk/downloads/victims-and-witnesses/vulnerable-witnesses/vulnerable-intimidated-witnesses.pdf (31.12.2013)

16 Munday, R., *Evidence* (4th Ed.). Oxford University Press, 2007, pp. 214-215

In addition, the court may prevent the accused from cross-examining a witness in person in any other criminal case if it is to be justified in the circumstances of the case (Section 36).

In the view of above mentioned and similar comparative legislative solutions,[17] as well as the court practice's positions, it should be noted that excluding the direct confrontation of a vulnerable witness with the defendant is not universally considered to be violation of one of fundamental requirements of a fair trial.[18]

A fundamental issue concerning rules of examination of an especially vulnerable witnesses is the possibility of exclusion of cross-examination and confrontation of these persons with the defendant by which one of the most important defendant's rights – the right to fair trail and the equality of arms principle might be endangered. On the other hand, the fact is that extremely hostile treatment regularly faced by victims and witnesses in many courtrooms worldwide either has nothing to do with fairness, justice and equality. Unlike prosecutors and defendants, victims-witnesses most often are completely "unarmed" and left to their own. Not unusually, examination, cross-examination and confrontation make them feel even more fragile, harmed, double looser being used as the means.

According to judicial practice of the European Court of Human Rights the principle of equality of arms is the criminal procedure law principle that should be understood in legal-technical sense, that is, as a functional principle.[19] It refers to the set of procedure rules that guard equal rights and opportunities to the parties while realizing their interests in a criminal proceeding.[20]

The Strasbourg practice has established several principles relating to the possibility of using anonymous witnesses or written evidence from unexamined witnesses, including:

All evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument;

Use of statements in absence of oral testimony is not per se incompatible with Article 6, paras. 1 and 3(d), but must be compatible with the rights of the defense;

The accused must be given a proper and adequate opportunity to challenge and question a witness against him either when the witness makes the statement or later;

It is generally not compatible, where there has been no opportunity to challenge the evidence given by witnesses, for a conviction to be based solely or to a decisive extent on their statements.[21]

According to the practice of the European Court of Human Rights, a clear and serious threat to the witness's safety must exist before protection reach the level that enables limitations of defendant's rights. While, according to the court's views, the kind and the level of protection depend on individual circumstances, several forms of protection are generally accepted as allowed in particular cases: excluding the public and/or the media's presence from the trial; reading the witness's statement without his/her presence; allowing witness's testifying in disguise; non-disclosure or partial disclosure of witness's identity at trial; witness's voice distortion at trial; testifying from another room, via video-link, and disclosure of witness's identity not before the final phases of the proceedings.

Although the fair trial principle demands that an accused must be provided with a possibility to exercise his/her right to confront and to examine accusatory witnesses, some limitations are allowed in order to protect the rights of witnesses facing a danger from the accused and the

17 It is interesting to note that prohibition of confrontation of especially vulnerable witness with the defendant is also stipulated by the Macedonian Code of Criminal Procedure. Confrontation of this category of witness with other witnesses is possible only upon their request (Art. 232 para. 6). Закон за кривичната постапка, Службен весник на Република Македонија, no. 150/2010.

18 The right to cross-examine the witnesses is an integral part of the right to a fair trial which is considered a basic human right - principally no exceptions are permitted, particularly in countries with adversarial system. Munday, R., *Evidence* (4th Ed.). Oxford University Press, 2007, p. 207.

19 Krapac, D., *Osnovna prava čovjeka i građanina i načela krivičnog postupka*, Zbornik Pravnog fakulteta Sveučilišta u Zagrebu, 5-6/1989, pp. 829-830.

20 Krapac, D., *Načelo enakosti orožij strank v kazenskem postopku, Uveljavljanje novih institutov kazenskega materialnega in procesnega prava,* Uradni list Republike Slovenije, Institut za kriminologijo pri Pravni fakulteti v Ljubljani, 2000, p. 212.

21 Reid, K., *A Practitioner's Guide to the European Convention on Human Rights* (4th Ed.). Sweet & Maxwell, 2011, p. 262.

rights of especially vulnerable victims (e.g. victims of sexual offences). These exceptions are justified by a duty to protect a significant interest competing to the rights of defense.[22]

Confrontation of an especially vulnerable witnesses with the defendant may be extremely traumatic and painful for them. It may annul all positive effects of special rules and measures in examining these witnesses (aiming to exclude or minimize the possibility of direct contact between witness and defendant during witness's testifying), making the whole system of special protection of vulnerable witnesses useless. On the other hand, credibility of witness statements given in the context of confrontation with defendant may be full of shortages, contradictorynesses and vagueness resulting from fear, anxiety and uneasiness because of witness's direct contact with the defendant. Hence, it should be excluded a possibility of confrontation of especially vulnerable witness and the defendant unless requested by the witness himself/herself.

The new Serbian Criminal Procedure Code foresees the cross-examination of the witnesses when they may be asked suggestive questions. However, it is unclear whether this applies to especially vulnerable witnesses too. According to opinion of the author of the Code, this possibility exist – however, the authority in charge of the proceedings may forbid such question, taking into consideration the level of the witness's vulnerability on the one hand and the fair trial standards on the other.[23]

As noted by some authors, protection from cross-examination of especially vulnerable witnesses may be achieved through the possibility of making video recording of the first examination that would be subsequently presented to defendant and defense attorney giving them opportunity to analyze the testimony and to ask the questions. Then, it would be carried out the second examination followed by the defendant and defense attorney via CCTV (*closed-circuit television*) with the opportunity of establishing an audio link between the defense and witness examined. The questions would be asked via specially trained *intermediary*, while the recordings might subsequently be used at trial as evidence.[24]

Finally, as a shortage, the new Serbian Criminal Procedure Code has omitted to provide the right of a victim to engage a person of trust for the purpose of support and assistance during the whole criminal proceeding, including particularly testifying as especially vulnerable witness. Since the victims of sexual offences have been recognized - in the view of international standards - as a specific category of vulnerable victims, possibility of prohibition by the law of questioning the victims about their sexual history in order to check witness's credibility should be considered.[25]

As universally acknowledged, the rights of crime victims deserve equal treatment before the law. In criminal proceedings, along with the defendant's right to presumption of innocence, the witnesses, in particular victim-witnesses, should be granted the right to presumption of vulnerability. That demands not only an optimal protection from secondary victimization during witness examination, but even more the duty of collecting much more decisively and effectively other evidence. The experience with so called *evidence based prosecution* in the U.S. should be considered a piece of good practice and instructive experience in these terms.

CLOSING REMARKS

By reintroduction of regulation of an especially vulnerable witness institute a huge step forward has been made in witness protection in Serbian criminal procedural law. As stipulated in the new Criminal Procedure Code, under the category of especially vulnerable witness fall

22 Bubalović, T., *"Jednakost oružja" i njegova afirmacija u okviru prava na odbranu (regionalni komparativni osvrt), Savremene tendencije krivičnog procesnog prava u Srbiji i regionalna krivičnoprcesna zakonodavstva (normativni i praktični aspekti),* Misija OEBS u Srbiji, Beograd, 2012, p. 222.

23 Ilić, P.G. et al., *op.cit.,* p. 290.

24 Trechsel, S., *Human Rights in Criminal Proceedings.* Academy of European Law European University Institute, Oxford University Press, 2005, p. 322.

25 By recent ratification of the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* the Republic of Serbia has taken the obligation to harmonize national legislation with the provisions of the Convention including its rule (Art. 54) that evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary. Law on the Ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, *Official Gazette of the Republic of Serbia – International Agreements*, no. 12/2013.

witnesses who are especially vulnerable in view of their age, experience, lifestyle, gender, state of health, nature, the manner or the consequences of criminal offence committed, or other circumstances. The legislator has omitted to directly include in this category an injured party as it was the case in 2006 Criminal Procedure Code. However, there is no obstacles for an injured party to acquire especially vulnerable witness status.

A significant shift in protection of especially vulnerable witness has been made by regulation on possibility of appointing a proxy for the purpose of protecting especially vulnerable witness's interests, as well as by stipulating a precise procedure for acquiring especially vulnerable witness status.

The legislator has foreseen special rules on examination of especially vulnerable witnesses including a possibility of conducting the examination of the witness with the assistance of a psychologist, social worker or other professional; examination by using technical devices for transmitting images and sound, without the presence of the parties and other participants in the proceedings in the room where the witness is located; examination in witness's dwelling or other premises or in an authorized institution professionally qualified for examining especially vulnerable persons. It has been emphasized the obligation of indirect examination of the witness, that is, only through the authority conducting the proceedings, who is obliged to treat the witness with particular care, endeavoring to avoid possible detrimental consequences of the criminal proceedings to the personality, physical and mental state of the witness.

The 2011 Criminal Procedure Code imposes a *relative* ban on confrontation of especially vulnerable witness with the defendant, which is not acceptable having regard to the need of complete protection of this category of witnesses. In relation to this, we have referred to current international standards in this field, as well as to the legal practice of the European Court of Human Rights and particular legal (comparative and national) regulations that exclude a possibility of confrontation of an especially vulnerable witness with the defendant. *Ratio legis* of this institute is exactly ensuring security and respect for fundamental rights and freedoms of some categories of witnesses which is achieved by implementing special measures of protection during their examination. Thus, the national legislator stipulates special way of examination of vulnerable witnesses in order to provide for a more humane treatment of these persons and also to ensure a higher level of credibility of their statements.

Finally, we have emphasized a need of granting a victim-witness a right to engage a person of trust, and interceded in favor of considering the possibility of imposing a legal ban of questioning about victim's sexual history for the purpose of witness's credibility testing.

REFERENCES

1. Bubalović, T., *"Jednakost oružja" i njegova afirmacija u okviru prava na odbranu (regionalni komparativni osvrt), Savremene tendencije krivičnog procesnog prava u Srbiji i regionalna krivičnoprcesna zakonodavstva (normativni i praktični aspekti),* Misija OEBS u Srbiji, Beograd, 2012.
2. Drobnjak, T. *The Position of Trafficking Victims in Court Proceedings - The Analysis of Judicial Practice through Monitoring of Trials and Court Judgments.* Document available at: http://www.astra.org.rs/eng/wp-content/uploads/2008/07/LegalAnalysisASTRA2011.pdf (31.12.2013).
3. Ilić, P.G., Majić, M., Beljanski, S., Trešnjev, A., *Komentar Zakonika o krivičnom postupku, Prema Zakoniku iz 2011. godine sa izmenama i dopunama iz 2011. godine,* "JP Službeni glasnik", Beograd, 2012.
4. Krapac, D., *Osnovna prava čovjeka i građanina i načela krivičnog postupka*, Zbornik Pravnog fakulteta Sveučilišta u Zagrebu, 5-6/1989.
5. Krapac, D., *Načelo enakosti orožij strank v kazenskem postopku, Uveljavljanje novih institutov kazenskega materialnega in procesnega prava,* Uradni list Republike Slovenije, Institut za kriminologijo pri Pravni fakulteti v Ljubljani, 2000.

6. Munday, R., *Evidence* (4th Ed.). Oxford University Press, 2007.
7. Reid, K., *A Practitioner's Guide to the European Convention on Human Rights* (4th Ed.). Sweet & Maxwell, 2011.
8. Trechsel, S., *Human Rights in Criminal Proceedings.* Academy of European Law European University Institute, Oxford University Press, 2005.
9. *Vulnerable and Intimidated Witnesses: A Police Service Guide,* Ministry of Justice 2011. Document available at http://www.justice.gov.uk/downloads/victims-and-witnesses/vulnerable-witnesses/vulnerable-intimidated-witnesses.pdf (31.12.2013).

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SUBMISSION FOR IDENTIFICATION OF A PERSON IN A MODE OF VIDEOCONFERENCE IN THE COURSE OF A PRETRIAL INVESTIGATION UNDER THE CRIMINAL PROCEDURE CODE OF UKRAINE

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Abstract. The article deals with the issues of tactical peculiarities of preparation to realization, realization and fixing process and results of submission for identification of a person in a mode of videoconference in the course of a pre-trial investigation under the Criminal Procedure Code of Ukraine.

Keywords. Submission for identification of a person, videoconference, videoconferencing, distance investigation, search activity, Criminal Procedure Code of Ukraine

ПРОВЕДЕНИЕ ОПОЗНАНИЯ ЛИЦА В РЕЖИМЕ ВИДЕОКОНФЕРЕЕНЦИИ ВО ВРЕМЯ ДОСУДЕБНОГО РАССЛЕДОВАНИЯ ПО УГОЛОВНОМУ ПРОЦЕССУАЛЬНОМУ КОДЕКСУ УКРАИНЫ

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Аннотация. Рассматриваются вопросы тактических особенностей подготовки к проведению, проведение и фиксация хода и результатов предъявления для опознания лица в режиме видеоконференции в ходе досудебного расследования по Уголовному процессуальному кодексу Украины.

Ключевые слова. Предъявление для опознания лица, видеоконференция, видеоконференцсвязь, дистанционное расследование, следственное (розыскное) действие, Уголовный процессуальный кодекс Украины.

ПОСТАНОВКА ПРОБЛЕМЫ

В современных условиях наблюдается стремительное развитие и широкое использование во всех сферах жизнедеятельности компьютерных и других электронно -информационных и телекоммуникационных технологий. Эти технологии не обошли и уголовное судопроизводство, а их широкое применение способствует существенному повышению его эффективности.

Одной из технологий, которая с успехом начала использоваться в уголовном судопроизводстве, является видеоконференцсвязь, которая составляет сеанс двусторонней интерактивной коммуникации с использованием комплекса технических средств приема - передачи видеоизображения, звука и другой информации в режиме реального времени.

Уголовный - процессуальный кодекс Украины, который вступил в действие 20.11.2012 года, в значительной степени, изменил судебную и следственную процедуру в государстве, а значит влияние на методы и тактику работы правоохранителей. Появились новые прогрессивные аспекты работы и среди них введение в уголовное судопроизводство видеоконференции, а именно мы остановимся на введении возможности осуществления

предъявления для опознания лица в режиме видеоконференции. Эта законодательная новелла должна существенно повысить эффективность уголовного судопроизводства.

Проведение предъявления для опознания лица в режиме видеоконференции имеет много преимуществ и его следует рассматривать как инновационное средство технико - криминалистического обеспечения досудебного расследования, позволяет быстро и эффективно решать поставленные задачи, связанные с установлением истины в уголовном производстве.

АНАЛИЗ ПОСЛЕДНИХ ИССЛЕДОВАНИЙ

Исследуемая проблема в определенной степени освещалась в трудах таких ученых - процессуалистов и ученых - криминалистов, как В.П.Бахина, Р.С.Белкина, Т.В.Варфоломеевой, В.И.Галагана, В.Г.Гончаренка, Ю.Н.Денежного, О.Ф.Долженкова, А.В.Дулова, В.А.Журавля, А.В.Ищенка, Н.С.Карпова, В.Е.Коновалова, М.В.Костицкого, И.И.Котюка, Н.И.Клименко, В.С.Кузьмичова, В.П.Лаврова, О.М.Ларина, В.В.Лисенка, В.Г.Лукашевича, Е.Д.Лукьянчикова, В.Т.Маляренка, Г.А.Матусовского, Т.В.Михальчук, В.Т.Нора, М.А.Погорецкого, Б.Г.Розовского, М.В.Салтевского, М.Я.Сегая, М.И.Смирнова, В.В.Тищенко, Л.Д.Удаловой, Ю.М.Чорноус, В.Ю.Шепитько, М.Е.Шумила и др.

Состояние и логика предыдущих научных исследований, современная следственная практика, требования Конституции Украины и международно - правовые акты, а особенно принятие Уголовного процессуального кодекса Украины, требуют новых подходов к обеспечению качественного и быстрого расследования преступлений.

Целью исследования является определение алгоритма действий по проведению предъявления для опознания лица в режиме видеоконференции в ходе досудебного расследования по Уголовному процессуальному кодексу Украины, а именно особенности подготовительного этапа, проведения и фиксации хода и результатов предъявления для опознания лица в режиме видеоконференции.

В публикации рассматриваются вопросы регулятивно-правовой основы обеспечения защиты информации в информационных системах подразделений Министерства внутренних дел Украины, ведь в дистанционном досудебном расследовании по использованию технических средств и технологий помимо обеспечения надлежащего качественного изображения и звука также необходимо обеспечить информационную безопасность, то есть необходимо обеспечить защищенность информации и поддерживающей ее инфраструктуры от случайного или преднамеренного воздействия естественного или искусственного характера, которые могут нанести ущерб проведению следственного (розыскного) действия и уголовному производству.

ИЗЛОЖЕНИЕ ОСНОВНЫХ ПОЛОЖЕНИЙ

Предъявление для опознания - это следственное (розыскное) действие, заключающееся в предъявлении лицу объектов, которые он наблюдал ранее в связи с событием преступления, с целью установления их тождества или групповой принадлежности[1].

Видеоконференция (англ. videoconference или videoteleconference) - это телекоммуникационная технология, обеспечивающая одновременную двустороннюю передачу, обработку, преобразование и представление интерактивной информации на расстоянии в режиме реального времени с помощью аппаратно - программных средств вычислительной техники. Видеоконференция - один из видов Groupware, программного обеспечения для взаимодействия между людьми, совместно работают над одной проблемой[2].

1 Уголовно - процессуальный кодекс Украины. Научно - практический комментарий: в 2 т. Т.1 \ О.М.Бандурка., Е.М.Блажівський., Е.П.Бурдоль и др.; Под общ. ред В.Я. Таций., В.П.Пшонкы., А.В.Портнова. - Х.: Право , 2012.-768 с.

2 Электронный ресурс : http://uk.wikipedia.org/wiki/

Под проведением процессуального действия с использованием видеоконференцсвязи в порядке оказания правовой помощи необходимо понимать особую процедуру производства, при которой должностное лицо (судья, прокурор, следователь) компетентного органа запрашивающей Договаривающейся Стороны находится в месте основного производства, а участник процессуального действия находится на территории запрашиваемого договаривающейся стороны и общение между ними происходит в режиме реального времени с использованием технических средств с помощью аудиовизуального взаимодействия.

О регламентации такой возможности и необходимости говорится в ряде международно - правовых документов (Европейская конвенция о взаимной помощи по уголовным делам (20 апреля 1959)[3]; Второй дополнительный протокол к Европейской конвенции о взаимной правовой помощи по уголовным делам (8 ноября 2001) где ст.9 предусматривает проведение слушания дела с помощью видеоконференции, если лицо находится на территории одной страны и должна быть допрошена в качестве свидетеля или эксперта судебными органами другой страны, последняя имеет право, если личное прибытие лица на ее территорию является нежелательным или невозможным, предложить проведение слушаний по делу таким образом. Стороны могут по своему усмотрению также применять данные положения в соответствующих случаях с согласия компетентных судебных органов при дистанционном участии в уголовном производстве подозреваемого или обвиняемого, в таком случае решение о проведении видеоконференции и способ ее проведения согласованных между заинтересованными сторонами (государствами) происходит в соответствии с национальным законодательством и международными документами. При этом следует учитывать, что производство таким образом с участием обвиняемого или подозреваемого допускается только с их согласия. В ст.10 Протокола закреплена возможность проведения уголовного производства также посредством телефонной конференции[4], Конвенция о правовой помощи и правовых отношениях по гражданским, семейным и уголовным делам (Кишинев, 7 октября 2002 года)[5].

Фундамент для применения видеоконференцсвязи были заложены еще в мае 2000 года, когда в Кембридже состоялся XIV Коллоквиум Комитета экспертов Совета Европы по информационным технологиям и права, посвященный применению современных телекоммуникационных технологий в правовой сфере. Среди рассмотренных им вопросов можно выделить рекомендации Комитета экспертов по автоматизации процедуры судопроизводства государствам - участникам Совета Европы по внедрению информационных технологий на всех стадиях судопроизводства, в том числе в интерактивном режиме (оборудовать соответствующими техническими средствами зал судебного заседания, помещения органов досудебного расследования, следственные изоляторы, адвокатские конторы). В качестве примера приводится опыт Австрии - одной из первых стран, где такие технологии были внедрены в процессуальное право[6].

Принятие нового УПК Украины позволило решить ряд проблем, связанных с обеспечением участия сторон уголовного производства в исследовании доказательств благодаря использованию технических средств не только в рамках международного сотрудничества.

Основной задачей предъявления для опознания является установление тождества конкретного объекта или его групповой принадлежности.

Тождество объектов при опознании устанавливают по признакам объектов, воспринятых лицом и сохраненных в его памяти. Это особая форма идентификации, существенно

3 Европейская конвенция от 20 апреля 1959 «О взаимной правовой помощи по уголовным делам» ратифицирована Украиной 16.01.1998года. [Электронный ресурс]. - Режим доступа: http://zakon3.rada.gov.ua/laws/show/995_036.
4 Второй дополнительный протокол 8 ноября 2001 года по Европейской конвенции «О взаимной правовой помощи по уголовным делам» Страсбург // ратифицирован Украиной 01.06.2011года. [Электронный ресурс] . - Режим доступа: http://zakon2.rada.gov.ua/laws/show/994_518
5 Конвенция от 7 октября 2002 года «О правовой помощи и правовых отношениях по гражданским, семейным и уголовным делам» Кишинев [Электронный ресурс] - Режим доступа: http://zakon4.rada.gov.ua/laws/show/997_619.
6 Морозов А.В., Полопанова И.С. Результаты работы ХИУ Коллоквиум Комитета экспертов Совета Европы по информационным технологиям и праву // Информатизация правоохранительных систем: сб. тр. ИХ Междунар. науч. конф. (7-8 июня 2000 г. , Москва). - М., 2000. - С. 38-44.

отличается от случаев идентификации по следам и другими вещественно - зафиксированными признаками. В ходе опознания лицо наблюдает признаки предъявленного объекта, сравнивает и сопоставляет их с сохраненными в памяти и приходит к определенному выводу о наличии или отсутствии тождества или групповой принадлежности.

Юридическими основаниями для предъявления лица для опознания являются: заявление лица во время проведения допроса о том, что он может узнать лицо, которое наблюдал в обстановке совершения преступления, и хорошо помнит его признаки и различия; заявление лица во время допроса о том, что он сможет назвать лишь общие черты объекта, хотя не сможет точно описать его отличия, но выражает уверенность, что сможет его узнать, когда увидит.

Проведение опознания в режиме видеоконференции регулируется статьями 228 Уголовного - процессуального кодекса Украины «Предъявление лица для опознания», 229 Уголовного - процессуального кодекса Украины «Предъявление вещей для опознания», 232 Уголовного - процессуального кодекса Украины «Проведение допроса, опознания в режиме видеоконференции во время досудебного расследования». Согласно положениям ст. 232 Уголовного - процессуального кодекса Украины допрос лиц, опознание лиц или вещей во время досудебного расследования могут быть проведены в режиме видеоконференции при трансляции вне помещения (дистанционное досудебное расследование) в случаях:

1) невозможности непосредственного участия определенных лиц в досудебном производстве по состоянию здоровья или по другим уважительным причинам;

2) необходимости обеспечения безопасности лиц;

3) проведение допроса малолетнего или несовершеннолетнего свидетеля, потерпевшего;

4) необходимости принятия таких мер для обеспечения оперативности досудебного расследования;

5) наличия других оснований, определенных следователем, прокурором, следственным судьей достаточными[7].

Применение новых методов исследования доказательственной информации способствует соблюдению разумных сроков уголовного производства, однако практика реализации законодательных новелл выявила отдельные проблемные аспекты технического обеспечения доказывания. Возникают сомнения относительно соблюдения прав человека, участвующего в дистанционном производстве. По мнению Е.Желтухина, системы видеоконференции успешно работают в тех государствах, в деятельности правоохранительных органов которых даже не возникает вопрос о допустимости пыток, жестокого обращения, где существует взаимное доверие и определены стандарты работы, где согласие лица на использование видеоконференции не вызывает сомнений[8]. Мы согласны с мнением Н.Ахтырской, что нельзя исключить возможность принуждения в предоставлении такого согласия или подсказок при проведении, опознания с использованием видеоконференции. Еще возникает вопрос сколько защитников должно быть у подозреваемого, обвиняемого, который принимает участие в видеоконференции при предъявлении для опознания в рамках уголовного производства, и они должны находиться[9].

В соответствии с требованиями закона решения следователя и прокурора о проведении дистанционного досудебного расследования принимаются в форме постановления (ч.3 ст.110 Уголовно - процессуального кодекса Украины), судебные решения принимаются в форме постановления (ч. 2 ст. 110 Уголовно - процессуального кодекса Украины). Итак, следователь и прокурор о проведении следственного (розыскного) действия в режиме видеоконференции принимает постановление, следственный судья постановляет об этом постановление. Если стороны уголовного производства как со стороны обвинения, так и со стороны защиты, а также потерпевший возражают против проведения опознания

7 Уголовный процессуальный кодекс Украины: - М.: «Центр учебной литературы », 2012 . - 254 с .

8 Желтухин Е. Видеоконференцсвязь: Требование времени или повод для злоупотреблений / С.Е.Желтухин // Судебно -юридическая газета. - 2012. - № 32 (150). - С.5.

9 Ахтырская Н.Н. . Применение видеоконференции в уголовном судопроизводстве через призму практики Европейского суда по правам человека // Судебная апелляция, № 2 (31) 2013 года. [Электронный ресурс] . - Режим доступа: // http://kia.court.gov.ua/sud2690/1j/4q/48733/.

дистанционно, а следователь, прокурор или судья по считают целесообразным провести следственное действие в таком режиме, последние имеют право обосновать свое решение в форме мотивированного постановления или постановлении. Исключение устанавливается по осуществлению дистанционного досудебного расследования, в котором дистанционно находиться подозреваемый. Поскольку дача показаний является правом, а не обязанностью подозреваемого, в случае его отказа от участия в дистанционном досудебном расследовании решение об этом принято быть не может.

Главным элементом тактики предъявления для опознания в режиме видеоконференции является подготовка к его проведению, которая включает предварительный допрос лица, которое будет узнавать, подбор участников следственного (розыскного) действия, определение места, времени и условий предъявления для опознания; налаживание связи или приглашение специалистов, наладят каналы связи и обеспечат установку оборудования, надлежащее качество изображения и звука в кабинете или в специально оборудованном помещении и помещении, в котором находится лицо, которое будет принимать участие в досудебном расследовании дистанционно. Организация и подготовительный этап является обязательным условием успеха этого следственного (розыскного) действия.

Необходимость предварительного допроса перед предъявлением для опознания определена в ст.228-230 Уголовного - процессуального кодекса Украины. Во время проведения допроса необходимо выяснить: все обстоятельства, при которых лицо, узнает, наблюдало соответствующее лицо, характерные признаки, приметы и особенности личности, может кто-нибудь подтвердить показания лица, узнает, характерные приметы и особенности личности, состояния слуха и зрения того кто узнает, насколько хорошо он помнит лицо, подлежащее опознанию.

Если лицо, которое будет принимать участие в досудебном расследовании дистанционно, согласно решению следователя или прокурора, находится в помещении, расположенном вне территории, находящейся под юрисдикцией органа досудебного расследования, или вне территории города, в котором он расположен, то следователь, прокурор своим постановлением поручает в пределах компетенции органа внутренних дел, органа безопасности, органа, осуществляющего контроль за соблюдением законодательства, органа государственного бюро расследований, на территории юрисдикции которого находится такое лицо, организацию проведения видеоконференции.

Должностное лицо органа, получившего поручение, по согласованию со следователем, прокурором, который дал поручение, обязан в кратчайший срок организовать выполнение указанного поручения.

В том случае, если лицо, которое будет принимать участие в досудебном расследовании дистанционно, содержится в учреждении предварительного заключения или учреждении исполнения наказаний, организация проведения видеоконференции, установления личности, вручения ей памятки о процессуальных правах осуществляются на основании постановления о поручении на проведение следственного (розыскного) действия должностным лицом такого учреждения. Должностное лицо должно также находиться рядом с лицом, которое принимает участие в проведении следственного (розыскного) действия в режиме видеоконференции, до окончания этого следственного (розыскного) действия[10].

Считается нецелесообразным проведение предъявления для опознания в режиме видеоконференции с участием лиц, имеющих дефекты речи, зрения или слуха, а также если лицо не помнит признаки лица и не может его узнать, или же лица знают друг друга и не отрицают этого, то проводить следственное (розыскное) действие не имеет смысла.

Переходя к рабочему этапу, следователь должен быть, уверен, что соблюдены все требования процессуального, тактического и технического характера, необходимых для качественного проведения предъявления лица для опознания в режиме видеоконференции.

К тактическим приемам рабочего этапа, которые рекомендуется применять при проведении опознания лица в режиме видеоконференции во время досудебного расследования относятся:

1. Должностное лицо органа досудебного расследования на основании постановле-

10 Уголовно - процессуальный кодекс Украины. Научно - практический комментарий: в 2 т. Т.1 \ О.М.Бандурка., Е.М.Блажівський., Е.П.Бурдоль и др.; Под общ. ред В.Я. Таций., В.П.Пшонкы., А.В.Портнова. - Х.: Право , 2012.-768 с.

ния следователя или прокурора о поручении на проведение следственного (розыскного) действия в режиме видеоконференции должно вручить лицу, которое принимает участие в видеоконференции и находится в другом помещении, памятку о ее процессуальных правах, проверить ее документы, удостоверяющие личность, и находиться рядом с ней до окончания следственного (розыскного) действия;

2. В помещение, в котором будет находиться лицо которое, будут узнавать следователь обязан пригласить не менее двух незаинтересованнымих лиц (понятых) для предъявления лица для опознания. Также не менее двух понятых необходимо пригласить в помещение, где будет находиться узнаваемое лицо, и начинается проведение следственного (розыскного) действия, лицо, ее проводящее, должно разъяснить права и обязанности лицам, которые принимают в ней участие, а также процессуальный порядок ее проведения. Исключениями, при которых, допускается отсутствие понятых, случаи применения непрерывной видеозаписи хода проведения следственного (розыскного) действия, но и в этом случае понятые могут быть приглашены, если следователь, прокурор сочтет это целесообразным;

3. Размещение в комнате статистов (не менее трех вместе с узнаваемым лицом, статисты должны быть одной расовой и национальной принадлежности, пола и по возможности схожие с ним по внешности (возраст, рост, вес, телосложение, форма и цвет лица, длина и цвет волос, цвет глаз) и одеждой));

4 . Если предварительное ходатайство защитника, приглашение его;

5. После размещения понятых, статистов, защитника, приглашают лицо предъявляемое для опознания и предлагается ему занять любое место среди присутствующих статистов, про, что ставится отметка в протоколе;

6. В помещение, где происходит трансляция видеоизображения, приглашается опознающий (желательно с использованием телефонной связи понятым, или помощником следователя). Его знакомят с сутью следственного (розыскного) действия.

7. Письменное предупреждение всех участников следственного (розыскного) действия о неразглашении данных досудебного следствия, предупреждения узнающего лица, в зависимости от процессуального статуса, об уголовной ответственности за отказ от дачи показаний и дачу заведомо ложных показаний;

8 . Предложение опознающему осмотреть лиц, предъявляемых для опознания, и указать, не узнает он среди них лицо, в отношении которого давал показания ранее. Если да, то кого именно и по каким конкретно приметам. Эти показания опознающего передаются по видеосвязи, или с использованием телефонной связи в помещение, где находятся статисты, защитник, лицо которое опознают, которому при этом предлагается назвать свою фамилию и анкетные данные .

После проведения указанных действий следователь приступает к фиксации проведения и результатов следственного (розыскного) действия, которые фиксируются с помощью технических средств видеозаписи, и в протоколе следственного (розыскного) действия. В материалах уголовного производства обязательно хранятся оригинальные экземпляры технических носителей информации зафиксированного процессуального действия, резервные копии которых хранятся отдельно.

Копия постановления о проведении следственного действия в режиме видеоконференции может быть отправлена по электронной почте, факсимильной или другим средством связи.

В дистанционном досудебном расследовании использование технических средств и технологий должно обеспечивать надлежащее качество изображения и звука, а также информационной безопасности, то есть необходимо обеспечить защищенность информации и поддерживающей ее инфраструктуры от случайного или преднамеренного воздействия естественного или искусственного характера, которые могут нанести ущерб уголовному производству, привести к раскрытие тайны досудебного расследования, содержания показаний, которые были предоставлены во время следственного (розыскного) действия, данных о лицах , находящихся под государственной защитой и т.д.

Правовую основу технической защиты информации в Украине составляют: Конституция Украины, Законы Украины, акты Президента Украины и Кабинета Министров

Украины, нормативно - правовые акты Службы безопасности Украины, Администрации Государственной службы специальной связи и защиты информации Украины, других государственных органов, международные договоры Украины, согласие на обязательность которых предоставлено Верховной Радой Украины, по вопросам технической защиты информации. Всего, по подсчетам, на сегодня в Украине действует около 60 нормативных актов, которые прямо или косвенно касаются регулирования отношений в информационной сфере. Кроме того, издан ряд ведомственных актов Госкомсекретов Украины - циркулярных писем, разъяснений, методик (более 15) и т.д., которые являются обязательными для всех государственных органов, предприятий, учреждений, организаций при осуществлении ими функций по обеспечению защиты информации с ограниченным доступом, прежде всего - государственной тайны[11].

Действующее законодательство Украины до сих пор не предусматривает четкой трактовки составляющих и обращения информационных ресурсов. Законодательно не определены критерии их принадлежности к категориям государственных и негосударственных. Разработчики законодательства в Информационной сфере и информационной политике государства не совсем компетентны в современных технических, аппаратных, математических (криптографических методах и технологий защиты информации) средствах информационных технологий и, как следствие, ориентируются на внешние заимствования, которые, в свою очередь, далеки от совершенства[12].

Политика информационной безопасности документально описывает и регламентирует систему управления информационной безопасностью в информационных системах подразделений органов внутренних дел Украины, соответствует требованиям законодательства Украины и международных соглашений, рекомендациям международных стандартов ISO\IEC 27001:2005, ISO\IEC 17799\2005[13].

Регулятивно - правовую основу обеспечения защиты информации в информационных системах подразделений Министерства внутренних дел Украины составляют: Концепция национальной безопасности Украины (Постановление Верховной Рады Украины от 18 июля 1995 года № 532- 95- n) Конституция Украины; Законы Украины «Об информации» от 2 октября 1992 года № 2657 - XII, «О научно - технической информации» от 25 июня 1993 года № 3322 - XII, «О государственной тайне» от 21 января 1994 года № 3855 - XII, «О защите информации в автоматизированных системах» от 5 июля 1994 года № 80/94 - ВР, «О национальном архивном фонде и архивных учреждениях» от 24 декабря 1993 года № 3814 - XII, «О связи» от 16 мая 1995 года № 160/95 - ВР, «О издательском деле» от 5 июня 1997 года № 318/97 - ВР, «О доступе к публичной информации» от 13 января 2011 года № 2939 - VI, «О защите персональных данных» от 1 июня 2010 года № 2297 - VI, Постановление Кабинета министров Украины «Об утверждении Правил обеспечения защиты информации в информационных, телекоммуникационных и информационно - телекоммуникационных системах» от 29 марта 2006 года № 373.

Для достижения качественного технологического процесса следователь, прокурор или судья должны привлечь к участию в проведении следственного действия в режиме видеоконференции специалиста, обладающего специальными знаниями и навыками применения соответствующих технических средств и технологий и обеспечит первичную установку аппаратуры, налаживание каналов связи и обслуживание видеоконференцсвязи непосредственно во время выполнения следственного действия.

В контексте применения видеоконференцсвязи в уголовном производстве следует выделить две основные проблемы: нормативно - правовая и практическая. Первая заключается в том, что в уголовном процессуальном законодательстве не определено - какие

11 Ворожко В.П. Правовые основы защиты информации в Украине / - [Электронный ресурс] . - Режим доступа: http://www.bezpeka.com.ru.

12 Захарова А.В., Зачек А.И., Рудый Т.В. Принципы организации системы защиты информационных систем подразделений МВД / О.В.Захарова., О.И.Зачек., Т.В.Рудый. / Научный вестник Львовского государственого университете внутренних дел . - 2012 (2). - С.307 -314.

13 Захарова А.В., Зачек А.И., Рудый Т.В. Система управления информационной безопасностью в информационных системах подразделений ОВД на основе политики безопасности / О.В.Захарова., О.И.Зачек., Т.В.Рудый. / Материалы международной научно - практической конференции «Борьба с интернет - преступностью. Министерство внутренних дел Украины Донецкий юридический институт. Фонд Ганса Зайделя. - 2013 - С.228 -231.

технические средства могут использоваться для проведения дистанционного допроса или предъявления для опознания, каким образом судья будет идентифицировать личность свидетеля или иного участника процесса, который находится на значительном расстоянии[14].

Относительно второй проблемы можно выделить следующие препятствия внедрения видеоконференцсвязи: недостаточность организационной и технологической культуры, неприятие пользователями нововведений, необходимость существенных инвестиций в оборудование и обучение персонала на начальном этапе построения единой информационной системы органов уголовной юстиции; сложность создания и обслуживания программного обеспечения, связано с большим количеством трудно предсказуемых следственных и судебных ситуаций, отсутствие общих стандартов и форматов аудио - и видеоданных, используемых в системе электронного документооборота уголовной юстиции[15].

Украина, как молодое независимое государство, уделяет большое внимание вопросам международного сотрудничества в борьбе с преступностью.

Важной гарантией обеспечения защиты прав и законных интересов лиц, с участием которых могут проводиться процессуальные действия с помощью видеоконференцсвязи, есть возможность обжалования действий и решений должностных лиц о проведении процессуального действия. На территории Украины возможно обжалование процессуального порядка проведения запрашиваемых процессуальных действий, соблюдение положений международного договора при направлении ходатайства и процедуры проведения процессуального действия с помощью видеоконференцсвязи.

ВЫВОДЫ

Таким образом, обобщая вышесказанное, можно утверждать, что: проведение предъявления для опознания лица в режиме видеоконференции с помощью видеоконференцсвязи не имеет существенных недостатков по сравнению с традиционными способами сбора и проверки доказательств, не создает непреодолимого барьера для эффективной коммуникации между участниками процессуального действия. Принципы уголовного процесса под влиянием таких факторов, как скорость, простота, процессуальная экономия, видоизменяются, не теряя при этом своего процессуального характера; процедура получения доказательств в режиме видеоконференции является качественной альтернативой обычному способу получения доказательств путем проведения предъявления для опознания, поскольку следователь непосредственно может наблюдать поведение опознаваемого лица, его эмоции, реакции организма, которые не поддаются волевому контролю человека или являются подсознательными, а также существует возможность применения всех тактических приемов проведения следственного действия; режим видеоконференции при осуществлении предъявления для опознания лица позволяет значительно сэкономить как материальные, так и человеческие и временные ресурсы, позволяет адекватно и оперативно менять тактику производства процессуального действия (например, формировать вопросы во время опознания) и, как результат - более качественное и продуктивное расследование.

СПИСОК ЛИТЕРАТУРЫ

1. Ахтырская Н.Н.. Применение видеоконференции в уголовном судопроизводстве через призму практики Европейского суда по правам человека // Судебная апелляция, № 2 (31) 2013 года. [Электронный ресурс] . - Режим доступа: // http://kia.court.gov.ua/sud2690/1j/4q/48733/.
2. Ворожко В.П. Правовые основы защиты информации в Украине / - [Электронный ресурс] . - Режим доступа: http://www.bezpeka.com.ru.

14 Ширина С.А. Дистанционный рассмотрение дел об административных правонарушениях, связанных с безопасностью дорожного движения. - Таможенное дело . - 2011. № 6 (78частина 2), книга 1. -С . 260-265.

15 Мурадов В. Проблемы использования видеоконференцсвязи на современном этапе развития технико - криминалистического обеспечения судебного разбирательства уголовных дел // Право Украины . 2011. № 7. С. 235-240.

3. Второй дополнительный протокол 8 ноября 2001 года по Европейской конвенции «О взаимной правовой помощи по уголовным делам» Страсбург // ратифицирован Украиной 01.06.2011года. [Электронный ресурс] . - Режим доступа: http://zakon2.rada.gov.ua/laws/show/994_518.
4. Европейская конвенция от 20 апреля 1959 «О взаимной правовой помощи по уголовным делам» ратифицирована Украиной 16.01.1998года. [Электронный ресурс]. - Режим доступа: http://zakon3.rada.gov.ua/laws/show/995_036.
5. Желтухин Е. Видеоконференцсвязь: Требование времени или повод для злоупотреблений / С.Е.Желтухин // Судебно -юридическая газета. - 2012. - № 32 (150). - С.5.
6. Захарова А.В., Зачек А.И., Рудый Т.В. Принципы организации системы защиты информационных систем подразделений МВД / О.В.Захарова., О.И.Зачек., Т.В.Рудий. / Научный вестник Львовского государственого университете внутренних дел . - 2012 (2). - С.307 -314.
7. Захарова А.В., Зачек А.И., Рудый Т.В. Система управления информационной безопасностью в информационных системах подразделений ОВД на основе политики безопасности / О.В.Захарова., О.И.Зачек., Т.В.Рудый. / Материалы международной научно - практической конференции «Борьба с интернет - преступностью. Министерство внутренних дел Украины Донецкий юридический институт. Фонд Ганса Зайделя . - 2013 - С.228 -231.
8. Конвенция от 7 октября 2002 года «О правовой помощи и правовых отношениях по гражданским, семейным и уголовным делам» Кишинев [Электронный ресурс] - Режим доступа: http://zakon4.rada.gov.ua/laws/show/997_619.
9. Морозов А.В., Полопанова И.С. Результаты работы ХИУ Коллоквиум Комитета экспертов Совета Европы по информационным технологиям и праву // Информатизация правоохранительных систем: сб. тр. ИХ Междунар. науч. конф. (7-8 июня 2000 г. , Москва). - М., 2000. - С. 38-44.
10. Мурадов В. Проблемы использования видеоконференцсвязи на современном этапе развития технико - криминалистического обеспечения судебного разбирательства уголовных дел // Право Украины . 2011. № 7. С. 235-240.
11. Уголовно - процессуальный кодекс Украины. Научно - практический комментарий: в 2 т. Т.1 \ О.М.Бандурка., Е.М.Блажівський., Е.П.Бурдоль и др.; Под общ. ред В.Я. Таций., В.П.Пшонкы., А.В.Портнова. - Х.: Право , 2012.- 768 с.
12. Уголовный процессуальный кодекс Украины от 13.04.2012 г. // Официальный вестник Украины от 25.05.2012 года.
13. Уголовный процессуальный кодекс Украины: - М.: «Центр учебной литературы », 2012.- 254 с.
14. Ширина С.А. Дистанционный рассмотрение дел об административных правонарушениях, связанных с безопасностью дорожного движения. - Таможенное дело . - 2011. № 6 (78 часть 2), книга 1. - С . 260-265.
15. Электронный ресурс : http://uk.wikipedia.org/wiki/.

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THE RELATIONSHIP BETWEEN PUBLIC PROSECUTOR AND THE POLICE DURING PRELIMINARY PROCEEDINGS ACCORDING TO THE SERBIAN CODE OF CRIMINAL PROCEDURE[1]

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Abstract: The National Assembly of the Republic of Serbia adopted in September 2011 the new Criminal Procedure Code, which started to be used from 15 January 2012 related to cases disposed by the Public Prosecutor's Office with special jurisdiction in accordance with a special law, while therestof the Code starts with application from 1 October 2013. The new Code, among other things, introduces prosecutorial investigation concept implying that public prosecutor and the police conduct preliminary proceedings on the whole, i.e. preliminary inquiry and investigation. In this paper the author is dealing with legal character of preliminary proceedings and special attention is paid to the question whether preliminary proceedings is considered as a part of criminal process in the true sense of the word. After that, the author is discussing the relationship between public prosecutor and the police during preliminary proceedings, i.e. preliminary inquiry and investigation, giving a critical review of some provisions. The aim of this paper is precisely to suggest some issues in the theory and practice concerning the relationship between public prosecutor and the police during preliminary proceedings, as well as some ideas that could be applied in practice.

Keywords: public prosecutor, the police, preliminary inquiry, investigation, preliminary proceedings, prosecutorial investigation concept.

INTRODUCTION

Public prosecutor and police are very important state authorities in opposing criminal activity, ie. in the field of an offense and their perpetrators detection, preservation of evidence and the criminal prosecution. Thus, speaking about relation of public prosecutor and police and their authority in criminal proceeding, that is above all, about mutual distribution of authority in preliminary proceeding. In fact, from the moment of knowledge that an offense is committed prosecuted ex officio untill the charges are pressed by public prosecutor, a series of investigative and evidentiary actions and measures are undertaken in order to reach the data and evidences which leads to charges. The main role during undertaking those actions, in most countries, have public prosecutor and police, but their relation is regulated differently depanding on accepted model of investigation.

Regarding this, from the public prosecutor and police aspect, ie. distribution of their authorities in preliminary proceeding, we distinguish continental and English system.[2] In continental system police has active role during preparation of criminal record (*dossier*), but the public prosecutor is the main subject in preliminary proceeding who makes the final decision on criminal prosecution. On the other side, English system favors police noting that the public prosecutor institute is like inquisitorial system inheritance, relatively recently introduced, with significant difficulties, in English proceeding legislation.[3]

In context of pre-exposure and addressed from the perspective of this article subject, should be noted that Serbia is one of the countries belonging to the continental system. However, in the

1 This paper is the result of the realisation of the Scientific Research Project entitled *„The Development of Institutional Capacities, Standards and Procedures for Combating Organized Crime and Terrorism in the International Integration Conditions*". The Project is financed by the Ministry of Science and Technological Development of the Republic of Serbia (No 179045), and carried out by the Academy of Criminalistics and Police Studies in Belgrade (2011−2014). The leader of the Project is Associate Professor Saša Mijalković, PhD.

2 Mathias, E., (2005), The balance of power between the police and the public prosecutor, *European Criminal Procedures,* edited by Mireille Delmas-Marty and J. R. Spencer, Cambridge University Press, Cambridge, paperback edition, 460.

3 See: Mathias, E., (2005), *op. cit.,* 460-471; Ilić, G. (2005), Položaj i uloga policije u prethodnom krivičnom postupku, *Policija i pretkrivični i prethodni krivični postupak*, VŠUP, Zemun, 114-120.

countries of continental Europe, there are certain differences considering whether investigation is conducted by investigative judge or public prosecutor. Therefore, it may be said that there are two concepts of investigation: judicial and prosecutorial, except that there are various modes of prosecutorial investigation, and depending on the jurisdiction and authorities of the police in the concept of prosecutorial investigation may be discussed about the prosecutorial-police investigation as well.

In accordance with contemporary trends, Republic of Serbia started reforms, so in the September 2011. Parliament of Republic of Serbia adopted a new Code of Criminal Procedure[4] which began to apply January 15th 2012. in proceeding offenses which are regulated with special law to be proceeded by public prosecutor of special jurisdiction, and in the rest of it, after appropriate changes and amendments of law, began to apply October 1st 2013. New Code brings a lot of novelty and the most significant is: judicial investigation is replaced with prosecutorial which after all does contain some elements of party investigation; it the principle of material truth is abolished with the aim to court becomes classic arbiter in dispute between public prosecutor on one side and defendant and his counsel on the other side; public prosecutor becomes *dominus litis* of investigative proceeding who has obligation to prepare case and legally sustainable charge in cooperation with police in front of court, the institute of investigative judge is abolished and it is introduced the preliminary proceeding judge as a guarantee of basic rights and freedoms in the preliminary inquiry and investigation, etc.[5]

It is certainly that, one of the most important novelties brought by the new CCP of Republic of Serbia is change of investigation concept or regulation of preliminary proceeding on a different basis than it has been the case in long legal tradition in this region. Basically, conducting preliminary proceedings in general are entrusted with the public prosecutor and the police with the intention to public prosecutor become a *dominus litis* of entire preliminary proceeding. In this context, in the following presentation will first be presented the basic characteristics of the preliminary proceeding with special reference to the question whether the preliminary proceeding is part of the criminal proceedings in the true sense of the word, and then will be indicated on the relationship of the public prosecutor and the police in preliminary inquiry and investigation, with a critical review of some controversial decisions and issues that have already appeared in the practice.

TERM AND BASIC CHARACTERISTICS OF PRELIMINARY PROCEEDING

Preliminary proceeding presents important stage of criminal proceedings and its basic aim is to collect data and evidence based on which public prosecutor will decide whether to press charge or not. In countries of continental legal tradition, along with Serbia, in a great number of cases the outcome of main proceeding depends on evidence gathered by public prosecutor and police during preliminary proceeding. Relationship between public prosecutor and police, i.e. way of authority distribution during investigation depends on way of regulation of preliminary proceeding.

New CCP resolves the question when it is considered that the criminal proceeding is initiated. Thus, according to Article 7 regular criminal proceeding begins by ordering conducting of investigation, i.e. by confirmation of charge which was not proceeded by an investigation. From this legal determination stems that the investigation is part of the criminal proceeding, which is confirmed by provision of Article 2, Paragraph 1, Item, 14 of CCP according to which inquiry is preliminary and criminal. Therefore, the main stages of the proceedings in accordance with the provisions of CCP would be preliminary inquiry, preliminary proceeding (investigation, charge) and main proceeding (main hearing preparation, main hearing, and verdict).

In accordance with mentioned legal definition stems that preliminary inquiry is not part of criminal proceeding and that it replaces former pre-criminal proceeding, which means that it

4 „Službeni glasnik Republike Srbije“, br. 72/11, 101/11, 121/12, 32/13 i 45/13.

5 Detailed about it: Bošković, A., Risimović, R., (2012), Osnovne karakteristike novog Zakonika o krivičnom postupku Republike Srbije iz 2011. godine, *Suprotstavljanje savremenom organizovanom kriminalu i terorizmu - knjiga III,* Beograd : Kriminalističko policijska akademija, 211-226.

is lead when there is grounds for suspicion that offense is committed. It is managed by public prosecutor and in cooperation with police undertake specific actions in order to detect offense and suspects. Also, he may delegate to police performing of action and which is required to carry out his order and that informs him about it on regular basis. Therefore, main subjects of preliminary inquiry are public prosecutor and police which is characteristic of former pre-criminal proceeding.

Investigation is according Code systematization, first phase of preliminary proceeding which may be run in two cases: first, against certain person for whom exist grounds for suspicion that he committed offense and second, against unknown perpetrator when there are grounds for suspicion that offense is committed. Investigation is initiated by order of public prosecutor who has jurisdiction to lead investigation. During investigation data and evidence are collected which are required in order to decide whether to press charge or dismissal of proceeding, evidence required for determine identity of perpetrator, the evidence that there is a danger that can not be repeated in main hearing or presenting them would be difficult, and other evidence which may be useful for proceeding, and which presentation considering case circumstances is meaningfully.

This definition of moment of criminal proceeding inititation is, regarding new organization of preliminary proceeding, questionable for the following reasons. First, new Code introduces the concept of prosecutorial investigation instead of the previous judicial concept. This implies that the initiation and conduct of investigations under the jurisdiction of the public prosecutor and the police and it is run by an order of the public prosecutor, without possibility court control of such decision. In this way the investigation completely changes its legal nature becoming from judicial administrative activity.[6] Regardless this change, the legislature retains the notion that the first-instance criminal proceeding consists of two stages – preliminary proceeding which is made of the investigation phase and the phase of putting the charge and the main proceedings that resolves the criminal matter and make verdict on the basis of the main hearing.

From the above mentioned stems another reason why this legal solution is questionable, according to which the investigation is first phase of preliminary proceeding. In fact, this solution leaves mostly widely accepted definition of the concept of criminal proceedings as a tripartite legal relationship between the court, authorized prosecutor and the defendant. In theory of the Criminal Procedure Law, there are three views on the concept of determining criminal proceedings: realistic, juristic and realistic-juristic definition. Thus, for example, criminal proceeding is defined as law regulated undertaking criminal procedure actions by the criminal procedural subjects, all with the aim of court making the decision on an offense, offender accountability, criminal sanctions and other proceeding relations that are associated with offense, and require participation of the court's decision.[7] Also, it is stated that for forming of criminal procedure relationships it is necessary that there are three main process of the subject: court, prosecutor and suspect, i.e. defendant, and that the actions they undertake are procedural.[8] Regardless of the many different definitions of criminal proceedings, the generally accepted view is that criminal proceeding is essentially a criminal procedural relationship that is created, run and terminates between the court and the parties with an aim of the proper application of Criminal Code in a criminal matter that is the subject of proceeding.[9] Simply, before beginning of the proceeding there must be a judicial decision which establishes that there are Code prescribed requirements for its conduct.[10]

Bearing in mind the above-presented arguments, we can say that this concept of investigation ordered and lead by the public prosecutor in cooperation with the police, cannot be a phase of criminal proceedings in the strict sense. The public prosecutor orders an investigation in which there is no possibility of appeal on which court would decide, and therefore no court decision

6 Grubač, M., (2010), Odredbe o organizaciji prethodnog krivičnog postupka Nacrta ZKP Srbije iz aprila 2010. godine upoređene sa odgovarajućim odredbama italijanskog ZKP, *Glasnik Advokatske komore Vojvodine,* 82(12), 563.

7 Bejatović, S., (2010), *Krivično procesno pravo,* Službeni glasnik, Beograd, 50.

8 Simović, M., (2009), *Krivično procesno pravo – uvod i opšti deo,* Pravni fakultet, Bihać, 30.

9 Đurđić, V., (2010), Redefinisanje klasičnih procesnih pojmova u Prednacrtu Zakonika o krivičnom postupku iz 2010, *Revija za kriminologiju i krivično pravo,* 48(2), 3-22.

10 Grubač, M., (2008), *Krivično procesno pravo,* Pravni fakultet Univerziteta Union i Službeni glasnik, Beograd.

to determine the existence of the necessary legal requirements for conducting investigation. In this way, in the investigation there is no formation of the tripartite criminal procedure relationship because there is no court, i.e. there is formation of a relationship only between the public prosecutor and the suspect. It was different to the solution CCP/2001[11] because the pre-criminal proceeding represented no court activity, and the investigation judicial activity where it came to the formation of the tripartite criminal procedure relationship and therefore investigation is considered to be a part of criminal proceeding in the true sense of the word.

To all this should be added that the new CCP provides possibility that the investigation is conducted against an unknown perpetrator when there are grounds for suspicion that offense is committed (Art. 295 Para. 1 Item. 2). If the prosecutor decides to act in accordance with this authorization and initiate an investigation against an unknown perpetrator of an offense, it will happen that besides the court, in the investigation there is no suspect acted as defense.

In addition to the reasons in favor of the inadequacy of such a legal solution there is thinking according to which the distribution on preliminary inquiry and investigation is unnecessary and that there is little justification. In fact, this division makes sense in CCP/2001 where there is judicial concept of investigation, because in this way the pre-criminal procedure, which is no court activity, i.e. activity of the public prosecutor and the police is clearly separated from investigation, led by the investigative judge as someone who has functionally jurisdicition in the court for conducting this phase of the proceeding. However, in the prosecutorial police concept of investigation that introduces a new CCP, preliminary inquiry and investigation are the activities of the public prosecutor and the police, and thus both phases have the same legal nature and therefore there is no need to be separated in this way, i.e. in a way that there is the judicial concept of investigation.

One of many reasons in favor of opinion that an investigation designed in this way can not be considered as a part of the criminal proceeding in the true sense lies in the fact that the basic material requirement for conducting preliminary inquiry and investigation is exactly the same. Namely, the preliminary inquiry is conducted when there are grounds for suspicion that offense is committed, and the investigation may be initiated against a person for whom there are grounds for suspicion of having committed a offense and against an unknown perpetrator when there are grounds for suspicion that a offense is committed. Thus, it is possible that investigation be led on the same degree of suspicion as preliminary inquiry against a known perpetrator and against an unknown perpetrator as well. The only thing that differentiates the preliminary inquiry and the investigation is a formal element, which is the order of the public prosecutor to initiate an investigation. The very order of the public prosecutor to initiate an investigation has no essential significance because does not create any difference in terms of a legal nature with respect to the preliminary inquiry because it is led by tha same authority, i.e. prosecutor and police and material reguirement is the same as well, i.e. degree of grounds for suspicion.[12] Also, the term suspect is also used for a person in preliminary inquiry and the person against whom the investigation is led and in both phases of the proceeding the suspect has the same rights and therefore the division on preliminary inquiry and investigation has even less significance. However, despite all this, the legislator considers that the moment of ordering to conduct an investigation is the moment of initiation of criminal proceeding in the true sense of the word.

Finally, perhaps one of the most important reasons in favor of that the entire preliminary proceeding actually begins with preliminary inquiry and ends with the confirmation of the charge and as such is not part of the criminal proceeding is that, the rule *ne bis in idem* does not apply in the preliminary proceeding.[13] Namely, if the public prosecutor order dismissal of investigation (eg, if there is not enough evidence for accusation) that is not a reason to eventually later re-open the investigation against the same person for the same offense, i.e. in this particular case is not able to point out the objection of *res iudicata*. In fact, if it is accepted the view of the legislature that the investigation stage is part of the criminal proceeding, it would mean that against one

11 „Službeni list SRJ," br. 70/01 i 68/02, i „Službeni glasnik Republike Srbije," br. 58/04, 85/05, 115/05, 49/07 i 20/09 - dr. zakon, 72/09 i 76/10.

12 Bošković, A., (2012), Pojam krivičnog postupka prema novom ZKP Republike Srbije iz 2011. godine, *Kultura polisa,* 9 (posebno izdanje 2), 266.

13 About that the rule *ne bis in idem* does not apply in investigation, see: Ilić, G., Majić, M., Beljanski, S., Trešnjev, A., (2013), *Komentar Zakonika o krivičnom postupku,* Službeni glasnik, Beograd, 714.

person investigation could be constantly re-run, i.e. criminal proceeding even though the public prosecutor several times brought the order to suspend the investigation. It is known that the rule *ne bis in idem* means that no one can be prosecuted for the offense for which the decision of the court finally acquitted or convicted him or for the offense for which the charges have been dismissed or criminal proceeding finally dismissed. It is clear that this is about final judicial decisions which are the reason more in favor of claim that the preliminary proceeding is not part of the criminal proceeding because if there is such a possibility, i.e. the investigation leading as a phase of the criminal proceeding many times against the same person for the same offense, it would not be in compliance with the rule, and would not ensure legal safety.

Based on all the above it can be concluded that this concept of investigation, ordered and led by the public prosecutor in cooperation with the police, remains a part of criminal proceeding, but in a broader, unjustly sense, while the main proceeding remains criminal proceeding in the proper sense of the word. In this way the investigation would be, together with the preliminary inquiry and charges procedure, part of the preliminary proceeding, but not in the sense that was planned in the former judicial concept of investigation, but would present prosecutorial part of proceeding, and only with confirmation of the charge proceeding would be moved from prosecutorial to judicial phase.[14] Therefore, the charge confirmation by the court would be a moment for which it should bind the initiation of criminal proceeding in the true sense of the word, while the preliminary proceeding would be out of it. In this way, the procedure is divided into administrative preliminary proceeding (including judicial control of charge) and entirely main court proceeding. Thus non-judicial investigation ceased to be part of the criminal proceeding in the true sense of the word. It remains a criminal proceeding, but in another, broader or untrue sense, as opposed to the main proceeding, which remains criminal proceeding in the true sense of word.[15]

GENERAL CONSIDERATIONS ABOUT THE PUBLIC PROSECUTOR AND THE POLICE RELATION IN PRELIMINARY PROCEEDING

The relation of the public prosecutor and the police in the preliminary proceeding is regulated differently in different countries depending on the accepted model of investigation. In this sense comparative solutions can be classified into three groups. First, legislation which, like the english where police are left preliminary inquiry and initiation of prosecuting the suspect. The second system is represented in the laws of Italy and Germany, and is characterized by the joint action of the prosecution and the police in preliminary inquiry and prosecution of presumed perpetrators of offenses. The third model is characterized by the distribution of powers between the police, prosecutors and investigative judges, and there is in France and the countries that have adopted its model of the preliminary proceeding.[16]

According to the CCP of Serbia the concept of prosecutorial investigations is introduced in which the main role in the conduct of preliminary inquiry and investigation will have public prosecutor and the police. This leads to a concentration of prosecution and investigation function in the role of the public prosecutor which raises the question how to regulate its proceeding position in order not to question the objectivity during leading the investigation proceeding.

This problem is eliminated in two ways: by strengthening the defendant's right to defense and the fact that the public prosecutor in conducting an investigation, and therefore the police as well is duty of care to the burdensome and liberating circumstances as well as the provision of evidence that there is a danger to be lost.[17]

In any case, one of the starting points for the successful implementation of the concept of prosecutorial investigation as provided in new CCP of Serbia is that the public prosecutor dur-

14 Ibid: Ilić, G. (2011), Odnos javnog tužilaštva i policije u svetlu novog Zakonika o krivičnom postupku, *Revija za kriminologiju i krivično pravo,* 49(2-3), 318.

15 Grubač, M., (2010), *op. cit.,* 562-563.

16 Ilić, G., Banović, B. (2013), Policija i nova rešenja u Zakoniku o krivičnom postupku, *Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena,* Srpsko udruženje za krivičnopravnu teoriju i praksu, Zlatibor-Beograd, 102-103.

17 Bejatović, S. (2008), Koncept istrage i njen uticaj na efikasnost krivičnog postupka, *Krivično zakonodavstvo, organizacija pravosuđa i efikasnost postupanja u krivičnim stvarima,* Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 124.

ing conducting preliminary inquiry and the investigation does not act as a party but as a state authority under the assumption that he can be neutral and objective as it was the investigative judge in the judicial concept of investigation. In this sense, Prof. M . Škulić points out that the public prosecutor in purely proceeding terms is a party that is in function of the charges , but he is not a typical ‘’party’’ in criminal proceeding because he is a state authority as well, and as usual in continental European types of criminal proceeding the public prosecutor must not at all costs be guided by his party interests (as is typical, primarily in civil proceeding) and ignore the interests of the other party, i.e. defense in criminal proceeding as a result of which he is a kind of ‘’paraparty’’.[18]

Likewise, in Germany, where since the 1975th has been applied the concept of prosecutorial investigation, is prescribed that during the investigation, public prosecution i.e. police when entrusted the investigation conduct by the public prosecutor are obliged to take care of gathering all the relevant facts, as aggravating as well as mitigating circumstances, but also to take care of providing the evidence for which there is a danger of being lost. In this way, public prosecutor in fact ‘’does not have the role of party like in the adversarial system, but is representative of a neutral country’’.[19] Also, the German process theory emphasizes that change of the investigation concept, i.e. cancelation of the investigative judge institute in the criminal proceeding legislation is not an attempt to replace impartial investigative judge with the biased prosecutor, but this change is based on the assumption that the public prosecutor may be an objective member of the judiciary – as ‘’court’’ – during the investigation.[20]

In the context of the above discussion it should be noted that the intention of the legislator in Serbia is that criminal proceeding be conceived primarily as a dispute between the parties, i.e. usually as a dispute between the public prosecutor, on the one side and the defendant and his counsel, on the other side which is a heritage of adversarial model of criminal proceeding.[21] It means minimizing the role of the court[22] in the process of proof and the search for truth which raises the question whether this concept of proceeding leaves place for prescribing responsibilities to the public prosecutor acting totally objective and impartial during conducting in the preliminary proceeding. However, Art. 6 Para. 4 of CCP proscribes duty to the public prosecutor and the police to impartially clarify doubt about the offense for which conducting official duties and also to examine with the same attention the facts which incriminate defendant as well those in his favor. We believe that this is a good solution and in the spirit of the European continental legal tradition which Serbia belongs to and as such a provision is in favor of it to ensure the objectivity and neutrality of public prosecution in the conduct of preliminary inquiry and investigation.

However, in order to pre-set objectives be realized in practice in the right way, it is necessary that the public prosecution become independent and responsible for the performance of the new prosecutorial function.[23] Authority to conduct the investigation will significantly increase the authority and power of the public prosecutor . This increased power should be accompanied by increased control and responsability, but also the measures that will prevent that the authority of public prosecutor does not usurp other centers of power and higher level executive branch

18 Škulić, M., (2007), *Komentar Zakonika o krivičnom postupku,* Službeni glasnik, Beograd, 201.

19 Weigend, T., (1980), *Continental Cure for American Ailments: European Criminal Procedures a Model for Law Reform,* In: Morris N, Tonry M, ed. Crime and justice. Vol. 2. Chicago: Chicago University Press, 395.

20 Goldstein, A. S., Marcus, M., (1977), *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany,* Yale Law Journal, Vol. 87. No. 2. Yale Journal Co. Inc., New Haven, 249.

21 About application of certain adversarial criminal-proceeding institutes in countries of continental legal tradition see: Bošković, A. (2013), Analiza primene pojedinih adversarijalnih krivičnoprocesnih instituta u kontinentalnom krivičnom procesnom zakonodavstvu, *Revija za kriminologiju i krivično pravo,* 51(1), 75-94.

22 About devaluation of principle of truth in new CCP see: Škulić, M., Ilić, G. (2012), *Novi Zakonik o krivičnom postupku Srbije – reforma u stilu „jedan korak napred, dva koraka nazad",* Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije i dr, Beograd, str. 33-37; Bošković, A., Risimović, R., (2012), *op. cit.,* 218-224.

23 About problems regarding prosecutorial independence and objectivity of criminal proceeding see: Ilić, G. (2012), Položaj javnog tužioca prema novom ZKP Republike Srbije, *Savremene tendencije krivičnog procesnog prava u Srbiji i regionalna krivičnoprocesna zakonodavstva (normativni i praktični aspekti),* Misija OEBS u Srbiji, Beograd, 64-65.

authority. Thus, independence is essential in order to prosecutor's authority which derives from monopoly to prosecute would not be abused by other authority, and the responsibility in order not to abuse his own authority.[24]

RELATION BETWEEN THE PUBLIC PROSECUTOR AND THE POLICE IN PRELIMINARY INQUIRY

Preliminary inquiry is basicly first phase of the preliminary proceeding and it starts by undertaking first action of the jurisdictional authorities (police or public prosecution) in order to check the grounds for suspicion that an offense is committed or that a person has committed an offense. So, to begin the preliminary inquiry there is no need for any formal decision of the jurisdictional authority and it is not necessary that the action taken is evidentiary action, but it can be any of the investigative action that is usually at this stage of the proceedings undertaken by the police.[25] The goal of its leading is to find the perpetrator of the offense, that perpetrator or accomplice does not hide or escape, to detect and provide traces of an offense and objects which can be used as evidence, as well as to collect all the information that could be useful for successful conduct of criminal proceeding.

Seen from the relation of public prosecutor and the police point of view, it is very important provision which provides that the public prosecutor manages the preliminary inquiry (Art. 43 Para. 2 Item. 1 CCP). As it points out, the leadership role primarily involves active rather than reactive approach of public prosecutor who is expected to strategicly plan this and the next phase of the proceeding.[26] The intention of the legislator is to really have in practice, the leadership role of the public prosecutor in the preliminary inquiry, primarily in his relation to the police considering that the public prosecutor was formally head of former pre-criminal proceeding, but such role of his was rarely carried out in full capacity in practice. In fact, the public prosecutor as the leader of the preliminary inquiry should be the authority which makes decisions that are of strategic importance for the outcome of the preliminary inquiry, not only that but also to directly manage i.e. make operational decisions about actions to be taken in the preliminary inquiry, of course, all in cooperation with the police.

In order to public prosecutor properly directes actions of police in the preliminary inquiry and to successfully and fully have this relathionship between public prosecutor and the police in practice, it is necessary to have much more intense, more direct contact between these two subjects than it was in the previous period. This entails a number of things, primarily that the public prosecutor is included in work on a particular case from the time of knowledge that offense is committed, under the assumption that the police has fulfilled its duty and informed him about committed offense in timely manner, but that prosecutors more master criminalistic knowledge to adequately perform their duties as prescribed by the Code as well. Such process position of the public prosecutor in new proceeding will its recent, fairly comfortable process position radically change so that it will become the most dynamic, responsible and burdened criminal prosecution authority.

In this regard, the Code provides that the public prosecutor is authorized to issue binding orders according to which the police are obliged to act. This implies that the public prosecutor may order the police to engage in a certain direction or to order undertaking of certain, specific actions.[27] If it comes to specific orders, it may happen that the public prosecutor within his order determine the way of conducting concrete action by the police. Logically, the public prosecutor, in particular because he is not to that extent operational as police authority, will not in most cases determine the way of conducting ordered action, but he may do so and the police are then

24 Grubač, M., (2007), Treba li sudsku istragu zameniti nesudskom istragom – perspektiva i dileme, *Primjena krivičnog zakonodavstva Crne Gore – dileme i problemi,* Udruženje za krivično pravo i kriminalnu politiku Crne Gore, Budva, 273.

25 About that the key criterion for diferentiation of preliminary inquiry and investigation is character of undertaken actions by authorized subjects see: Kesić, T., Čvorović, D. (2011), Policija kao subjekt tužilačkog koncepta istrage prema radnoj verziji Zakonika o krivičnom postupku od 2010. godine, *Nova rešenja u krivičnom procesnom zakonodavstvu – teoretski i praktični aspekti,* Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 387.

26 Ilić, G., Majić, M., Beljanski, S., Trešnjev, A., (2013), *op. cit.,* 657.

27 Ibid, 658.

obliged to realize it in the way provided in order of the public prosecutor.[28]

Finally, regarding the authority and rights of the public prosecutor in the preliminary inquiry in relation to the police, there is a possibility that during the preliminary inquiry the public prosecutor may take over conducting the actions from the police that were undertaken by the authorized police officers independently. However, despite such a provision, the question of its practical application rises, i.e . to what extent and under what conditions will the public prosecutor be guided by this authority and take over conducting some action from police considering the fact that the police are far more operational authority, and the fact that police will often inform prosecutor about undertaken, primarily a investigative actions immediately after their undertaking.

As far as prescribed duties of the police towards the public prosecutor during the preliminary inquiry it is prescribed that the police are obliged to inform the public prosecutor about undertaking investigative actions immediately, but not later than 24 hours after their unertaking (Art. 286 Para. 4 CCP), and about undertaking evidentiary actions are required to infrom the public prosecutor without delay (Art. 287 Para. 1 CCP). Also, the police are obliged to act on any request by the public prosecutor (Art. 44 Para. 1 CCP).

Through analysis of these provisions of the Code two things are noticed. First, that the police are required to inform the public prosecutor about undertaken investigative and evidentiary actions in preliminary inquiry on regular basis as soon as possible, i.e. immediately and without delay, noting that in case of a investigative actions that deadline may be to a maximum of 24 hours from the moment of their undertaking. Comparing, the new CCP of Croatia[29] which introduces prosecutorial model of investigation, obliges the police to inform the public prosecutor about undertaking preliminary inquiry immediately, but not later than 24 hours of undertaking action,[30] while in Germany, it is provided that the police are obliged to inform the public prosecutor of its activities and to deliver him the results of their investigation related to specific offense without delay.[31] Similarly, the domestic proceeding theory in the scientific papers which elaborate adequate mechanisms of introducing the proposes prescribing deadline within the police are obliged to inform the public prosecutor about committed offense and every undertaken action. Thus, for example Prof. S. Bejatović stating the basic features of the new prosecutorial investigation concept points out that the police are obliged to inform the public prosecutor about any undertaken action of disclosure within no longer than 48 hours.[32] A similar view is expressed V. Đurđić who stresses that disclosure action police would undertake on their own initiative or at the request of the public prosecutor and would be obliged to inform the public prosecutor about any undertaken action or measure in order to detect offense and the perpetrator in a particular statutory deadline (eg, 24 or 72 hours).[33]

However , similar police obligation was prescribed in CCP/2001. that in the past was never realized in practice in an appropriate manner. Namely, the police are in practical actions undertook a number of actions about which, before they were undertaken, did not inform the public prosecutor. Moreover, the police undertook all necessary actions and measures and only after the completion of the pre-criminal proceeding, i.e. when there was a reasonable suspicion that a person has committed an offense for which has been prosecuted by official duty, the police press criminal charges to the public prosecutor. In this way, the public prosecutor had no active role during the pre-criminal proceeding , at least a managing one prescribed by Code. Considering mentioned above, new CCP introduces prosecutorial investigation, which inevitably requires increased activity of the public prosecutor during the preliminary inquiry, it is clear that this practice must change. Of course, it is certain that the police will not inform the public prosecutor before undertaking any action , because it would not be in favor of the efficiency of the procesding, but it is certainly necessary to inform him in timely manner after undertaken action within the deadlines prescribed by Code on which it was discussed.

28 Škulić, M. (2007), *op. cit.,* 202.
29 "Narodne novine" br. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13 i 145/13.
30 Article 207 Para. 2 CCP Croatia.
31 Article 163. Para. 2. *Strafprozeßordnung – StPO.*
32 Bejatović, S. (2008), *op. cit.,* 127.
33 Đurđić, V. (2008), Krivičnoprocesno zakonodavstvo kao normativna pretpostavka efikasnosti postupanja u krivičnim stvarima, *Krivično zakonodavstvo, organizacija pravosuđa i efikasnost postupanja u krivičnim stvarima,* Srpsko udruženje za krivičnopravnu teoriju i praksu, Zlatibor-Beograd, 23.

Secondly , the police are obliged to act on any request of the public prosecutor. If the police do not act upon the request of the public prosecutor and do not undertake ordered action, the public prosecutor shall immediately inform the officer in charge of the authority, and if necessary, may inform the Minister in charge, the Government or the authority in charge of the Parliament. If within 24 hours from the moment of received information from the public prosecutor, the police do not act on the request, then the prosecutor may request the initiation of disciplinary proceeding against a person who is considered to be responsible for the failure of his request. Therefore, the public prosecutor can only initiate disciplinary proceeding in this case, and he does not initiate it directly.

Finally, one might ask what happens if the authority in charge to initiate disciplinary proceeding would not in a relatively short period of time initiate disciplinary proceeding. Surely that the public prosecutor then would have possibility to inform about his restraint from initiation of disciplinary proceeding his direct superior, the Minister, the Government or the authority in charge of the Parliament.[34]

RELATION OF THE PUBLIC PROSECUTOR AND THE POLICE IN INVESTIGATION

The investigation is the second phase of preliminary inquiry in the regular criminal proceeding and can be run in two cases: first, against a person for whom there is grounds for suspicion of committing an offense and, second, against an unknown perpetrator when there are grounds for suspicion that an offense is committed. The main objective of the investigation is primarily to collect evidence and data necessary in order to decide whether to press charge or dismiss criminal proceeding. In addition to the primary objective of the investigation there is a need to achieve two objectives: to collect the evidence required to determine the identity of the perpetrator, and second, the evidence that there is a danger that can not be repeated at main hearing or presenting them would be difficult, and other evidence which may be useful for proceeding, and which presentation considering case circumstances is meaningfully.

The investigation is initiated by the order of the public prosecutor, for which is not anticipated to appeal the court or the public prosecutor of higher level. Also, the public prosecutor is in charge to lead the investigation, noting that he bring the order to conduct the investigation before or immediately after the first evidentiary action undertaken by the public prosecutor or the police in the preliminary inquiry, but no later than 30 days after the public prosecutor is informed about first evidentiary action undertaken by the police.

Considering that the investigation is initiated, led and undertake evidentiary action by the public prosecutor, he is absolute "master" of the investigation. This implies determination of the investigation strategy, type, order and manner of undertaking evidentiary actions as well as the subjects who will assist him in this.[35]

Regarding mentioned above, the relation of the public prosecutor and the police in the investigation may be viewed from two aspects. First, the public prosecutor may delegate undertaking certain evidentiary actions in the investigation to the police (Art. 299 Para. 4 CCP), and second, the public prosecutor during the investigation may have a need for professional assistance, for which he may engage the police who have the required expertise (Art. 298 Para. 4).

First, viewed from the aspect of the public prosecutor authority to entrust to the police undertaking certain evidentiary actions during the investigation, very important question may be raised, which is whether the public prosecutor may entrust the police undertaking all evidentiary actions, even those that the police cannot undertake at all during preliminary inquiry. By interpretating legal provisions may be noted that on this issue there is not a single ban, which would mean that in theory public prosecutor may entrust all evidentiary actions to the police during the investigation, even the questioning of witnesses. However, we believe that the public prosecutor should not entrust to the police questioning of witnesses during investigation, primarily because such a possibility does not exist in the preliminary inquiry, on the other hand, the investigation should be a phase which focus is collecting of evidence and where public prosecutor should

34 Škulić, M. (2007), *op. cit.,* 203.
35 Ilić, G., Banović, B. (2013), *op. cit.,* 114.

be *dominus litis*. Especially for that reason, this authority of the public prosecutor should be interpreted restrictively.

Finally, the public prosecutor during the investigation may have a need for professional assistance, for which he may engage the police who have the required expertise. The Code explicitly mentions the forensic and analytical assistance, but providing a professional assistance includes providing of all other types of assistance that may also need the public prosecutor during the investigation. Of course, this type of assistance referes to mainly criminalistic-technical assistance of the police or the assistance of an traffic profession expert, which depends on the specific situation and need.

CONCLUSION

The new Code of Criminal Proceeding of the Republic of Serbia 2011th year brings a lot of innovation in the field of regulation of the criminal proceeding regarding the previous period. Primarily, special attention deserves introduction of the prosecutorial investigation and replacement of the existing model of judicial investigation , which is present in the Serbian criminal proceeding legislation nearly 60 years. By introducing the prosecutorial investigation concept, conducting the investigation is no longer in the hands of the investigative judge, but conducting the investigative proceeding in whole, i.e. conducting the preliminary inquiry and the investigation are entrusted to the public prosecutor and the police.

Regulation of relations between the public prosecutor and the police in the preliminary proceeding according the provisions of the new CCP of the Republic of Serbia clearly indicates the intention of the legislature that the public prosecutor should take the leading role in collecting data and evidence that may lead to charge. This role of public prosecutor should affect the greater efficiency of the preliminary proceeding, i.e. that the public prosecutor is able to assess whether there are sufficient evidence for a justified suspicion that a person has committed a specific offense, under the assumption of inevitable better cooperation with the police than currently the case.

However, we should not lose sight of that in practice, in countries in which there has been presented the prosecutorial investigation concept for years, things are different, i.e. the police are the one who dominate from the beging of investigation till its end. In fact, there is disharmony between theory and reality regarding theoretical dominant role of public prosecutor and theoretical limetted role of the police. Namely, the public prosecutor during the investigation participates only partialy and uncompletely although in theory he should dominate, while the police, on the other side, uses its authorities maximum, and sometimes usurp authorities which do not belong to it.

Main reasons, in countries where there has been presented the prosecutorial investigation concept, that led to “switched roles”, i.e. that the police dominate during the investigation, and that the public prosecutor participates only partially are the following. First, the missing of police to fulfill its obligation and inform the public prosecutor about committed offense and eventually perpetrator without delay, i.e. immediately, and second, the public prosecutor passivity during the investigation, regarding above all, his often absence from the scene during commission of an offense.

Considering this new legislation in the Republic of Serbia and experiences of other countries which apply the prosecutorial investigation concept for years, it can be concluded that the greater activity of the public prosecutor during investigation is necessary in order to bring his leading and dominant role to live in full meaning, but there is also a need for greater engagement of the police regarding in common cooperation with the public prosecutor. With this, the question of responsibility for inefficiency of investigative proceeding would be clearly regulated, i.e. the public prosecutor, above all, and the police would be the only ones responsible for efficiency of investigative proceeding. This relathionship and continuous cooperation should bring to a greater efficiency of investigative proceeding, and then criminal proceeding in whole which is the aim of introducing the prosecutorial investigation concept.

REFERENCES

1. Bejatović, S. (2008), Koncept istrage i njen uticaj na efikasnost krivičnog postupka, *Krivično zakonodavstvo, organizacija pravosuđa i efikasnost postupanja u krivičnim stvarima,* Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd.
2. Bejatović, S. (2010), *Krivično procesno pravo,* Službeni glasnik, Beograd.
3. Bošković, A. (2012), Pojam krivičnog postupka prema novom ZKP Republike Srbije iz 2011. godine, *Kultura polisa,* 9(posebno izdanje 2).
4. Bošković, A. (2013), Analiza primene pojedinih adversarijalnih krivičnoprocesnih instituta u kontinentalnom krivičnom procesnom zakonodavstvu, *Revija za kriminologiju i krivično pravo,* 51(1).
5. Bošković, A., Risimović, R. (2012), Osnovne karakteristike novog Zakonika o krivičnom postupku Republike Srbije iz 2011. godine, *Suprotstavljanje savremenom organizovanom kriminalu i terorizmu - knjiga III,* Beograd : Kriminalističko policijska akademija.
6. Goldstein, A. S., Marcus, M. (1977), The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany, *Yale Law Journal,* 87(2), Yale Journal Co. Inc., New Haven.
7. Grubač, M. (2007), Treba li sudsku istragu zameniti nesudskom istragom – perspektiva i dileme*, Primjena krivičnog zakonodavstva Crne Gore – dileme i problemi,* Udruženje za krivično pravo i kriminalnu politiku Crne Gore, Budva.
8. Grubač, M. (2008), *Krivično procesno pravo,* Pravni fakultet Univerziteta Union i Službeni glasnik, Beograd.
9. Grubač, M., (2010), Odredbe o organizaciji prethodnog krivičnog postupka Nacrta ZKP Srbije iz aprila 2010. godine upoređene sa odgovarajućim odredbama italijanskog ZKP, *Glasnik Advokatske komore Vojvodine,* 82(12).
10. Ilić, G. (2005), Položaj i uloga policije u prethodnom krivičnom postupku, *Policija i pretkrivični i prethodni krivični postupak*, VŠUP, Zemun.
11. Ilić, G., Banović, B. (2013), Policija i nova rešenja u Zakoniku o krivičnom postupku, *Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena,* Srpsko udruženje za krivičnopravnu teoriju i praksu, Zlatibor-Beograd.
12. Ilić, G., Majić, M., Beljanski, S., Trešnjev, A. (2013), *Komentar Zakonika o krivičnom postupku,* Službeni glasnik, Beograd.
13. Ilić, G. (2011), Odnos javnog tužilaštva i policije u svetlu novog Zakonika o krivičnom postupku, *Revija za kriminologiju i krivično pravo,* 49(2-3).
14. Ilić, G. (2012), Položaj javnog tužioca prema novom ZKP Republike Srbije, *Savremene tendencije krivičnog procesnog prava u Srbiji i regionalna krivičnoprocesna zakonodavstva (normativni i praktični aspekti),* Misija OEBS u Srbiji, Beograd.
15. Kesić, T., Čvorović, D. (2011), Policija kao subjekt tužilačkog koncepta istrage prema radnoj verziji Zakonika o krivičnom postupku od 2010. godine, *Nova rešenja u krivičnom procesnom zakonodavstvu – teoretski i praktični aspekti,* Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd.
16. Mathias, E., (2005), The balance of power between the police and the public prosecutor, *European Criminal Procedures,* edited by Mireille Delmas-Marty and J. R. Spencer, Cambridge University Press, Cambridge, paperback edition.
17. Simović, M., (2009), *Krivično procesno pravo – uvod i opšti deo,* Pravni fakultet, Bihać.
18. Škulić, M. (2007), *Komentar Zakonika o krivičnom postupku,* Službeni glasnik, Beograd.
19. Škulić, M., Ilić, G. (2012), *Novi Zakonik o krivičnom postupku Srbije – reforma u stilu „jedan korak napred, dva koraka nazad",* Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije i dr, Beograd.

20. Đurđić, V. (2008), Krivičnoprocesno zakonodavstvo kao normativna pretpostavka efikasnosti postupanja u krivičnim stvarima, *Krivično zakonodavstvo, organizacija pravosuđa i efikasnost postupanja u krivičnim stvarima,* Srpsko udruženje za krivičnopravnu teoriju i praksu, Zlatibor-Beograd.
21. Đurđić, V. (2010), Redefinisanje klasičnih procesnih pojmova u Prednacrtu Zakonika o krivičnom postupku iz 2010, *Revija za kriminologiju i krivično pravo,* 48(2).
22. Weigend, T. (1980), *Continental Cure for American Ailments: European Criminal Procedures a Model for Law Reform,* In: Morris N, Tonry M, ed. Crime and justice. Vol. 2. Chicago: Chicago University Press.

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POLICE FORCES IN POLAND – PRESENT SITUATION AND RECENT CHANGES

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Abstract: The article is dedicated to the scope of powers of police services and their influence on capacities and possibilities to provide public order and fruitful fight against crimes in Poland. These issues have changed during a few years and next changes would be done in the near future. The reason is both political vision (putting forward by the government and the Parliament as a law) and judgments, included the Constitutional Tribunal verdicts.

The article consists of a few areas:

- Police forces in Poland – brief describing;
- New act on coercive measures – catalogue and law amendments;
- Means of the special technique – present situation based on requests of the Ombudsman and the General Public Prosecutor;
- Bill on Internal Security Agency and next steps of rebuilding the State's security system of special services,
- Review and planned changes in the National Security Strategy of the Republic of Poland.

In Poland there are more than ten institutions and services which have structure and character like regular police force (see art. 87.1 of the Treaty on the Functioning of the European Union). There are: Police, Border Guard, Internal Security Agency, Foreign Intelligence Agency, Central Anticorruption Bureau, Customs Service, Treasury Control, Government Protection Bureau, Prison Service, Military Police, Military Counterintelligence Service, Military Intelligence Service, Road Transportation Inspection and municipal guards. All of them could use coercive measures and much of them as well means of special technique.

Last years a few of them were transformed (Internal Security Agency and Foreign Intelligence Agency after division of State's Protection Office) or just created (Central Anticorruption Bureau, Road Transportation Inspection). It means that system of state's security is not stabilized.

Next changes, planned in the near future, stems also from revision of the National Security Strategy of Republic of Poland and new proposal of law, dedicated to special services system of supervision.

Keywords: Poland, police services, the Constitution, National Security Strategy, police competences.

INTRODUCTION

When communist regime had collapsed (1989), in Poland started time of changes. Firstly, it was connected with two areas: economy and political system, including police services. To this time, at the local level existed Internal Affairs Offices, combined with two parts: Civic Militia (MO – *Milicja Obywatelska*) and Security Service (SB – *Służba Bezpieczeństwa*). The first one was a classical police service, the second one was a (political) secret service, set up for fighting with everyone who didn't want to support official state's doctrine and protect regime. In 1990 the name 'Civic Militia' was changed into the Police and all officers started the new service. But only a part of Security Service (SB) officers were accepted as state officials. Most of them were fired and the rest started their work in a quite new State's Protection Office (*UOP – Urząd Ochrony Państwa*), responsible for intelligence and counterespionage matters.

Of course they weren't 'the one and only' institutions set up for public order and security protection. We could also mention (for example) Public Prosecutor's Office, described in the Constitution (dated 1952, deeply reformed and supplemented from 1989 to 1992).

For more than twenty years the changes have gone further. The most important is that since 1997 in Poland we have new the Constitution which doesn't say anything about Public Prosecutor's Office or about any names, scopes or purposes of some police or investigative service. The Constitution imposes only on the President[1] and the Cabinet[2] obligations to ensure (between others) internal and external security.

The second change of the State's nature (however this question didn't and doesn't direct significance to the scope of police services) took place from the 1st of May 2004, when Poland joined the European Union. The added task for police services is to co-operate closely and regularly with other foreign services and according to the same rules in matters such as: customs, acquis Schengen (as well *Schengen Information System – SIS* and *Visa Information System – VIS*).

At present in Poland we have over a dozen of police services[3]:
Border Guard[4];
Central Anticorruption Bureau[5];
Customs Service[6];
Government Protection Bureau[7];
Internal Security Agency;
Foreign Intelligence Agency[8];
Military Counterintelligence Service;
Military Intelligence Service[9];
Military Police[10];

1 Art. 126 of the Constitution.
1. The President of the Republic of Poland shall be the supreme representative of the Republic of Poland and the guarantor of the continuity of State authority.
2. The President of the Republic shall ensure observance of the Constitution, safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory.
3. The President shall exercise his duties within the scope of and in accordance with the principles specified in the Constitution and acts.

2 Art. 146 of the Constitution.
1. The Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland.
2. The Council of Ministers shall conduct the affairs of State not reserved to other State organs or local government.
3. The Council of Ministers shall manage the government administration.
4. To the extent and in accordance with the principles specified by the Constitution and acts, the Council of Ministers, in particular, shall:
   1) ensure the implementation of acts;
   2) issue regulations;
   3) coordinate and supervise the work of organs of State administration;
   4) protect the interests of the State Treasury;
   5) adopt a draft State Budget;
   6) supervise the implementation of the State Budget and pass a resolution on the closing of the State's accounts and report on the implementation of the Budget;
   7) ensure the internal security of the State and public order;
   8) ensure the external security of the State;
   9) exercise general control in the field of relations with other States and international organizations;
   10) conclude international agreements requiring ratification as well as accept and renounce other international agreements;
   11) exercise general control in the field of national defence and annually specify the number of citizens who are required to perform active military service;
   12) determine the organization and the manner of its own work.

3 Which due to the art. 87.1 of the of the Treaty on the Functioning of the European Union are all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.

4 Act of October 12th, 1990 on the Border Guard.

5 Act of June 9th, 2006 on the Central Anticorruption Bureau.

6 Act of August 27th, 2009 on the Customs Service.

7 Act of March 16th, 2001 on the Government Protection Bureau.

8 of May 24th, 2002 on the Internal Security Agency and Foreign Intelligence Agency. Both started in 2002, when – above mentioned – State Protection Office was divided into two new agencies.

9 Act of June 9th, 2006 on the Military Counterintelligence Service and the Military Intelligence Service. To this time military special service realised its duty without 'hard' law basis.

10 Act of August 24th, 2001 on the Military Police and military law enforcement authorities.

municipal (city) guards[11];
the Police[12];
Prison Service[13];
Road Transportation Inspection[14];
Treasury Control[15].

All of them – in a different range – could use two kinds of special measures treated as real (and regular) police powers. They are: coercive measures (including weapon) and means of special technique (technical resources), e.g. recording.

COERCIVE MEASURES ACT

For many years a basic rule was that each service has 'its' own act ruling the catalogue of (existing in the service) coercive measures and conditions of their use[16]. Details, methods of use, technical description of a certain measure and reporting procedures were specified in regu-

11 Act of August 29th, 1997 on the municipal guards.

12 Act of April 6th, 1990 on the Police.

13 Act of April 9th, 2010 on the Prison Service.

14 Act of September 6 2001 on the road transportation.

15 Act of September 28th, 1991 on the treasury control.

16 E.g. act on the Police (in version up to 2012):
Art. 16. 1. In cases of failing to observe orders issued pursuant to law by Police authorities or police officers, police officers may apply the following means of direct coercion:
(1) physical, technical and chemical means used for overpowering or escorting people and stopping vehicles,
(2) truncheons,
(3) liquid incapacitating agents,
(4) police dogs and horses,
(5) non-explosive bullets shot from firearms.
2. Police officers may only apply means of direct coercion meeting the needs of a situation and necessary to have people obey orders given.
3. *(deleted).*
4. The Council of Ministers shall, by way of ordinance, determine the detailed cases and conditions and ways of application of means of direct coercion referred to in Paragraph 1.
Art. 17. 1. Should the means of direct coercion referred to in Article 16 (1) appear insufficient or their use, due to the circumstances of a given situation, be impossible, the police officer shall have the right to use firearms only:
(1) to defend against direct and unlawful assault against life, health or freedom of the police officer or other person and to counteract actions leading directly to such assault,
(2) against a person who ignores the call to immediately drop weapon or other dangerous tool, the use of which may threat life, health or freedom of the police officer or other person,
(3) against a person who attempts lawlessly and by force to seize firearms from the police officer or other person authorised to carry weapon,
(4) to defend against dangerous direct, violent assault against facilities and devices important for the country's safety and defence, on the seats of principal authorities, principal and central state administration authorities or the judiciary, on facilities of economy and national culture and on diplomatic missions and consular offices of foreign countries or international organisations, as well as facilities supervised by armed protection unit established pursuant to the separate provisions,
(5) to defend an assault against property posing direct threat to human life, health of freedom,
(6) in direct pursuit of a person, against whom the use of arms was permissible in cases determined in Subparagraphs (1)-(3) and (5), or in relation to a person reasonably suspected of homicide, terrorist attack, kidnapping a person for ransom or specific behaviour, robbery, robbing with violence, racket, intentional serious body injury, rape, arson or otherwise intentionally bringing public danger to life or health,
(7) to detain a person referred to in Subparagraph 6, if that person took shelter in a place difficult to access, and the concurrent circumstances prove that the person may use firearm or other dangerous tool, the use of which may threat life or health,
(8) to defend against violent, direct and unlawful assault against escort of persons, documents containing state secret messages, money or other valuables,
(9) to detain a person or prevent escape of a detainee, remandee or a person serving a sentence of imprisonment, if:
(a) escape of a person serving a sentence of imprisonment poses threat to human life or health,
(b) there is justified suspicion that a detainee may use firearm, explosives or a dangerous tool,
(c) detention took place in relation to a justified suspicion or determination of crime referred to in Subparagraph 6.
2. In actions of Police units and sub-units firearms may be used only upon the order of their commander.
3. Firearm should be used in a way doing the least possible damage to the person against whom the firearm was used.
4. The Council of Ministers shall establish, by way of ordinance, detailed conditions and procedure for using firearms, and the principles of using firearms by the units referred to in Paragraph 2.

lations, based on the acts[17]. This solution was questioned by the Ombudsman (*Rzecznik Praw Obywatelskich –RPO*) and General Public Prosecutor (*Prokurator Generalny – PG*). The Constitutional Tribunal accepted their point of view and on 17th of May (in case K 10/11) found it unconstitutional[18]. The judges explained that 'cause action of coercive measures and description of their use by officers (policemen, guardians, etc) can limit freedom of citizens and should be act's matters, because due to the art. 41.1 and 31.3 of the Constitution[19] only act may interfere with the freedoms…'.

In this situation the Parliament had a year to amend the acts. For the first time in the history of Poland it was decided that it wouldn't be modification of all acts but instead would be created only one act for all services, institutions and organizations using the coercive measures.

The act (of 24th of May, 2013) on coercive measures and firearms entered into force on 5th of June 2013 (art. 84). As indicated art. 2.1 of the act, the right to use or apply of coercive measures and firearms was given to:

officers of the Internal Security Agency;
officers of the Intelligence Agency;
officers of the Government Protection Bureau;
officers of the Customs Service officers;
officers of the Central Anticorruption Bureau;
inspectors and employees of treasury control;

17 Art. 92 of the Constitution.

1. Regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act.
2. An organ authorized to issue a regulation shall not delegate its competence, referred to in para. 1 above, to another organ.

18 Art. 188 of the Constitution.

The Constitutional Tribunal shall adjudicate regarding the following matters:

1. the conformity of acts and international agreements to the Constitution;
2. the conformity of an act to ratified international agreements whose ratification required prior consent granted by act;
3. the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;
4. the conformity to the Constitution of the purposes or activities of political parties;
5. complaints concerning constitutional infringements, as specified in Article 79, para. 1.

19 Art. 41 of the Constitution.

1. Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by act.
2. Anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation. Any deprivation of liberty shall be immediately made known to the family of, or a person indicated by, the person deprived of liberty.
3. Every detained person shall be informed, immediately and in a manner comprehensible to him, of the reasons for such detention. The person shall, within 48 hours of detention, be given over to a court for consideration of the case. The detained person shall be set free unless a warrant of temporary arrest issued by a court, along with specification of the charges laid, has been served on him within 24 hours of the time of being given over to the court's disposal.
4. Anyone deprived of liberty shall be treated in a humane manner.
5. Anyone who has been unlawfully deprived of liberty shall have a right to compensation.

Art. 31 of the Constitution.

1. Freedom of the person shall receive legal protection.
2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.
3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by act, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

guardians of the State Hunting Guard;
guardians of the State Fisheries Guards;
officers of the Police;
officers and soldiers of the Military Counterintelligence Service;
officers of the Prison Guard;
officers and soldiers of the Military Intelligence Service;
municipal (city) guardians;
officers of the Border Guard;
guardians of the Forest Guard;
guardians of the Parliament Guard;
workers of the Railroad Protection Guard;
Park Guard officers;
soldiers of the Military Police or military law enforcement authorities;
personnel of the security plants (business enterprises) which realise their work according to the provisions of the act of 22nd August 1997 on the protection of persons and property;
inspectors of the Road Transportation Inspection.

Art. 12 establishes the catalogue of the coercive measures (except firearms). They are:
physical force in the form of techniques of:
transportation,
defence,
attack,
overwhelming;
handcuffs:
worn on the hands,
worn on the legs,
in both ways;
straitjacket;
overwhelming belt;
overwhelming net;
safety helmet;
truncheon (officer's baton);
water cannons;
service dog;
service horse;
non explosive bullets;
chemical incapacitating agents;
items intended to incapacitate people with electricity;
protection cell;
insulation chamber;
isolation room;
spike belt (spike stop) and other means to stop and immobilize vehicles;
service vehicles;
means for overcoming construction's and other's building obstacles, including explosives;
pyrotechnics with the properties of stun or dazzling.

Beyond this, in art. 11 there are fourteen cases in which it is legal to use coercive measures (e.g. to defend against direct and unlawful assault against life, health or freedom of the police officer or other person and to prevent violation of public order and safety). The act also amended all internal regulations in (above mentioned) services' acts by one notation, that these matters are governed by the act on coercive matters and firearms.

MEANS OF A SPECIAL TECHNIQUE

As it was mentioned above, the second 'privilege' which influences the common opinion about the level of protection of human rights in the state is how police services can use technical resources. In this matter, as it was with coercive measures, each service has its own rules, described into separate act (e.g. on the Police, on the Border Guard, on the Central Anticorruption Bureau). In practice theses rules are almost the same. Because of that if a court considers the mean or way of using it unlawful, this affects all services.

The rules are different[20] but (probably) the most 'intense' is operational control, performed secretly and consisting of:

control of the content of correspondence,
control of the content of parcels,
use of technical resources, which facilitate obtaining of information and evidence in secret as well as recording thereof, especially the content of telephone conversations and other information submitted via the telecommunications networks.

Besides there are rules on unofficial (not known for a regular citizen) collection of data, access to professional secrecy or exchange of information with other countries, first of all from the European Union. All of them interfere with the human right. It is a matter of judgments if it is acceptable and (if yes) to what extent. The first question is explained in (mentioned before) art. 31.1 of the Constitution, which permits that only in act only and if it is necessary in a democratic state for protection:

of its security or public order;
natural environment;
health;
public morals;
freedoms and rights of other persons.

To answer the second question we need to analyze jurisdiction, firstly given by the Constitutional Tribunal which is authorized to confirm an act to the Constitution or ratified international agreements whose ratification required prior consent granted by act.

In this moment we are still waiting for the Constitutional Tribunal verdict in case K 23/11. *RPO* (the Ombudsman) and *PG* (General Prosecutor), claimed several times from 2011 to 2013 (case K 23/11 consists of five requests) on regulations given to the police services right to collect telecommunications data (billings, telephone callers' numbers, etc) without external control and in any crimes. The second question is possibility to use any technical resources when operational control. *RPO* and *PG* consider that it should be a catalogue of means, written directly in act[21].

Early in 2013 the Constitutional Tribunal had to deliver judgment regarding rules of collection data by the Police (case K 20/2012) in National Police Information System (*KSIP – Krajowy System Informacji Policji*). It is needed to mention that the Police gather more than

20 Let's look (for example) to the act on the Police:
Art. 19a.
1. In cases on crime defined in Article 19 (1), criminal police activities aimed to check previously obtained reliable information about the crime and to establish perpetrators and obtain evidence of crime may consist in secret purchase, sale or takeover of objects relating to crime, subject to forfeiture, or the manufacture, possession, transportation or turnover of which is prohibited, as well as to takeover or awarding financial benefits.
2. Preliminary investigations referred to in Paragraph 1 may also involve a proposal to purchase, sell or takeover objects from crime, that are subject to forfeiture or objects, manufacture, possession, transport or sale of which is illegal, as well as the acceptance or giving of financial benefit…

Art. 19b.
1. To document crimes referred to in Article 19 (1) or establish the identity of those involved in the crimes or take over the objects of crime, the Police Commander in Chief or the Voivodship Police Commander may institute a secret surveillance of the manufacture, transport, storage and turnover in crime objects, provided this does not involve a threat to human life or health.
2. The district prosecutor competent for the seat of the Police authority in charge of the activities shall be notified of such institution immediately. The prosecutor may order the abandonment of the activities at any time.
3. The Police authority referred in Paragraph 1 shall keep the district prosecutor informed about the results of the activities…

21 Instead of telecommunications data collection, operational control needs judge's permission.

90% of all criminal information in Poland. Furthermore, the Police Commander in Chief is as well responsible for State's Criminal Information Center (*KCIK – Krajowe Centrum Informacji Kryminalnych*) where such information is collect, from every empowered institutions, including public prosecutor's offices.

That's why this verdict could have a significant impact on all systems of police's catalogues in Poland. Objection of the Ombudsman concerned that the Police have right to collect, convert and exchange of information described in resolution and (in addition) Commander's decision.

It should be recalled that in Poland limitations in the area of human rights could be introduced only in act. What's more, due to the art. 93.1 of the Constitution, resolutions of the Council of Ministers and orders of the Prime Minister and ministers shall be of an internal character and shall bind only those organizational units subordinate to the organ which issues such on act. It means that resolution may concern only indicated institution or service (inside effect) but never people or citizen in general (outside effect).

Seeing that the Parliament has amended art. 20.19 act on the Police and Ministry of Internal Affairs has issued the regulation on collecting data by the Police. The resolution and decision automatically were cancelled. After that the Constitutional Tribunal has to discontinue proceeding and the case is finished.

BILL ON INTERNAL SECURITY AGENCY AND CHANGES IN NATIONAL SECURITY SYSTEM

In 2012 it was revealed the 'Amber Gold' financial pyramid scandal. The size and scope of losses caused that part of files were published. Conclusion is that duplication of responsibilities of services is a disadvantage when we need to investigate these kinds of swindles. This was the first step to reform the system.

From this moment we have the Police, treasury control and two special services[22] which can proceed with serious economic crime. We have, as well, three civilian[23] and two military[24] special services responsible for protection of constitutional order. As the government declared, the new division of tasks was needed. From the 1st of August (2013) the Parliament has been working on a bill on Internal Security Agency. This proposal also includes changes in Intelligence Agency and in system of state's security, e.g. the Police would be the only one service responsible for fight with almost all serious crimes[25]. The Internal Security Agency should be focused on:

fight with terrorism;
counterintelligence;
classified information protection.

Furthermore, the Agency would be supervised by the Minister of Internal Affairs[26], who is responsible as well for activities of: the Police, Border Guard, State Fire Service and Government Protection Bureau.

Moreover, the system of coordination of special services would be also changed. The government would create The Cabinet Committee for State's Security, consisting of ministries of: Internal Affairs, National Defence, Finance, Foreign Affairs and Chief of Prime Minister Chancellery. The Committee would give tasks and evaluate the special services activity[27].

22 Internal Security Agency and Central Anticorruption Bureau.

23 Internal Security Agency, Foreign Intelligence Agency and Central Anticorruption Bureau.

24 Military Intelligence Service and Military Counterintelligence Service.

25 Of course the Public Prosecutor Office is and will be a leader of investigation from legal point of view, but only police services can use special technique and work undercover. Changes don't touch the code of criminal proceeding but – first of all – before criminal process phases.

26 Now it is the Agency supervised directly by the Prime Minister.

27 Now on behalf of Prime Minister realizes it Ministry-Coordinator, nominated always personally by the Primer.

THE WHITE PAPER ON STATE SECURITY OF THE REPUBLIC OF POLAND

The National Security Strategy of Republic of Poland (2007) imposed obligation to carry out the Strategic Review of the Strategy. The President of Poland ordered to do this in November 2010. The work was ended last year. The results were classified (non-public) and would be a basis for creating new or modify above mentioned Security Strategy from 2007. Simultaneously the White Paper on State Security of the Republic of Poland was published. The idea of this document is to build up a public consensus on modifying view of the security system in Poland. In other words the authors[28], first of all the Chief of the National Security Council[29], explained that now this problem consists of many operational purposes and support systems but together they are not a real one system. According to them two kinds of activities are needed:

to deepening awareness to the subject;

to propose much wider that only military view on state's security issues.

The second one is the most important. For the first time in Poland it is clearly recognized that when we talk about total system of security, the Army and military questions are only one between the other but for sure not the sole. The proposal in the White Paper is that we ought to create a new security system based on four fields:

defence (Armed Forces, foreign affairs matters, military industry);

protection (judicial system, courts, public prosecutor, police services, guards and inspections, crisis management);

society (national identity, national heritage, social security, demographic potential, education, scientific researches, media, health care system);

economy (international position, finance security, pension system, energetic security, critical infrastructure, strategic reserves).

By this way (point 2) police services activities were recognized as an important element of state's security strategy. In details the main tasks in this matter would be: fighting terrorism, counteraction against political extremism, combating cybercrime, modifying the structure of police and special services (first of all to eliminate duplication of competences) and combating organizing crime and corruption.

Above mentioned shows that the 'change course', particularly in matter of competence of the Police connected with role of other services, is not closed. What's more, we could tell that legislative process, jurisdiction and work on (probably) a new Security Strategy make it faster than we thought even a year ago.

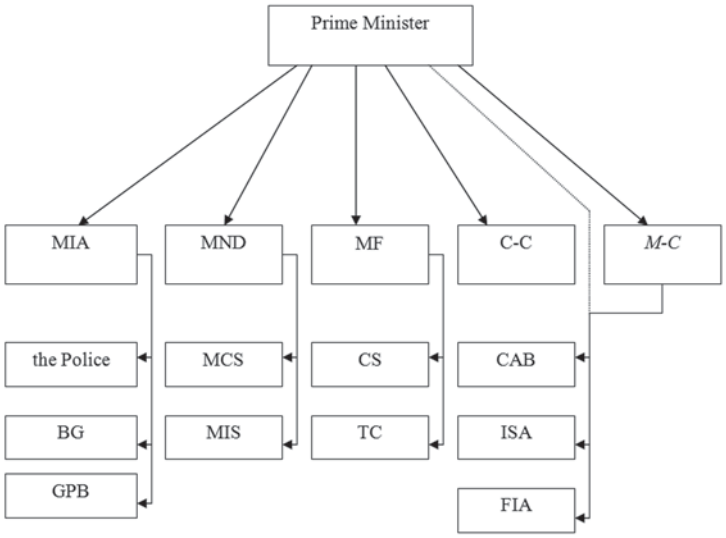
Ministers:

C-C – Minister-Chief of the Prime Minister Chancellery
MIA – Minister of Internal Affairs
MND – Minister of National Defence
MF – Minister of Finance
M-C – Minister-Coordinator for Secret Services[30]
MFA – Minister of Foreign Affairs

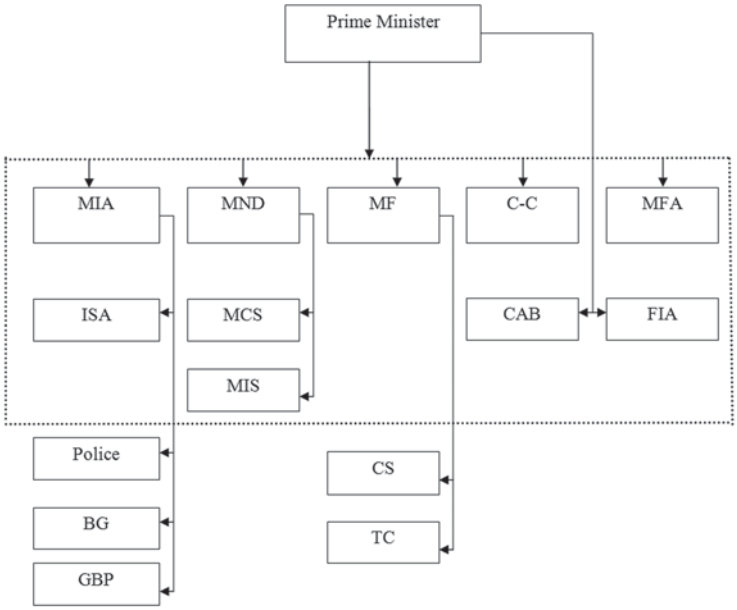
28 The authors are the same which worked on the Strategic Review.
29 The constitutional body, created in the Constitution.
Art. 135.
The advisory organ to the President of the Republic regarding internal and external security of the State shall be the National Security Council.
30 only if designated by the Prime Minister

Main police services in Poland – organizational charts

1. Present



2. Planned



..... - the Cabinet Committee for State's Security (selected ministers and chiefs of the special services

Services:

BG – Border Guard
CAB – Central Anticorruption Bureau
CS – Customs Service
FIA – Foreign Intelligence Agency
GPB – Government Protection Bureau
ISA – Internal Security Agency
MCS – Military Counterintelligence Service
MIS – Military Intelligence Service
TC – Treasury Control

REFERENCES

1. Gierszewski, J., (2013). *Bezpieczeństwo wewnętrzne. Zarys systemu*, Warszawa
2. Gierach, E., Chybalski, P., (2009). *Polish constitutional law : the constitution and selected statutory materials*, Warszawa
3. Hanausek, T., (1998). *Kryminalistyka. Zarys wykładu*, Kraków
4. Kurzępa, B., (2003). *Podstęp w toku czynności karnoprocesowych i operacyjnych*, Toruń
5. Paździor M., Szmulik, B., (2012). *Instytucje bezpieczeństwa narodowego*, Warszawa
6. Szumiło-Kulczycka, D., (2012). *Czynności operacyjno-rozpoznawcze i ich relacje do procesu karnego*, Warszawa.
7. Taracha, A., (2006). *Czynności operacyjno-rozpoznawcze. Aspekty kryminalistyczne i prawno-dowodowe*, Lublin

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PLEA AGREEMENT

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Abstract: In recent years, there is a tendency of convergence between two large criminal procedure systems, continental-European and the Anglo-Saxon, resulting in the possibility of mutual agreement between the public prosecutor and the defendant in our criminal proceedings. This paper analyzes the plea agreement envisaged by the 2011 Criminal Procedure Code, thoroughly explaining the methods to conclude the agreement, its content, decision making, the legal effect, and the appeal against decision on the agreement. Given that this is a relatively new concept, a range of existing and potential problems is indicated, concurrently suggesting the solutions or methods to mitigate them. Some of the issues addressed by the author involve: the method to start negotiations and the abuse potential of the initiative, if filed by defense counsel or the defendant; the role of defense counsel to resolve the situation when the defendant declines counsel during negotiations and conclusion of the agreement; the contents of agreement and the possibility or inability to resolve some issues, for example, the issue of detention; sentencing issue, in case the agreement determines a range of penalties; whether the prosecutor's ability to dispose prosecution for a criminal offense represents a specific form of opportunity; the injured party's potential to block passing of a judgment based on the plea; the basis and legal effect of the appeal against judgment rendered upon the plea; legal effect of the plea agreement in relation to the co-defendants and the possibility of the defendant who concluded the agreement to appear as witness.

Keywords: negotiations, plea, criminal offence, defendant, prosecutor, injured party.

INTRODUCTION

There is a common division in the literature into two major criminal procedure systems, the continental-European or mixed, and the Anglo-Saxon or the adversarial. In recent years, there is a tendency of convergence of these two systems, primarily in terms of strengthening adversarial elements in the mixed procedure and taking over some Anglo-Saxon, particularly the U.S. solutions in the states of the continental Europe. These also included the introduction, initially of the plea on guilt, and subsequently the plea agreement on the criminal offense in our criminal procedure (hereinafter: plea agreement).

The first examples of a guilty plea in the U.S. appear in the beginning of the nineteenth century in the proceedings for illegal alcohol retail, while in the early twentieth century it became the dominant method of resolving criminal cases. Initially, the agreements on the indictment appeared, obliging the prosecutor to drop some of the charges or mitigate the indictment in exchange for the defendant's confession, while in the late nineteenth century, when the judges began to accept this practice, the agreement on the sanction also developed.[1]

The Criminal Procedure Code recognizes three agreements that may be concluded between the public prosecutor and the defendant, including: plea agreement on the confession of the offense, the agreement on the testimony of the defendant and the agreement on the testimony of a convicted person. The 2009 additions and amendments introduced a brand new, previously absent procedural concept, referred to as the plea agreement in our criminal procedure, which continues to appear in the 2011 Criminal Procedure Code as the plea agreement on the criminal offence.

Although the goal of the criminal proceedings (Article 1, Para 1 of the CPC) is that no innocent person is convicted, and that the offender is imposed sanctions under the conditions prescribed by the criminal law, on the basis of a lawful and fair procedure, the plea agreement itself carries a certain degree of risk that an innocent person is convicted.[2] Concurrently, although the fact that this agreement accelerates the criminal proceedings can not be denied, the

1 Bajović V., *Sporazum o priznanju krivice, uporedno-pravni prikaz*, Beograd, 2009, p. 56.
2 On the potentials and reasons for an innocent person to conclude plea agreement see: Škulić M., Ilić G., *Reforma u stilu "jedan korak napred - dva koraka nazad"*, Beograd, 2012, p. 93-98, and Simonović B., Turanjanin V., "Sporazum o priznanju krivice", *Kriminalistički i krivično procesni aspekti dokazivanja,* Banja Luka, 2013, p. 27-28.

question arises whether this case still involves a fair hearing, while it must be taken into account that the efficiency can not be equated to the swiftness of the criminal proceedings, or to its final outcome.[3] Solely swift but unfair criminal proceedings can not be an ideal of a democratic state or the one at least elementary seeking to be a state characterized by the rule of law.[4]

CONCLUSION OF THE AGREEMENT

The benefit of the plea agreement, when it comes to the public prosecutor, is reflected in the importance of the confession of the defendant that corroborates the charges, whilst from the defendant's viewpoint, the benefit is primarily reflected in the possibility of a more lenient punishment.[5] In addition, the prosecution may be motivated to conclude the plea since they will not have to collect additional evidence and spend time working in preparation for a trial and attending the trial, which can be time consuming, while they will also avoid the risk of failure in court. The defendant may have an additional incentive to avoid the uncertainty of the outcome of the proceedings, hardly tolerated by some people, and the discomfort experienced over the course of the trial. Particularly interesting motive for the defendant to enter into an agreement may also be a need to avoid the costs of criminal proceedings, or the inability to bear such expenses. Namely, the criminal proceedings conducted in accordance with the 2011 Criminal Procedure Code, represent an extremely expensive process for the defendant, as he must provide evidence for his defense.[6] For the purposes of a well prepared defense, the counsel needs to conduct a large number of interviews with potential witnesses, examine the evidence, both those found in the files, as well as the ones he had discovered through own engagement, and the working hours of counsel must be financed by the defendant. Moreover, in order to prepare a quality defense, it is necessary to perform expertise or hire a professional consultant or the like, at the expense of the defendant, which is pretty expensive, and in practice, the defendants often lack sufficient funds. In such situation, without financial support, the defendant is at risk that, despite possible good defense inside the courtroom, his position is worse than it would have been if he had the money to finance a quality defense. In that case, it may be wiser for the defendant not to risk a trial, but to make a pragmatic decision and plea agreement on the confession of the offense.

The initiative for negotiations may come from the public prosecutor, the defendant or defense counsel. Unlike the previous legal provision that allowed the plea agreement only for offenses punishable by imprisonment up to 12 years,[7] it is now possible to conclude an agreement for any criminal offence. The law does not require a special form for the initiative to launch negotiations, which means that it is an informal act of one of the parties or counsel. The proposal has no legal effect and the parties can always change the conditions that are stated in the proposal or cancel the proposal. However, there is a potential for abuse of the initiative that came from the defendant or defense counsel if it was made in a written form, which is reflected in the risk of such document being disclosed to the media or in the case of failure of the negotiations "accidentally" found in the case file during the trial in which the defendant denies the commission of a crime. Therefore, when the defendant or the counsel initiates negotiations, they usually do it verbally.

The negotiation process has two basic stages. The first stage of plea bargaining involves the analysis of the facts in hand, i.e. the ones presented by the prosecutor and the defendant with the counsel. The second stage involves negotiations on the penalty on the basis of prior agreement on the existence of certain facts based on which each side interprets the guilt of the accused.[8] With regard to the first stage, questions are raised in the theory about how the facts can be determined by negotiation, and such a possibility is criticized. In this respect, it is emphasized

3 Škulić M., Ilić G., *Reforma u stilu "jedan korak napred - dva koraka nazad"*, Beograd, 2012, p. 22.
4 Škulić M., Ilić G., *Kako je propal reforma šta da se radi?*, Beograd, 2012, p. 13.
5 Ilić G. at al., *Komentar Zakonika o krivičnom postupku,* Beograd, 2012, p. 666.
6 Although the Code declares the presumption of innocence (Article 3), in many provisions it requires or even expects that the accused persons prove their innocence (Article 303, Para 3, Article 350, Para 1, Article 395, Para 4, Item 1).
7 The Criminal Procedure Code in 2001. as amended in 2009. stipulated (Article 282a to 282d) plea agreement on the guilt, not an agreement on criminal offense.
8 Simonović B., Turanjanin V., "Sporazum o priznanju krivice", *Kriminalistički i krivično procesni aspekti dokazivanja,* Banja Luka, 2013, p. 23.

that the facts either exist and have certain features and connotations, or do not exist. They are objective and represent a part of reality resulting from a criminal offense. Negotiations on the criminal offense related facts and their relevance for the assessment of guilt are substantially and procedurally totally different from their establishment by the evidentiary process. The reality is not determined by negotiation, rather by evidence.As the negotiation process does not involve the presentation and analysis of evidence in the framework of the principle of contradiction, the quality of the facts set forth in such proceedings is questioned. The parties' perception of the facts may affect their interpretation, particularly when the process does not involve an impartial and objective body in the form of court. When two parties agree on all the details, the question is whether the court will be able to be objective and critical in assessing the quality of the agreement.[9] Furthermore, a series of controversial questions may arise, ranging from how the defendant and the defense counsel can successfully negotiate with the prosecutor, who collected the evidence and knows the kind of evidence obtained, to those whether the prosecutor has an obligation in the negotiations to demonstrate evidence, or may only refer to the evidence allegedly obtained, that is, whether in this occasion, as a part of the "negotiation strategy", the prosecutor is allowed to use deceit. Although it should not be arguable that the prosecutor should not use deception in any stage of any proceedings, on the one hand, it is controversial whether the prosecutor, on the other hand, may reveal the exact situation regarding the evidence, especially in the case where there are multiple defendants, and the investigation has yet to be conducted in relation to a defendant who did not negotiate with the prosecutor.

According to the explicit legal provision (Article 313, Para 1), the public prosecutor and the defendant may conclude a plea for the offense since the issuance of an order for investigation until the declaration of the defendant about the charges at trial. If the legal text is literally interpreted, given that the Code prescribes that it is possible to conclude the plea agreement since the moment of issuing the order to conduct an investigation, it could be concluded that, on the one hand, such an agreement is not possible in the Abstract proceedings, because there is no investigation at all, it would also mean that no agreement is possible even in the general criminal proceedings when a direct indictment is filed (which is always possible to be filed without special conditions), and when there is no investigation.Such interpretation would basically be legitimate when it comes to the language of the legislator, but it was certainly not the intention of the legislator, thus the *ratio legis* of the plea agreement would indeed require a broader interpretation, according to which the conclusion of the plea agreement would always be possible, which means that in the Abstract proceedings (particularly since the subject of these proceedings are generally less serious offenses than those in the regular criminal procedure), as well as in the regular criminal proceedings, when the indictment was not preceded by an investigation, i.e. when the indictment was filed directly.[10] In fact, it would be good that the legislator specifies this provision, so as to determine that an agreement may be concluded as of the initiation of criminal proceedings (Article 7) until the declaration of the defendant about the charges at trial.

When concluding the plea agreement, the defendant must have a defense counsel (Article 313, Para 2). This provision is clarified by the specification that it is a form of mandatory defense (Article 74, Item 8), where the defendant must have counsel from the beginning of negotiations with the public prosecutor on the conclusion of the plea agreement until the decision on the agreement. Given the fact that beyond some benefits to the defendant, this agreement also imposes certain obligations, and denies some of the rights that the defendant would have in the regular proceedings, the legislator has properly prescribed mandatory defense. This further means that the defendant shall be assigned defense counsel *ex officio*, if he does not provide counsel himself (Article 76, Para 1). In practice, problems may arise in a situation where the defendant wants to negotiate with the prosecution, but does not want the counsel (regardless whether elected or appointed) to know about the negotiations, or does not want a third person, beyond himself and the prosecutor to know that such negotiations are performed, which may be motivated by a desire to avoid jeopardizing personal safety of the defendant and his family.[11] Given that this is a mandatory defense, despite some problems, the defendant must have counsel

9 *Ibid.*
10 Škulić M., *Osnovne novine u krivičnom procesnom pravu Srbije,* Beograd, 2013, p. 109.
11 This situation may arise in particular when it comes to criminal offenses referred to in the Law on Organization and Jurisdiction of Government Authorities in Suppression of Organised Crime, Corruption and Other serious crimes (Article 2).

even in such situation, so if he hasn't selected one, the body conducting the proceedings will assign one *ex officio*. If the defendant rejects such counsel, analogically it should be acted in accordance with the provisions governing this situation in the regular proceedings (Article 72, Para 2).

When discussing the necessity of the presence of counsel during the conclusion of the agreement, it should be noted that the agreement can not be considered a legal transaction involving two equal parties, based on good faith and legally valid and correct principles of negotiation supported by clear procedures. The concepts: contract, agreement, negotiation, equal parties, equality of arms, do not reflect the real life situation in which the implementation of this institute occurs. At its base, there is a legal, institutional pressure on the defendant to accept the conclusion of the agreement. The pressure stems from the plea agreement, so the word "voluntarily", which is mentioned in its connection has substantially the character of a slogan.[12] These are the reasons which fully justify the necessity to require the attendance of counsel at the conclusion of the agreement.

If the plea agreement was concluded prior to filing the indictment, the prosecutor will submit to the court the agreement and the indictment, which is an integral part of the agreement. Depending on the stage of the proceedings, the counsel shall submit the plea to the appropriate form of judicial functional competence. Until confirmation of the indictment, the agreement shall be submitted to the judge for preliminary proceedings, and after the confirmation of the indictment, the presiding judge.

In the event that an authorized person has not filed a claim for property compensation, the prosecutor will invite him to submit such a request prior to conclusion of the agreement. Although the legal formulation indicates that claim for property compensation should be submitted, this is certainly not the case, because there is no method to force an individual to submit such a request, if one really does not want to do so, or, for example, for any reason, wishes to file such request in the civil proceedings. This in fact means that the prosecutor actually educates the person on the possibility to file a claim for property compensation.[13] It is not clear why the agreement should always have to entail a claim for property compensation, even if such claim is filed, because it would then mean that the person authorized to file a compensation claim, which is practically the injured party, can always "block" the plea, if his request is directed to its realization (and hence negotiation in this regard under the plea agreement), it would practically be impossible because, for example, a claim for property compensation is completely unrealistic and the like. Furthermore, it is irrational that such element of an agreement (even mandatory) between the two parties involves a claim for property compensation, i.e. certain "sub-agreement" between the defendant and the injured party, when a person who is entitled to such a request is not in general a party to the plea agreement.[14]

In this regard, the question is what effect the agreement has on a compensation claim, considering that it is a mandatory element of the agreement if it is filed, or whether the defendant is obliged to accept every compensation claim of the authorized person. In other words, can the injured party block or prevent the conclusion of an agreement by submitting a claim to the defendant, which is unacceptable for any reason. Given the fact that this is an agreement between the defendant and the public prosecutor, not the injured party, the answer to this question would have to be negative. In the event that there is no consensus by the defendant regarding the claim for property compensation, the injured party should be instructed to exercise his rights in litigation. To avoid any doubt, the legal text should specify that the compensation claim represents a mandatory element of the agreement only if consensus is reached in this regard, rather than, as it now stands, if it is submitted.

12 Simonović T., Turanjanin V., "Sporazum o priznanju krivičnog dela i problem neistinitog priznanja", *Pravni život,* broj 9, tom II, Beograd, 2013, p. 24.
13 Škulić M., *op. cit.*, p. 109.
14 Škulić M., Ilić G., *Vodič za primenu novog Zakonika o krivičnom postupku*, Beograd, 2013, p. 70.

CONTENT OF THE AGREEMENT

A plea agreement includes mandatory and optional elements. Mandatory elements are: 1) description of the offense, 2) confession of the defendant that he has committed the offense, 3) agreement on the nature, extent or range of punishment or other criminal sanction, 4) agreement on the costs of the criminal proceedings, confiscation of the proceeds from crime and the compensation claim, if filed, 5) waiver of the parties and counsel of the right to appeal against the decision of the court fully accepting the agreement, except in the case of Article 319 Para 3, and 6) the signature of the parties and counsel. Optional elements involve: 1) statement of the public prosecutor on withdrawing from prosecution for criminal offences not covered by the plea agreement, 2) statement of the defendant on accepting the obligations referred to in Article 283 Para 1, provided that the nature of the obligation enables the initiation of its execution before submission of the plea agreement to the court, 3) agreement in respect of the proceeds from crime to be seized from the defendant.

The first mandatory element raises the question what is meant by "the description of the criminal offence one is charged with" and whose description is to be specified (the defendant's or the prosecutor's). The issue is particularly important when the agreement is concluded immediately after the issuance of an order to conduct investigation, in a situation when not all the evidence is collected. The defendant always has "his" view of the offence, such as explanation of motives, conditions and circumstances that existed during the commission of the offence, as well as the real actions of certain individuals (injured parties, accomplices, witnesses). The prosecutor may have a rather different view of the criminal offense related facts. At times there may be important differences between their two views.If the defendant is the perpetrator of the criminal offence, it does not mean that he is aware of all the circumstances of the offence that need to be included into the "description". Objectively, he is often not able to perceive all the elements of the offense, even if there were no internal adverse factors affecting his ability to perceive, memorize and reproduce. Therefore, when it comes to the defendant, he can only express his version of the events, which is always subjective, incomplete and deviating more or less from the objective events.[15] On the other hand, the prosecutor has an image of the event on the basis of the defendant's confession and other evidence available. If an agreement is concluded in the early stages of the investigation, the prosecutor will have less evidence to build his own image of events, thus his version will usually tend to deviate from the realistic events.

The legal text requires that the confession of the defendant must be complete, voluntary, conscious and not contrary with other evidence. A complete confession is the one encompassing all of the factual elements of the charges and the legal qualification of the offense. Confession is voluntary if it is a result of the defendant's free will and must not be the result of force, threats, coercion or unlawful promises, while conscious confession implies the existence of full awareness of the defendant that his statement confirms the allegations.[16]

With regard to the confession of the defendant, it is typically argued in the literature that it is necessary to obtain a complete confession, but such a statement is only partially true. It is argued that the confession must be complete and unequivocal and that it can not be equated with the notion of the confession, which has often been interpreted too broadly in the practice of the courts. Confession of the defendant is a statement that he fully agrees with both the factual allegations of the prosecutor and the legal qualifications. Any restrictions or conditions that the defendant would point out would not fit into this perceived notion of the confession. Thus, for instance, it could not be considered a confession if the defendant would make a statement that it is true that he had killed the victim, but he did it in order to defend himself because he was attacked. Limitations of this type would have to be interpreted as a statement that essentially points to the defendant's perception of the lack of wrongfulness of his behavior (self-defense).[17]

The standpoint that the complete confession of the defendant is necessary is correct, if the confession is viewed in relation to the indictment, when it should be fully in relation to the disposition of the indictment. However, if the agreement is concluded before the indictment was

15 Simonović T., Turanjanin V., *op. cit.*, p. 21-22.
16 Bajović V., "Sporazum o priznanju krivice", *Revija za kriminologiju i krivično pravo*, Beograd, 2009, p. 323.
17 Ilić G., et al., *op. cit.*, p. 668.

submitted to the court, or when the agreement is concluded first and the indictment is subsequently attached as an integral part of the agreement, the situation is somewhat different. It may happen that the prosecutor issues an order to conduct investigation for the crime of robbery or aggravated murder, but during the negotiations on the agreement the prosecutor and the defendant "agree" that it is a theft or murder. In this case, the confession is essentially incomplete, it is partial, but the prosecutor prepares an indictment on the basis of such confession, which is fully compliant with the defendant's confession and therefore only apparently appears as "complete" confession. The same applies if the prosecutor initially considered that this is a severe form of a criminal offense, but ends up "agreeing" that it is a basic form of the offense.

Even in case that plea agreement is concluded after the indictment was submitted to the court, or even if the indictment is confirmed, the confession may not be essentially complete with respect to the disposition of the indictment. In fact, since the prosecutor has the power over the indictment, or has the right to change or renounce from a part or all the indictment, it may happen in practice that a plea agreement is concluded, but does not fit entirely to the dispositive of the present indictment. In such case, the prosecutor would first edit the indictment, so the confession would be "complete", but in relation to the new or amended indictment. This standpoint could be criticized by the argument that the amendment or filing of a new indictment is only possible in the course of the trial (Article 409), and that the prosecutor is unable to perform such action during the period of filing the indictment to the court before the main trial. However, given that the prosecutor may withdraw the charges at any time, and that under the agreement he may change the indictment in favor of the defendant, it should be accepted that a person who can do more can also do less, that is, if the prosecutor can fully drop the charges, he can certainly change the indictment in favor of the defendant.

In regards to the agreement on the criminal sanction, the possibility of agreeing upon a sentencing range is often criticized in the literature. This is because the court is not able to present evidence that would relate to the circumstances which determine the range of punishment, in the process of accepting the agreement. Hence the question is how the court would determine the concrete punishment within the range established by the agreement, when it was not able to determine evidentiary circumstances based on which a range of punishment depends on in line with the criminal law (mitigating and aggravating circumstances). It is supported that this is unnecessary and brings an element of uncertainty, because the defendant does not know what to expect, despite admitting to a crime.[18]

During the recent years, there have been frequent deviations from the principle of legality, primarily in order to increase the efficiency of the criminal proceedings, whereby the plea agreement appears as one of the forms of the principle of opportunity. In this context, it is necessary to distinguish the plea agreement and the agreement on the sanction. The agreement on the sanction is not related to the expediency of prosecution, bearing in mind that the defendant pleads guilty to the offense he has committed and he is sentenced for this offence, in line with the agreement with the prosecutor, thus it can not be perceived as absence of criminal proceedings or disposal of prosecution. The principle of opportunity in terms of the plea agreement can be observed solely in the case of a plea agreement on indictment. In such case, the prosecutor decides not to initiate criminal proceedings or refrain from prosecution for one or more criminal offences of the defendant, in exchange for confession of other criminal offenses.[19]

In a situation where the public prosecutor charges the defendant with multiple offenses, the subject of the agreement may be a disposal of prosecution for some of them (Article 314, Para 2, Item 1). The perception that it is done in the case of the defendant's confession[20] is not quite correct. In case it would be accepted that this is performed in case of the defendant's confession that he has also committed other criminal offences for which the prosecutor withdraws from prosecution, there is a whole range of issues that arise regarding the principle of opportunity, such as, for which offenses the prosecutor is allowed to dispose of prosecution, are there any limitations at least of a general nature, are certain conditions to be fulfilled as a prerequisite to withdraw, is there some kind of control of the application of such opportunity, how and to what extent the rights of injured parties are protected and the like. In fact, it would be rather appropri-

18 Škulić M., Ilić G., *op. cit.*, p. 70.
19 Bajović V., *Sporazum o priznanju krivice, uporedno-pravni prikaz*, Beograd, 2009, p. 177.
20 Ilić G., et al., *op. cit.*, p. 670.

ate that the prosecutor withdraws from prosecution solely for those criminal offences that the defendant has not confessed.

On the other hand, if the plea agreement is concluded prior to the confirmation of the indictment, whereby an integral part of the agreement is the withdrawal from prosecution for criminal offences not covered by the agreement, it would be logical that these offences are not included in the indictment. However, in such case the defendant would not be protected by the rule *ne bis in idem* (Article 4), because there would be no court decision on the offenses for which the prosecution was withdrawn. This means that after a final judgment pursuant to the agreement, the prosecutor could reopen the proceedings for the offenses which were not included in the agreement. To prevent potential abuse, it would be necessary that the defendant, or his counsel, requires that these offences are listed in the disposition of the indictment, and that the prosecutor withdraws from prosecution only at the hearing on the plea agreement. The court would then be obliged to issue a dismissing judgment in relation to these offenses, so that the defendant would be protected by the rule *ne bis in idem* from the moment of the final judgment. In that case, analogy would be applied because dismissingjudgmentis made if the public prosecutor drops the charges as of commencement until the completion of the trial. In this regard, it should be noted that an unsolved question remains, whether the injured party, at a time when the public prosecutor withdraws from criminal prosecution has the right to take over the prosecution of these criminal offences. In order to avoid potential abuse or problems in practice, it would be beneficial to specify this situation in the law.

In regards to the injured party, it should be noted that the prosecutor's ability to refrain from prosecution for any criminal offence lingers a series of unsolved problems, particularly whether the injured parties can exercise their rights in the criminal proceedings (Articles 50-52). The question is, whether and who shall notify the injured party's attorney that the prosecutor withdrew from criminal prosecution, can the injured party lodge a complaint to a senior public prosecutor if the prosecutor refrains from prosecution before the confirmation of the indictment, as well as what decision on the objection can or must be made by senior public prosecutor, i.e. whether he must abide to the plea agreement or not. If the senior prosecutor would order that the prosecution shall still continue, the question is what would then be the outcome of the plea agreement. Even more serious issue arises if the prosecutor enters into an agreement after the indictment was confirmed, and commits to refrain from prosecution for some criminal offences within the agreement (whether a new indictment is prepared in such case, and how the prosecutor refrains from prosecution, either in writing or orally at the hearing). Does the injured party have the right to take over the prosecution in that case? If the injured party does so, can the prosecutor take over the prosecution from the injured party afterwards? How does this affect the judgment? Can it become final and in what way? Is the rest of the agreement valid, whereby it should be taken into account that the defendant's motive was to avoid prosecution for those offenses.

In this regard it should be borne in mind that the public prosecutor is obliged to prosecute when there are grounds for suspicion that a criminal offense is committed or that a person has committed a criminal offense prosecuted *ex officio* (Article 6, Para 1) but also that the public prosecutor may exceptionally decide not to prosecute, under the conditions stipulated by the Criminal Procedure Code (Article 6, Para 3). As a prosecutor may only exceptionally decide not to prosecute, he should not use this opportunity too often when concluding the plea agreement and refrain from prosecution for certain offenses, especially in a situation where there is reliable evidence that the defendant committed such an offense. On the other hand, in using this right, the prosecutor should not put pressure on the defendant, by charging him with a larger number of offenses, including those for which he knows were not committed by the defendant, and then under the agreement on the offense for which the prosecutor believes were actually committed by the defendant, easily "give up" from the latter, as that would be a form of extortion of confession.

The Criminal Code stipulates (Article 91) that no one can keep the proceeds of a criminal offense, and that such proceeds from crime will be confiscated by the court decision establishing the commission of the offense. To that end, a mandatory element of a plea agreement involves the agreement on the confiscation of the proceeds from crime. Although it is formally called the

agreement, given the Criminal Code, this essentially represents a mandatory forfeiture of the entire proceeds from crime. The situation is something different when it comes to property derived from crime, when the Law on Seizure and Confiscation of the Proceeds from Crime is applied, which stipulates that the proceeds from crime involve the property of the owner which is obviously disproportionate to his lawful income (Article 3, Item 2). Agreement in respect of these assets can be an integral part of the plea agreement, but not necessarily. Whenever possible, it would be good to resolve this important issue as well, while the prosecution has some freedom to negotiate and to make a certain arrangement - concession for this property.

The Higher Court in Belgrade, the Special Department (PO1 SPK No. 5/12 from 28 March 2012) has held that when a plea agreement includes a decision in respect to the proceeds of crime, which were seized from a third party, beyond the public prosecutor, the defendant and defense counsel, a third person, or his counsel if he has one, shall be invited at the next hearing.[21]This standpoint can be criticized, because the Code provides that a decision on the plea agreement is made at the session to which the public prosecutor, the defendant and his counsel are invited (Article 315, Para 2), without the possibility to invite a third party, such as the injured party, his counsel or the person from whom the proceeds from crime were taken or his authorized representative. Moreover, it is envisaged that a hearing is held without public presence (Article 315, Para 3). In addition, it is not clear what the third party or his attorney would do at that hearing. In this respect, it is unclear whether the court, based on the plea agreement, whereas the confession may not be true (completely or in respect of certain facts), may seize property that is located at the third party, whereby the court did not collect any evidence in order to ascertain the veracity of the information that that person really has the property derived from the offense. Another unresolved issue is how to protect the rights of third parties from whom the assets would be confiscated on the basis of the judgmentrendered on the plea agreement, which can be appealed only by the public prosecutor, the defendant and his counsel, and extraordinary, given the very narrow grounds for appeal (Article 319, Para 3).

As a part of the plea agreement, the defendant may be required to fulfill the obligations related to the disposal of criminal prosecution (Article 314, Para 2, Item 2 of the CPC), for instance to eliminate the consequences of the offense or compensate the damage caused, undergo treatment for alcohol or drug misuse, conduct socially beneficial or humanitarian work and the like. For some of these obligations to be imposed by the agreement, there is a precondition that their fulfillment or commencement of fulfillment is possible prior to submission of the agreement to the court. Will the defendant be able to perform the commitment prior to submission of the agreement to the court, reasonably depends on the nature of the obligation. While certain obligations, such as payment of a sum of money to a charitable organization, damage compensation, fulfillment of due obligations of child support, may be fully performed by a single transaction, a certain period of time is necessary for the fulfillment of other obligations. In this case, it is necessary that the defendant only starts fulfilling his obligations until the submission of the agreement to the court, for example to start with the performance of a humanitarian work, or initiate treatment for alcohol or drug misuse.[22]

The parties may agree that the defendant is exempted from paying the costs of the criminal proceedings.[23]

Although not explicitly required by the Criminal Procedure Code, the plea agreement can also refer to the resolution of the issue of detention or the prosecution may agree with the abolition of detention or substitution of detention with a less severe measure to ensure the presence of the defendant or for the smooth conduct of the criminal proceedings. This issue is decided by the same judge who will decide on the plea, since in that case the question of detention is an integral part of the agreement, and logically, given that there is an agreement of the parties, the detention should be abolished and replaced by a less severe measure. In this line, it should be noted that the Higher Court in Belgrade, the Special Department for Organized Crime and War Crimes

21 Ilić G., et al., *op. cit.*, p. 672.
22 Bajović V., "Sporazum o priznanju krivice", *Revija za kriminologiju i krivično pravo,* Beograd, 2009, p. 327.
23 The decision of the Appellate Court in Belgrade, Special Department Kž1 Po1 14/12 of 26 June 2012, see: Vučinić V., Trešnjev A., *Priručnik za primenu Zakonika o krivičnom postupku,* Beograd, 2013, p. 300.

took the opposite legal position.[24] This stance was taken that at the hearing regarding the plea agreement, even if there is agreement of the parties to abolish detention, the judge deciding on the agreement is not authorized to decide on detention, but shall submit the files to the pre-trial chamber, which is the only body authorized to decide at this stage about detention. However, at the subsequent joint meeting of the judges of the Appellate Court in Belgrade, the opposite view was rightly taken, that is, if there is an agreement of the parties to abolish detention, this can be decided by the judge who will decide on the plea, similar to the authority available at the preliminary hearing.[25]

DECIDING ON THE PLEA AGREEMENT

Plea agreement does not represent a civil law contract, even though it includes a confession that involves not only the confession of the facts and legal conclusions, approaching in this way to the act of recognition of the claim in litigation.[26] This is not an ordinary contract that would produce the effect in itself, upon the conclusion in the statutory form, but it only represents the basis for a judicial decision to adjudicate criminal matters, provided that the court, upon evaluation, accepts it in its decision. Hence, its effect on the criminal case is indirect.[27]

The court decides on the agreement at a hearing held without public presence (Article 315, Para 3), or at the preliminary hearing, which is also held without the presence of the public (Article 345). This solution has been criticized because in this way the agreement is not subject to any public scrutiny. It has been pointed out that the public hearing is one of the fundamental principles of the European Convention on Human Rights of 4 November 1950, and that the public is a fundamental prerequisite for a fair trial, which was confirmed by the European Court of Human Rights in numerous decisions. Noting that one can not overlook the fact that not all the details of the investigation process can be available to the public at the hearing, the position is taken that it should still be open to the public.[28]

The plea agreement is rejected if the agreement does not contain the mandatory elements. The rejection itself is not an obstacle for a party to file a new agreement that would not have shortcomings for which it was rejected. Also, if the defendant was duly summoned and has not justified his absence, does not appear at the hearing, the court shall reject the agreement. This solution is logical, because in the absence of the defendant it is not possible to examine whether he knowingly and voluntarily pleaded criminal offense or offenses which are the subject of the prosecution, on the one hand, and on the other hand, by not attending the hearing, the defendant essentially demonstrates that he is not interested in the agreement, or it can be interpreted that he withdrew from the agreement. The Code does not stipulate that, after making the decision[29] to reject the agreement, the agreement itself and all documents associated with it shall be destroyed, or that the judge who issued such a decision can not participate in further proceedings. This should be prescribed, because if the agreement remains in the files, or if the judge who issued the decision participates in further course of the proceedings, a justifiable assumption can be made that it creates a bias in relation to the guilt of the defendant, as he has "confessed" a criminal offense at one point. In addition, there is no reason not to act in the same way when it comes to the decision on rejection, as it is performed when a decision dismissing the agreement is issued. It would therefore be acceptable to analogically apply the same rules in this situation which are applicable in the event that there is a dismission of the agreement (Article 318, Para 2 and 3).

The court shall make the decision dismissing the plea agreement if it determines that: a) the offense which is the subject of the agreement is not a criminal offence, and there are no conditions for the implementation of security measures, b) the prosecution is obsolete, or the offence was included in the act of amnesty or pardon, or there are other circumstances that permanently

24 Sessions at which legal opinions were adopted were held since December 2011 by the end of 2012. in accordance with Articles 17-23 of the Court Rules.
25 Vučinić V., Trešnjev A., *Priručnik za primenu Zakonika o krivičnom postupku,* Beograd, 2013, p. 277.
26 Đurđić V., *Krivično procesno pravo - posebni deo*, Niš, 2011, p. 248.
27 *Ibid*., p. 245.
28 Jurgen Dehn, "Ubrzanje postupka nasuprot načela istine", *Kako je propal reforma šta da se radi?*, Beograd, 2012, p. 9.
29 This decision can not be appealed, it becomes final from the moment of adoption.

preclude criminal prosecution, c) there is insufficient evidence for a reasonable doubt that the defendant committed an act that is the subject of the agreement or the charges. The lack of evidence as the reason for the dismission of the agreement is interesting, particularly bearing in mind that the investigation is initiated by an order when there are reasonable grounds for suspicion, and as of that moment it is possible to enter into a plea agreement, after which the investigation is not carried out, implying that the prosecutor does not collect further evidence.It would therefore be possible that an agreement and charges without sufficient evidence are submitted to the court, while there is a question why the dismission of the agreement is stipulated in that situation, since there is a confession of the defendant. In theory, there is an explanation according to which in this way, "the court is given additional control in the process of assessing the evidence attached to the agreement, which prevents a situation in which the defendants would easily, due to fear of stricter punishment, recognize the offenses in respect of which there is not enough evidence of their guilt".[30] However, it should be taken into account that this solution does not prevent situations in which the defendant will easily plead guilty. First of all, the defendant does not known how much high-quality evidence the prosecutor has and, secondly, one cannot anticipate that the court will decide to dismiss the plea, so the danger that the defendant for some reason easily accepts the agreement continues to exist. Therefore, it appears that the legislator primarily wanted to compel the prosecutor in this way, to continue the collection of evidence even upon the conclusion of a plea agreement in the earliest stage, unless there is sufficient evidence necessary to confirm the indictment, and only after collecting them adequately, submit the agreement and the indictment to the court.

The court shall also dismiss the plea agreement if one or more of the conditions necessary for acceptance of the agreement are not fulfilled. Once this decision becomes final,[31] the plea agreement and all the related documents shall be destroyed in the presence of the judge who issued the decision and the record thereof shall be made, while the proceedings return to the stage preceding the conclusion of the agreement. The judge who issued a decision dismissing the agreement must not participate further in the proceedings. This formulation suggests that the proceedings continue in each case, which is not quite true. Perhaps the legislator could have used other solutions and exclude the possibility of further proceedings in situations where it is determined that the action that is the subject of the agreement is not a criminal offence, there are no conditions for the implementation of security measures, or that the prosecution is obsolete, or included in amnesty or pardon, or that there are other circumstances that permanently preclude criminal prosecution, that is to allow in this procedural situation the possibility that criminal proceedings are completed, for example, by making a decision on abolishment of the proceedings.

The court will accept the plea and find the defendant guilty if it finds that: a) the defendant knowingly and voluntarily pleaded criminal offense or offenses which are the subject of the charges, b) the defendant was aware of the consequences of the agreement, and in particular the fact that he waives the right to a trial and accepts the limitations of the right to appeal against a court decision rendered pursuant to the agreement; c) there is other evidence which are not inconsistent with the defendant's confession that he committed the offense, d) the sentence or other criminal sanctions or other measures in respect of which the public prosecutor and the defendant concluded an agreement are proposed under the Criminal Code or other law (Article 317). This judgmentshall include the reasons that guided the court to accept the agreement.

The purpose of judicial review is the protection of the defendant, so that in case of deception or coercion, which exclude voluntary decision making, as well as the lack of sufficient quality of awareness on all the elements not to accept the agreement, even when the defendant and his counsel remain at the concluded agreement. This court's role is to assess the existence of conditions for the conclusion of agreement to protect the defendant from any misuse by the other participants in the process.[32] This is because the confession of the defendant should not in any way be the result of blackmail, deception or coercion, not only of public authorities but also of any other person.[33]

30 Ilić G., et al., *op. cit.*, p. 677.
31 This decision can not be appealed, it becomes final from the moment of adoption.
32 Nikolić D., "Sporazum o priznanju krivice i njegov doprinos efikasnosti postupanja u krivičnim stvarima", *Alternativne krivične sankcije i pojednostavljene forme postupanja*, Belgrade, 2009, p. 163.
33 Ilić G., et al., *op. cit.*, p. 674.

It is not quite clear how the court determines at the hearing that the defendant knowingly and voluntarily confessed to a criminal offence or criminal offences that are the subject of the charges, or that there is other evidence which is not inconsistent with the defendant's confession that he committed a criminal offence. When it comes to other evidence, it is also unclear to what extent they need to exist to meet the requirements necessary for thejudgment, as well as whether in determining their existence or non-existence the rules that apply to the trial are equally applicable. It may also be controversial if this involves only inspection of the records formed by the prosecution until that time, or the evidence is presented. The Criminal Procedure Code does not provide an answer to these questions, and case law is so far insufficient to adopt a definitive stance.

The most common method used in other countries in order to establish that the defendant knowingly and voluntarily confessed to a crime that is the subject of the agreement is that the judge in charge of the hearing makes a number of previously set questions to the defendant, that contribute to the perception of the circumstances which preceded and were present in time of the conclusion of the agreement. The aim of these questions is to determine the state of consciousness and the will of the defendant at the time.[34]

Before accepting the agreement, the court must be ensured that the defendant is aware of the consequences of a given confession and the signed agreement. Fundamental right waived by the defendant in this way is the right to a trial, within which the prosecutor would be required to prove the allegations, while the defendant would be protected by the presumption of innocence. Pursuant to this agreement, the defendant waives these rights and instead proposes that the court makes a judgmentin Abstract proceedings, without a regular evidentiary procedure. In addition, the court must be ensured that the defendant is aware of the fact that his right to appeal against the judgmentaccepting the plea agreement will be significantly limited in comparison to the situation in which an appeal is made against the judgmentin the regular procedure. The court must examine not only whether the defendant was aware of the limitations of the appeal, but if he is familiar with the concrete directions in respect of which a complaint may be filed at all, or whether the defendant understands that instead of the rather limited scope of the appeal, in ordinary proceedings he could lodge an appeal on the basis of all legally stipulated reasons. Finally, the court should also educate the defendant that a conviction for a criminal offense or a sentence, may result in the loss of certain rights under the law (labor rights, etc).[35]

If the conditions are met, the court shall issue a judgmentaccepting the agreement. Since the agreement in practice typically contains a specific sentence, not the range of the sentence, such sanction shall be imposed by the judgmentthat is made. Therefore, it can be concluded that in this situation, the court's role is reduced to the role of the notary, whereas the public prosecutor, due to the role undertaken in agreeing upon the penalty, obtains in this regard a form of power that almost equates him with the judge. It is considered that the sentence, which is a result of the agreement and, as such, is not subject to scrutiny by the public and the judge, receives a kind of "quality assurance" by a mere acceptance of the judge.[36] Although such complaints are not ungrounded, it should be noted that the court's control of the agreement is not reduced to a mere confirmation of the agreement, but this method also tests and ensures the legality of the application of this institute, which is certainly very important.

The Criminal Procedure Code does not explicitly give the defendant a right to withdraw from the agreement, but it indirectly arises from the statutory situation that the court shall reject the agreement if a duly summoned defendant does not appear at the hearing (Article 316, Item 2). It is somewhat debatable what happens if the duly summoned public prosecutor or defense attorney does not come at the hearing. When it comes to the prosecutor, given that a decision on agreement is made at the hearing at which the prosecutor is invited, while his duty to attend is not otherwise prescribed, if the prosecutor is duly summoned, there are no obstacles that a hearing is held in his absence. In regards to the defense counsel, the situation is different because the defendant must have a defense counsel from the beginning of negotiations with the public prosecutor until the conclusion of the agreement and the decision of the court on the agreement

34 Judges in the United States set 11 questions prepared in advance. See: http://www.law.cornell.edu/rules/frcrmp/rule 11

35 Ilić G., et al., *op. cit.*, p. 674-675.

36 JurgenDehn, *op. cit.*, p. 9-10.

(Article 74, Item 8). Since this is a mandatory defense, the failure of counsel to appear at the hearing at which the decision on the agreement is made, is not a reason to reject the agreement, but to postpone the hearing.

When deciding on the agreement, the court will consider whether detention is properly included in the sentence agreed. Irregularities in the computation of detention or other deprivation of liberty are the reason for the court to dismiss the agreement.[37]

APPEAL AGAINST THE DECISION ON THE PLEA AGREEMENT

The right to an effective legal remedy is a basic human right and is therefore guaranteed by international documents and the highest legal acts of contemporary states.[38]

The solution according to which the parties and the defense counsel waive the right to appeal (Article 314, Para 1, Item 5) is criticized, by supporting that the waiver of the right to appeal should not even be possible in the agreement, but that finality should occur only after the expiry of the regular deadlines for the appeal. This would allow time for the defendant to think, preventing him from the hasty and current relief-related influence to waive his right to appeal.[39]

Although the sanctioning range provided by the agreement would undoubtedly be narrower than the one prescribed by the Criminal Code, the defendant can not be indifferent to whether his prison sentence, for example, ranges from one to three years, particularly if he has concluded an agreement with the public prosecutor and waived his right to trial and appeal. It should not be forgotten that in the U.S. and Germany, where it is possible to propose punishment in a relative range, it is possible to appeal to the sanction imposed by agreement, ensuring that the rights of a defendant are adequately protected.As our Criminal Procedure Code does not allow the right to appeal against the judgmentrendered on the basis of the plea agreement, the determination of a penalty range and refinement of the sentence by the court would decrease the motivation of the defendants to conclude agreements with the prosecutor, if they could not expect with certainty the type and extent of punishment to be imposed. Practical reasons also speak in favor of the parties' absolute determination of sanctions. As the court reviews the evidence upon which the choice of criminal sanctions and the type and extent of punishment depend on, primarily at the main trial, the question is how to determine the punishment on the basis of a plea agreement if the trial is not held.[40]

The appeal is not allowed against the decision to reject or dismiss the plea (Article 319, Para 2). The judgmentaccepting the plea may be appealed by the prosecutor, the defendant and defense counsel within eight days from receipt of the decision (Article 319, Para 3) if there is a reason for the suspension of proceedings (Article 338, Para 1), or if the action that is the subject of an agreement-judgmentis not a criminal offence, there are no conditions for the application of security measures, the statute of limitations has expired, or the act was involved in amnesty or pardon, or any other condition that permanently preclude prosecution.

The appeal is also allowed when there is not enough evidence for reasonable doubt that the defendant committed the offense he is charged with. The reason for the appeal is particularly interesting, considering the fact that the plea can be concluded even shortly after the order for investigation is issued when, as a rule, there is only evidence for suspicion that a person has committed a criminal offence, or that a criminal offence was committed (Article 295, Para 1). If immediately after the decision a plea agreement is concluded, the investigation would not have been conducted, which means that no evidence would be collected (Article 295, Para 2) on which the grounds of suspicion would be based (Article 2, Para 1, Item 17), to determine a grounded suspicion (Article 2, Para 1, Item 17), and a reasonable suspicion (Article 2, Para 1, Item 18).Consequently, it could be argued that the prosecutor is obliged to continue collecting the evidence that would be necessary for the existence of a reasonable doubt even after the conclusion of the plea agreement. Such viewpoint also arises from the fact that this is generally necessary to raise an indictment, even in cases within the institute of plea agreement. However,

37 Nikolić D., Milenković S., "Sporazum o priznanju krivice i njegov doprinos efikasnosti postupanja u krivičnim stvarima", *Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije,* Beograd, 2009, p. 126.
38 Djurdjić V., *op. cit.*, p. 251.
39 Jurgen Dehn, *op. cit.*, p. 10.
40 Bajović V., *op. cit.*, p. 323-324.

the current case law indicates that there was no continuation in evidence collection upon the conclusion of the plea agreement (except in the case of co-defendants who have not entered into an agreement, and in relation to them regular proceedings are conducted), and is not realistic to expect that this ground of appeal will often be used. This is because the defendant accepted the agreement precisely because he will avoid the risk associated with regular proceedings.

If the judgmentdoes not apply to the subject of the agreement, the appeal is also allowed. This refers to a situation where the court, in accepting the agreement, has stepped out of the framework set by the parties in the agreement. Thus, for example, an appeal against thejudgment on the basis of the agreement would be admissible if the court's decision would violate the factual identity of the criminal offense in respect to which there is a confession of the defendant or impose a more severe criminal sanction than the one that was agreed between the prosecutor and the defendant.[41] The same applies in the case the court imposes a more severe legal qualification of the offense than the one agreed, which involves all the situations that would be appealed primarily by the defendant and defense counsel, although there are no obstacles that the appeal is lodged by the public prosecutor in this case, who normally has the right to appeal both to the detriment, and in favor of the defendant (Article 433, Para 3). There should be no doubt that the right of appeal also exists if the court determines a lesser legal qualification or a criminal sanction than the agreed, for example, the agreement prescribes prison sentence and a fine, and the court imposes only the prison sentence or lesser prison sentence. Logically, only the prosecutor would have the right to appeal in such case, since the defendant and his counsel can not lodge a complaint to the detriment of the defendant.

Hence, there is a limited right to appeal against the judgmentaccepting the plea agreement. In this regard, there is an interesting judgmentof the Higher Court in Belgrade, the Special Department SPK -PO1 14/12 of 12 March 2012, in which the position was taken that in the plea agreement, the defense counsel and the parties waive their right to appeal if the court fully accepts the agreement, while after the hearing the parties and the defense counsel may also waive the right to appeal in the cases referred to in Article 319 Para 3 CPC.[42] This standpoint, when it comes to the defendant, may be accepted only if the judgmentis not a prison sentence. If the decision pronounces a prison sentence, the defendant could not waive the limited rights of appeal after the hearing, but only after the judgmenthas been delivered (Article 434, Para 1 of the CPC).

LEGAL EFFECTS OF THE PLEA AGREEMENT

An important question that arises in connection to the plea agreement is the possibility of its use in the proceedings pending against other persons. In fact, the previous question is what can possibly be used as evidence in any other proceedings, the plea agreement itself or the judgmentmade on the basis of that agreement. It should be stated that the Prosecutor's Office for Organized Crime has, as a rule, proposed that the judgmentmade under the agreement should be read as evidence!?[43] Although there is a dilemma in practice, it is clear that only the plea agreement may be evidence, but never thejudgment that was based on the agreement. The agreement contains the confession of the defendant, so that part of the agreement represents a form of evidence, which can be assessed in the context of all other evidence. The judgmentmade on the basis of the agreement is not evidence, but the assessment of the agreement, that is a value judgment on the legality and quality of the agreement. Such a judgmentcan only be evidence that certain proceedings took place regarding the agreement, indicate who were the participants in the proceedings and how they acted, when the proceedings were conducted, and the like. Certainly such ajudgment can not be used to prove the facts of the agreement, which would be subject of the trial of the co-defendants.

Thus, there remains doubt as to whether the agreement which includes the defendant's confession, may be evidence and be presented at the trial as such. The argument that could be cited in support of the possibility of the agreement being used as evidence lies in the fact that it con-

41 Ilić G., at al., *op. cit.*, p. 670.
42 Vučinić V., Trešnjev A., *Priručnik za primenu Zakonika o krivičnom postupku,* Beograd, 2013, p. 301.
43 See: cases of the Higher Court in Belgrade, Special Department, Po1 273/10, the record of the trial of 13 February 2012, p. 40, and K Po1 37/2012, the record of proceedings of the 5 November 2012, p. 16.

tains the confession of the defendant. The counterargument, supporting the thesis that the agreement can not be used as evidence, is that the law allows for the possibility that the trial chamber is familiarized with the contents of documents if it is a testimony of co-defendant against whom criminal proceedings have been separated or has been ended by a final judgment(Article 406, Para 1, Item 5), and that the agreement does not entail the testimony of the co-defendant, but "confession" which is a product of settlement, which could not be subsumed under the term statement. Such a standpoint would be particularly emphasized by the fact that the defendant had the opportunity "to trade" in making "confession" and that it is a compromise between him and the prosecutor and not the evidence in the sense of criminal proceedings. Although the preference should be given to the latter interpretation, it should be noted that previous case law generally accepted the possibility that a plea agreement is used as evidence in the trial of the co-defendants.

An additional controversial issue is whether a person who has entered a plea agreement can be a witness in the proceedings pending against co-defendants who have not signed the agreement. Since the Criminal Procedure Code does not exclude such a possibility, it should not be disputed whether such an action is allowed. Logically, it would be expected that the prosecutor would suggest that the person who has entered into an agreement be called as a witness, since he has already confessed criminal offense, but in our practice it has not happened so far. The prosecution typically proposes reading the agreement and thejudgment rendered on the basis of the agreement, which is often followed by the proposal of the defense to summon a person who has entered into an agreement and examine them as a witness, which is commonly opposed by the prosecution. The only logical explanation for this standpoint may be the nature of the confession itself, which opens the general question of quality, not only of the confession, but also of the judgmentbased on it. Even more so, as the prosecution stands only to read the agreement and not to hear the voice of a person who has entered into an agreement, a conclusion arises that the prosecution was not sure of the quality of the confession as well.

The attitude generally accepted by the courts is of particular concern, that is to read the agreement and the judgmentrendered on the basis of such an agreement, while refusing to examine the person who entered into the agreement as a witness. Interestingly, the explanation offered in such occasions refers to the claim that the law does not allow the same person to have a dual role in the proceedings, i.e. to be a witness and the defendant!?[44]This standpoint is entirely unacceptable because it is not the case of the same proceedings, rather completely separate proceedings. The fact that it is the same event can not deny the fact that these are two separate proceedings (where the one was completed by a finaljudgment). Criminal proceedings are pending against a single person for a criminal offense, while under the legal requirements (Article 30) single proceedings can be implemented. In the event of a separation of the proceedings (Article 31), there are two completely independent, separate proceedings, and the same person can be the defendant in one proceeding, and the witness in the other proceedings.There should be no controversy therefore, that the same person in two separate proceedings, which are conducted in regards to the same event, can appear as the defendant and the witness, which is both possible and permissible. This is also clear if the institute prescribed by the Criminal Procedure Code is observed, referred to as the agreement on the testimony of a convicted person (Articles 327-330).

In current practice, the defense vigorously challenged the confession given as a part of the settlement, arguing that some parts of the confession are absolutely false, elucidating the potential false confession of the crime. In addition, it is often emphasized that this is a pragmatic decision of the defendant to enter into an agreement, that when signing the agreement the defendant is not interested in the truth but only the benefits that can be obtained, even at the cost of confessing to any false parts of the indictment. For this reason, these individuals are proposed as witnesses by the defense. As the prosecution tends to oppose such proposals, it indirectly admits that it is just as uncertain of the quality of the obtained confession. By rejecting the proposal of the defense and adhering to the stance of the prosecution, the court performs a gross violation of the principle of contradiction, denying the basic right of the defendant or the defense, which is to ask questions to a person who is charging the defendant.

44 See: the case of the Higher Court in Belgrade, Special Department, K Po1 37/2012, the record of the trial of 17 October 2013, p. 6. and 25 November 2013, p 6.

In this line, if the trend of utilization of the plea as evidence of a criminal offense, or even worse the judgmentbased on the agreement would continue, that would essentially introduce the principle of formal assessment of evidence in our procedural system, which is certainly unacceptable. Therefore, the defense must be allowed to examine the person who concluded the plea agreement as a witness, if it requires doing so. It should concurrently be taken into account the fact that the agreement is a contract and the defendant may be guided by pragmatic considerations during his conclusion. In addition, since there is no legal obligation to tell the truth, the defendant may enter into an agreement and thereby give a false confession.[45]

If the plea agreement has been read in advance, it would be questionable whether such a person may be cross examined by the defense or only in the form of basic examination. The strict application of the Criminal Procedure Code would indicate that the defense would have to examine such a person in the form of basic examination, because the defense has proposed it. On the other hand, since the person has confessed committing an offense, the defense perceives it as a "hostile" witness, and would probably feel the need to cross-examine him, and it would be logical to be allowed to do so. However, given the fact that the code accurately regulates who and when is authorized to examine a witness in the basic or cross-examination, such an approach would not be possible.

If a person who concluded the agreement, acting as witness denies the confession given in the agreement during the trial of other defendants who have not signed, the question is whether it can have an effect on the judgmentrendered on the basis of the confession. Even more so if it turns out that this confession was indeed false. In this case, it should be accepted that, along with the fulfillment of other conditions, it is possible to use extraordinary remedies (the fact that the parties and the defense counsel waived the right to appeal does not mean they can not use extraordinary remedies).

CONCLUSION

The 2011Criminal Procedure Code provides for the possibility of plea agreement between the public prosecutor and the defendant, based on which a court judgmentis rendered, thus significantly simplifying and expediting criminal proceedings. At the same time, such a procedure is far less expensive, both for the state and the defendant, significantly justifying its use. However, criminal proceedings that are solely swift but not fair at the same time, can not be the ideal pursued in a democratic state characterized by the rule of law. Therefore it must always be considered that the institute of plea agreement carries a certain risk that an innocent person confesses to a crime he did not commit, and therefore be convicted, even though the purpose of criminal proceedings is exactly the opposite, i.e. that no innocent person is convicted.

The provisions regulating this institute lack precision to a certain extent and a number of issues are not resolved. While the institute is increasingly applied in our criminal proceedings, previous case law fails to respond to specific issues, adopting however a mistaken standpoint on others. Therefore, it is necessary to point out all the problems, and propose the amendments to the existing provisions, primarily in order to avoid that innocent people are convicted. In this regard, it should be particularly considered that our courts easily accept the plea agreement, or, even worse, use the judgmentmade on the basis of that agreement!? as evidence in the trial of co-defendants who have not entered into an agreement, whereby not allowing the defense to examine the person who concluded the agreement as a witness. In addition to a whole range of principal issues that appear in this regard, it is not disputed that in this way the risk that innocent persons being convicted based on the plea agreement increases, but in this case also for an innocent person who did not sign the agreement, i.e. the co-defendant, or persons who do not recognize the crime of which they are charged.

In order to reduce the abuse potential of this institute, but also unintentional errors that may appear in practice, there is a need to improve existing legal solutions, in order to avoid convicting innocent people, both those who conclude the agreement, as well as those who are being tried in the regular proceedings. Concurrently, the aim of the amendments of these provisions

45 For more on the reasons for false confession, see: T Simonovic., Turanjanin, V., "Sporazum o priznanju krivičnog dela i problem neistinitog priznanja", *Pravni život,* broj 9, tom II, Beograd, 2013, p. 27-30.

would be to facilitate the implementation of this relatively new institute in our criminal proceedings, or to respond to a whole range of controversial issues. To this end, our previous case law must be considered, as well as the comparative legal solutions and issues addressed, *inter alia*, in this paper.

REFERENCES

1. Bajović V., "Sporazum o priznanju krivice", *Revija za kriminologiju i krivično pravo*, Beograd, 2009.
2. Bajović V., *Sporazum o priznanju krivice, uporedno-pravni prikaz*, Beograd, 2009.
3. Vučinić V., Trešnjev A., *Priručnik za primenu Zakonika o krivičnom postupku,* Beograd, 2013.
4. Đurđić V., *Krivično procesno pravo - posebni deo*, Niš, 2011.
5. Ilić G., Majić M., Beljanski S., Trešnjev A., *Komentar Zakonika o krivičnom postupku,* Beograd, 2012.
6. Jurgen Dehn,"Ubrzanje postupka nasuprot načela istine", *Kako je propal reforma šta da se radi?*, Beograd, 2012.
7. Nikolić D., "Sporazum o priznanju krivice i njegov doprinos efikasnosti postupanja u krivičnim stvarima", *Alternativne krivične sankcije i pojednostavljene forme postupanja*, Belgrade, 2009.
8. Nikolić D., Milenković S., Nikolić D., Milenković S., "Sporazum o priznanju krivice i njegov doprinos efikasnosti postupanja u krivičnim stvarima", *Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije,* Beograd, 2009.
9. Simonović B., Turanjanin V., "Sporazum o priznanju krivice", *Kriminalistički i krivično procesni aspekti dokazivanja,* Banja Luka, 2013.
10. Simonović T., Turanjanin V., "Sporazum o priznanju krivičnog dela i problem neistinitog priznanja", *Pravni život,* broj 9, tom II, Beograd, 2013.
11. Škulić M., Ilić G., *Vodič za primenu novog Zakonika o krivičnom postupku*, Beograd, 2013.
12. Škulić M., Ilić G., *Kako je propal reforma šta da se radi?*, Beograd, 2012.
13. Škulić M., Ilić G., *Reforma u stilu "jedan korak napred - dva koraka nazad"*, Beograd, 2012.
14. Škulić M., *Osnovne novine u krivičnom procesnom pravu Srbije,* Beograd, 2013.
15. http://w.w.w.law.cornell.edu/rules/frcrmp/rule 11

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JURY SYSTEMS IN EUROPE AS THE ANGLO-SAXON TYPE OF TRIAL

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Abstract: Systems of jury trials exist around the world and represent a characteristic of, primarily, Anglo-Saxon legal system. On the first place, it should be noted that in the world exist two basic forms of citizen participation in trial. Today, we have a clear jury system, where citizens make a special trial chambers, which determine the facts and resolve all issues on trials, and on the basis of fact answer on question whether the defendant is guilty or not. On the other side, there is mixed jury system, where citizens and judges have a single trial chamber, and where there are equal in the fact-finding and the imposition of criminal sanctions. In the UK and Commonwealth countries, this type of trial has a long history. Nevertheless, in recent years, it experienced a renaissance over the world and established in those countries that never knew the jury system, or they had it in some stage of their development. In this work, the author deals with jury trials in some European countries, especially in Spain and Russia, and explains their legal solutions, which strengthening the security of the citizens in the legal system and rule of the law.

Keywords: jury system, Europe, citizens, trial

INTRODUCTION

When the major reforms across the European continent has been occurring, structural and theoretical basis of the criminal proceedings are the matter of international interest. European legislators have begun to turn to countries in Anglo-Saxon legal tradition, which have nurtured the legal institutes that proved their effectiveness, thereby causing the deletion once tightly bounded boundaries that existed between the European and American legal system.[1] On that way they try to solve many issues, such as: whether the legal solutions provide efficiency in handling criminal matters, which are the goals of the criminal proceedings, which are the social functions of trials and whether it is possible to develop a normative theory of the trial, or indeed there is an optimal criminal procedure that combines principle of due process of finding efficient material truth.[2] However, until they create a unique procedure, all countries in Europe create their own system of resolving criminal cases, and some of them in the legislation incorporated the system of real jury trial. Among the legal transplants that have found their place in the legislative solutions of continental European countries, by its features we can distinguish a jury.

Jury trials exist around the world, and represent a characteristic primarily of Anglo-Saxon legal system. Primarily, it should be noted that there are two basic forms of citizens participation in trial: a real jury system, in which citizens themselves create special judicial panels, which determine the facts and resolve all issues of trial, and on these facts they determine whether defendant is guilty or not, and mixed jury system, as a form of trial where judges and jurors form a unique judge panel.[3] England is considered as a cradle of jury system, which exported this own

1 M. Damaska, *The Fate of the Anglo-American Process Notion in Italy*, Croatian Annual of Criminal Law and Practice, Zagreb, vol. 13 – no. 1/2006, 3. Thus, the European legislation gradually incorporate instruments disposition with criminal proceedings by parties in them. See also: M. Damaska, *On Some Effects of the Party formed Preliminary Criminal Proceedeing*, Croatian Annual of Criminal Law and Practice, vol. 14, no. 1/2007, Zagreb, 3.

2 S. Swoboda, *A Normative Theory of Criminal Procedure*, Criminal Law Forum, vol. 18, 2007, 151.

3 S. Bejatovic, *Criminal Procedure Law*, Belgrade, 2010, 138-139. As it is case with almost every major issues of criminal procedure, presence of citizens here has its supporters and opponents. See: V. Hans, *Jury Systems Around the World*, Cornell Law Faculty Publications, 2008, 276. Jurors initially were not people who were called to court to hear the evidence, than to present them, so they occupied the position of witness in the proceedings.

product to Australia, Canada, New Zealand, Republic of Ireland, Northern Ireland, Scotland, and United States, but as well to the other colonies in Africa and South America.[4]

On the one hand, democratically oriented countries have recognized the importance of citizen participation in trials for criminal matters, and in parallel with political and legal changes have begun to establish mechanisms of jury trial, while, on the other hand, states that have established jury system continued maintenance this tradition.[5] Despite the fact that the percentage of criminal cases solved by jury in Anglo-Saxon countries has declined dramatically in the recent years,[6] primarily due to alternative ways of solving them, a number of states that incorporated into their legal systems some of the form of citizen participation in the trial, or at least, they debate about this issue, becomes striking.[7] In this paper, we deal with legislation of Spain and Russia, as countries with clear jury systems.

SPAIN

The most direct impact of the philosophy of French revolution came to Spain through the works of Montesquieu and Rousseau and through the capital work of Cesare Beccaria *On crimes and punishment*. In order to achieve that the third branch of government, the judicial, be truly independent and invisible, Spanish legislator has provided legal instrument known as a jury, as a social instrument that belongs to the middle class and makes counterweight to the nobility. However, the jury trial in Spain is more similar to Anglo-Saxon model, unlike the French, which is characterized by the participation of the professional judges and citizens together.[8] Jury trial, which we know today, is in the Spain legislation reintroduced by the Act of 22 May 1995[9], after sixty years of his suspension under the Franco regime (Decree no. 138/1936 revoked jury trial). Reintegration of this legal transplant in the one European legislation raises the question of whether the jury could be a catalyst in moving the legislation of this continent with a mixed criminal procedure system to adversarial, as it was during the French revolution.[10]

Nine citizens, chaired by professional judge, and two reserve jurors, assemble jury court in Spain (article 2. LOJ). Every person who wants to become a juror must meet some requirements. The first requirement is majority, which was many times repeatedly criticized. Therefore, there were proposals that this age limit should be raised to the 24 or 30 years.[11] Then, a juror must be able to read and write, to be a resident in the province where the crime is committed and that he does not have any physical, mental and sensory defect that prevents him of being a juror (article 8. LOJ).

Jurors are selected by a computer program, which selects 36 potential jurors. In that way, it forms a proper list (article 18. LOJ). After that, the court clerk sends them to complete a questionnaire (which includes all the necessary questions about the reasons of their potential inability of being jurors in particular case or general – article 19. LOJ). Together with a questionnaire, a clerk sends a prospect to a jury, in order to ensure that jurors are fully informed about their role. The completed questionnaire should be returned to the court within five days of receipt. After completion of this part of procedure, there have to remain at least 20 potential jurors. At that point, the parties will select nine jurors, who take an oath (article 41. paragraph 1. LOJ). Jurors have an obligation to attend on the trial for which they were elected. Hence, they have no right to refuse to be a juror. In the contrary, they could be subject of fines.

4 N. Vidmar, *Juries and Lay Assessors in the Commonwealth: A Contemporary Survey*, Criminal Law Forum, vol. 13, 2002, 385.
5 N. Marder, *An Introduction to Comparative Jury Systems*, Chicago-Kent Law Review, vol. 86, no. 2, 2011, 453.
6 See: V. Hans, *The Twenty-First Century Jury: Worst of Times or Best of Times?*, Criminal Law Brief, vol. 1, 2006, 3.
7 V. Hans, *Jury Systems around the World*, 276.
8 M. Jimeno-Bulnes, *Lay Participation in Spain: The Jury System*, International Criminal Justice Review, vol. 14, 2004, 166.
9 *Ley Orgánica del Tribunal del Jurado*, Boletín Oficial del Estado, B.O.E., 1995, 122, with ammandments: *Ley Orgánica* no. 8/1995 of 16. November and *Ley Orgánica* no. 10/1995 of 23. November (further: Law of jury – LOJ).
10 S. Thaman, *Spain Returns to Trial by Jury*, Hastings International and Comparative Law Review, vol. 21, 1998, 242.
11 M. Jimeno-Bulnes, *Jury selection and jury trial in Spain: between theory and practice*, Onati Socio-Legal Series, vol. 1, no. 9, 2011, 6.

The defendant does not have a possibility of choice between a jury and the court made by professional judges. The legislator accurately determined for which crimes is competent jury court. These are crimes against life, crimes committed by public officials, crimes against the freedom and safety, and crime of causing a fire.

Since the principle of the material truth is one of the key principles in the American law, and in the laws of European countries, in the Spanish criminal procedure a judge leads a trial. He eliminates any discussion that is not related with the clarification of the truth, but at the same time, he does not deprive a necessary freedom of defense.[12] With introduction of jury legislator has deprived a judge of the absolute right to choose a questions that will be settled for witnesses, expert witnesses and accused. Jurors are authorized, in writing, to submit questions to the judge, who will, after the evaluation of its relevance, post them to the person who is being questioned/ examined (article 46. paragraph 1. LOJ).

Prior to the closing words of the defendant, a professional judge is preparing a list of questions for jurors (*objecto del veredicto*).[13] Some of the questions are in his favor, but some goes to his detriment. Questions are divided into two groups. In the first group are questions of proved or unproved act in the proceeding, and in the second group are questions about guilt or innocence o the accused (articles 59. and 60. LOJ). These are questions related to the fact that proves commission of the crime and the identity of the accused as the perpetrator, his claims, facts that fully justify the commission of the crime, fact that shows the degree of participation of the defendant in the commission of the act, the aggravating and mitigating circumstances, and the defendant's plea – did he, or not, guilty for the crime.[14] During the voting there is necessary existence of seven votes for the fact that is not in favor of accused, but for the facts in his favor it is enough existence of five votes (article 59. paragraph 1. LOJ). After they finish voting about facts, the jury goes to the voting of defendant's guilt. For each part of the indictment the jury vote separately and there is necessary seven votes for the fact that defendant is guilty, and five votes in order to be considered that defendant is not guilty for specific charges (article 60. paragraph 2. LOJ).

One of the major characteristic of Spanish jury system is legal condition that the jury verdict must be reasoned, which not a feature of any other is known model of jury trials. Classical Anglo-Saxon jury characterizes provision that their verdict have to be "spontaneous",[15] without any explanation. In this legislation, the law requires the jury to give reasons that justifying the decision that certain facts are proved or not proved (article 61. paragraph 1. LOJ). In order to avoid gaps in verdict, the jury may request from the court secretary to assist in the preparation of its draft (article 61. paragraph 2. LOJ). That was not a rarity, especially in the first jury trials in this country.[16] After receiving a verdict, a judge has an obligation to review it, and, in a case that it has some flaws, requires from jurors to correct them (article 63. LOJ). In fact, a judge will restore a verdict to the jury when it does not contain a decision in relation to the facts in that case, than, if there is no decision about guilty for every person charged for the crime. In addition, a judge will restore a verdict in a case when there is lack of necessary majority in voting, or, if the decision about facts or about guilty is contradictory with proved facts, and if there is an error in the process of deliberation or voting (article 63. paragraph 1. LOJ).[17] However, if after third returning of the judgment, the deficiencies are not corrected, or if the jury could not obtain necessary majority, a judge will dismiss the jury and maintain a new process with completely new jury. However, if a new jury faces with the same problem, a judge has an obligation to acquit a defendant.[18] In any case, when the jury votes that defendant is not guilty for the crime, a judge is obliged to order his immediately release (article 67. LOJ).

12 S. Thaman, *Spain Returns to Trial by Jury*, 303-304.
13 In particular cases, preparing the list may last few hours. See: S. Thaman, *Spain Returns to Trial by Jury*..., 352.
14 S. Thaman, *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, 2011, 628-629.
15 M. Jimeno-Bulnes, *Lay Participation in Spain*..., 179.
16 S. Thaman, *Europe's New Jury System: the Cases of Spain and Russia*, Law and Contemporary Problems, vol. 62, no. 2, 1999, 255.
17 S. Thaman, *Should Criminal Juries Give Reasons for their Verdicts*..., 629.
18 S. Thaman, *Europe's New Jury System*…, 256.

RUSSIA

„Can such a delicate, complex and psychological case be submitted for decision to petty officials and even peasants? What can an official, still more a peasant, understand in such an affair?“

F. M. Dostoevsky – The Brothers Karamazov

The legislator in Russia introduced a jury during the judiciary reform in the year of 1993. That was the year when a legislator brought a new Constitution of Russia Federation.[19] That reform was a kind of revolution in Russian legislation, and it brought a plenty innovations, that were regarded as a primary catalyst of democracy and humanization of the Soviet criminal justice system.[20] Like many other countries, Russia is faced with escalation of crime.[21] Therefore, she reached for legislative changes, and among the largest, there is shift from inquisitorial to adversarial procedure and return to jury system, while the main objective that should be reached was to restore impaired confidence in the legal system of Russia. During the period of existence of Soviet Union, judiciary was the least respected legal profession in this country.[22] Access to the court was difficult, and membership in the Communist Party was a requirement for obtaining the judge title. Accordingly, judges were extended arm of the Party and followed the directives that are laid down in the higher hierarchical levels.[23]

The legislator through the new Russian Criminal Procedure Code[24], in whose preparation involved the American experts, clearly promotes adversarial procedure and principle of equality, and prescribes that the functions of prosecution, defense and judiciary have to be separated. In addition, prosecutor and accused will be equal parties in the criminal proceedings (article 15 CPC. and article 123. Russian Constitution). He also emphasizes the principle of material truth, right to privacy, right to human dignity, right to fair trial etc.[25]

In this reform, the jury[26] becomes one of the main features of the adversarial system. Preliminary and experimental, the jury was introduced in nine states of Russian federation. Few years after that step, the legislator extended the jury system through the whole country, except Chechnya, where he established a jury in the 2010 year. The jury is competent to judge only for serious crimes. It is possible to impose a term of imprisonment of ten years or longer for those crimes.[27] During their jury duties, jurors are protected from attacks on their personality, both officers and citizens who want to disrupt their duties. In addition, they are protected by law from the political influence o the high-ranking officials, and anybody who wants to make the impact on jurors can be a subject of criminal proceeding.[28]

19 Конституция Российской Федерации, *Российская газета* on 25. December 1993.
20 S. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, Cornell International Law Journal, vol. 40, 2007, 359.
21 K. Sweet, *Russian Law Enforcement Under President Putin*, Human Rights Review, July-September 2002, 20
22 S. Boylan, *The Status of Judicial Reform in Russia*, American University International Law Review, vol. 13, 1998, 1327; K. Sweet, *Op. cit*, 29.
23 L. Aron, *Russia Reinvents the Rule of Law*, American Enterprise for Public Policy Research, 2002, 1.
24 Уголовный Кодекс Российской Федерации on 13. Jun 1996., N 63-ФЗ, *Российская газета* broj 113 on 18.06.1996., with later amendments in 1998., 1999., 2001., 2002., 2003., 2004., 2005., 2006., 2009. and 2011. (further: CPC).
25 S. Thaman, *The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea Bargaining and the Inquisitorial Legacy*, Crime, Procedure and evidence in a comparative and international context, Essays in the honor of the professor Mirjan Damaska, 2008, 102.
26 In Russia existed jury system in period of year 1866-1917. See: J. Diehm, *The introduction of jury trials and adversarial elements into the former Soviet Union and other inquisitorial countries*, J. Transnational law & Policy, vol. 11, 2001, 31. Although the jury trial used to open certain amount of questions, primarily related to entrusting to the jury to solve serious cases, it has been terminated during the Bolshevik reign on 1917, by its Decree no. 1 on 17. December. See: F. Davis, S. Tyulkina, *Terrorism and Trial by Jury in Russia*, *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133235*, December 2013, 5. Until that moment, the jury decided over 7,5 million cases. J. Coughenour, *Op. cit*, 405.
27 J. Coughenour, *Reflections on Russia's Revival of Trial by Jury: History Demands That We Ask Difficult Questions Regarding Terror Trials, Procedures to Combat Terrorism, and Our Federal Sentencing Regime*, Seattle University Law Review, vol. 26, 2003, 407.
28 S. Plotkin, *The Jury Trial in Russia*, Tulane Journal of International & Comparative Law, vol. 2, 1994, 5-6.

Potential jurors for each case are selected from the list a persons who have a right to vote (article 325. CPC). They have to be citizens of Russia and have at least 25 years. Legislator does not require exact number of potential jurors, not the maximum number of jurors on the list. However, the list has to contain at least twenty names of citizens, chosen randomly, and the judge has a task to select jurors for particular trial (article 325. paragraph 4. CPC). He wills potential jurors ask the questions related to their years of life, abilities to speak and understand Russian language, mental disabilities that may affect their ability to serve as jurors, previous participation as juror during the same calendar year and about their criminal record. The judge will ask other questions for which a citizen may refuse a jury duty. Although Russian legislator nowhere prescribes reasons for automatic disqualification of person who carry out certain function, it is believed that that judges and prosecutors can be relieved from the jury duty if they call for that reason.[29] Elimination method will select 14 jurors, whose names will be put in the box. From that box, a judge will bring out 12 names, while the other two potential jurors will serve as reserve jurors. On the trial, jurors will take place opposite to the defendant.[30]

Defendant has to invoke the jury if he wants such kind of trial. He have to know in the procedure that he has a choice – to be tried by a jury or a court composed by professional judge and two jurors, and the legal consequences for any of these options. Statistic shows that in the period 1994-2001 23% of accused in the Russia enjoy the right to the jury trial, while in the year of 2002 that percentage was 25%.[31] Otherwise, in this period on average, each year approximately 360 defendants required a jury trial, and the jury in the approximately 18% of the cases acquitted defendant.[32] On this place, we should mention the fact that, according to the research from the year of 2006, 31% of respondents said that introduction of jury trial was a positive step in the Russian judiciary, and 44% would recommend a jury trial rather than trial with professional judge to his relatives, if necessary. However, 51% of respondents believe that it is difficult to be an impartial juror in this time, because the jurors are venal, while 43% of people would avoid this duty.[33]

After reading a indictment, defendant declares whether he is understood the indictment and does he consider himself as a guilty for a charged crime, followed by opening statements of the parties, on the first place by prosecutor, and then a defense. The prosecutor will present the evidences gathered about the defendant's guilt, whereupon defendant and his defense counsel have an opportunity to present their evidences (article 273-274. CPC). Closing arguments leads to the phase in which the court will briefly explain the criminal case in that proceeding, by summarizing undertaken evidentiary actions and attitudes of the parties, followed by formulation of the issues submitted to the jury, which will be related to the crime, identity of the defendant, his guilt, and aggravating and mitigating circumstances. The court emphasizes to the jury importance of presumption of innocence and the absence of the presumption o guilt in a case where defendant defended himself by silence.[34]

The estimated period in which the jury should bring unanimous decision of the guilty of the accused is three hours from the beginning of the jury session, unless jury decides in shorter period of time that was anticipated.[35] However, if after basic anticipated legal deadline for making a decision the jury does not agree unanimous, then it approaches to counting of votes and decides on basis of their majority, and the advantage of having the votes given in favor of the defendant. By adopting their decision, the court prepares a judgment that can be guilty or acquittal, depending on the decision made by a jury of which cannot be distinguished. The verdict was allowed to appeal to the Supreme Court for violation of the law, improper

29 N. Kovalev, *Jury trials for violent hate crimes in Russia: Is Russian justice only for ethnic Russians?*, Chicago-Kent Law Review, vol. 86, no. 2, 2011, 692-693.
30 S. Plotkin, *Op. cit*, 10.
31 K. Sweet, *Op. cit*, 30.
32 K. Y. Ok, *Study on Russian Jury System*, преузето са: *http://src-h.slav.hokudai.ac.jp/,* December 2013, 11.
33 S. Thaman, *The Good, The Bad, or the Indifferent: 12 Angry Men in Russia*, Chicago-Kent Law Review, vol. 82, 2007, 18.
34 S. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 366.
35 The situation in the Russian jury system we can observe through the movie of Nikita Mihalkov „12", which is a remake of the famous movie „12 angry jurors", adapted to the russian criminal procdure system.

application of the criminal law, violations of the criminal proceeding or because the verdict was not fair (article 379. CPC). When the judgment has acquired the status of finality, it may be questioned only in proceedings on extraordinary legal remedies: review and repeat the process (article 409. CPC).

CONCLUSION

End of the XX century and beginning of the XXI century brought many changes in the modern criminal procedures codes around the world. Faces with the accumulation of the criminal cases in courts and inefficient criminal proceedings, the states are, with great enthusiasm, started to search solutions in the comparative jurisdictions, assuming solutions that were previously incompatible with the continental laws. One of the solutions, compatible with the criminal process culture of concrete state, is legal institute known as jury, which was, in its pure form came to the fore in the jurisdictions of Spain and Russia. Although there are two completely different legal areas, legislator in both has revived the jury system, which was in the one period of their history existed in them. In addition, jury system in Russia is very similar to the American form of the citizen's participation in trial or crimes, while in the Spain exists *sui generis* solution that does not exist in any other country in the Europe. However, regardless to the differences in the implementation jury trials, in both countries is the main consideration that it is additionally secured element of democracy and protection of the defendant's rights in criminal procedure.

REFERENCES

1. L. Aron, *Russia Reinvents the Rule of Law*, American Enterprise for Public Policy Research, 2002
2. S. Bejatovic, *Criminal Procedure Law*, Belgrade, 2010
3. S. Boylan, *The Status of Judicial Reform in Russia*, American University International Law Review, vol. 13, 1998
4. J. Coughenour, *Reflections on Russia's Revival of Trial by Jury: History Demands That We Ask Difficult Questions Regarding Terror Trials, Procedures to Combat Terrorism, and Our Federal Sentencing Regime*, Seattle University Law Review, vol. 26, 2003
5. M. Damaška, *On Some Effects of the Party formed Preliminary Criminal Proceedeing*, Croatian Annual of Criminal Law and Practice, vol. 14, broj 1/2007
6. M. Damaška, *The Fate of the Anglo-American Process Notion in Italy*, Croatian Annual of Criminal Law and Practice, Zagreb, vol. 13 - broj 1/2006
7. F. Davis, S. Tyulkina, *Terrorism and Trial by Jury in Russia*,
8. *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133235*, December 2013
9. J. Diehm, *The introduction of jury trials and adversarial elements into the former Soviet union and other inquisitorial countries*, J. Transnational law & Policy, vol. 11, 2001
10. V. Hans, *Jury Systems around the World*, Cornell Law Faculty Publications, 2008
11. V. Hans, *The Twenty-First Century Jury: Worst of Times or Best of Times?*, Criminal Law Brief, vol. 1, 2006
12. M. Jimeno-Bulnes, *Jury selection and jury trial in Spain: between theory and practice*, Onati Socio-Legal Series, vol. 1, no. 9, 2011
13. M. Jimeno-Bulnes, *Lay Participation in Spain: The Jury System*, International Criminal Justice Review, vol. 14, 2004
14. N. Kovalev, *Jury trials for violent hate crimes in Russia: Is Russian justice only for ethnic Russians?*, Chicago-Kent Law Review, vol. 86, no. 2, 2011
15. N. Marder, *An Introduction to Comparative Jury Systems*, Chicago-Kent Law Review, vol. 86, no. 2, 2011
16. P. de Muniz, *Judicial reform in Russia: Russia looks to the past to create a new adversarial system of criminal justice*, Willamette Journal of International Law. & Dispute Resolution, 2004

17. K. Y. Ok, *Study on Russian Jury System*, *http://src-h.slav.hokudai.ac.jp/,* December 2013
18. S. Pomorski, *Modern Russian Criminal procedure: the adversarial principle and guilty plea*, Criminal Law Forum, vol. 17, 2006
19. S. Plotkin, *The Jury Trial in Russia*, Tulane Journal of International & Comparative Law, vol. 2, 1994
20. M. Spence, *The Complexity of Success: the U.S. Role in Russian Rule of Law Reform,* Democracy and Rule of Law Project, no. 60, 2005
21. K. Sweet, *Russian Law Enforcement Under President Putin*, Human Rights Review, July-September 2002
22. S. Swoboda, *A Normative Theory of Criminal Procedure*, Criminal Law Forum, vol. 18, 2007
23. S. Thaman, *Europe's New Jury System: the Cases of Spain and Russia*, Law and Contemporary Problems, vol. 62, no. 2, 1999
24. S. Thaman, *Spain Returns to Trial by Jury*, Hastings International and Comparative Law Review, vol. 21, 1998
25. S. Thaman, *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, 2011
26. S. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, Cornell International Law Journal, vol. 40, 2007
27. S. Thaman, *The Good, The Bad, or the Indifferent: 12 Angry Men in Russia*, Chicago-Kent Law Review, vol. 82, 2007
28. S. Thaman, *The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea Bargaining and the Inquisitorial Legacy*, Crime, Procedure and evidence in a comparative and international context, Есеји у част професера Мирјана Дамашке, 2008
29. N. Vidmar, *Juries and Lay Assessors in the Commonwealth: A Contemporary Survey*, Criminal Law Forum, vol. 13, 2002

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THE RIGHT ON CONFRONTATION THROUGH THE PRISM OF NEW SOLUTION OF CRIMINAL PROCEDURAL LEGISLATION IN BOSNIA AND HERZEGOVINA

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Abstract: Reform of criminal procedural legislation in Bosnia and Herzegovina, which was carried out in 2003, has made significant changes in order to create modern and more effective criminal procedure. That is how, in our continental model of criminal procedure, primarily were incorporated some accusatorial type institutes of criminal procedure, particularly cross examination and prosecutorial investigation. Effective protection of fundamental human rights and freedoms of the participants in the proceedings are opposed to aspiration for more efficient procedure, above all by installed "fuses" which amplifies their achievements. In any case, important contribution have been given to a fair trial that was proclaimed by International covenant on civil and political rights and European convention for protection of human rights and fundamental freedoms, where special emphasis was put on the right of accused to confront prosecution witnesses and to secure the attendance and examination of defense witnesses. In any case, rights of suspects and defendants to confront witnesses, or co-suspects or co-defendants, should not be questioned as part of their rights to defense.

This paper gives a short overview on the normative regulation of criminal procedural action of confrontation in Bosnia and Herzegovina, pointing to some inconsistencies in the "innovations" and proposals to overcome the doubts caused by the practical implementation of this procedural action.

Keywords: criminal procedure, fair trail, right on witnesses hearing, confrontation

INTRODUCTION

The court and the parties who participate in a criminal proceeding might perform some criminal procedural actions, and they can produce acts who are important for making proper and lawful court decision, that material and procedural criminal law adds certain effects (use of criminal sanctions, conducting criminal proceedings). Regarding this goal, we can take evidence or take some necessary legal actions in order to acquire convictions by the court regarding the existence or non existence of certain relevant facts, and to determine the relevant facts based on the decision in criminal proceedings.[1] Confrontation is one of the actions in criminal proceeding which has been carried out to identify important facts during suspect examination and questioning of witnesses. Confrontation is procedural action that has been carried out during main inquest and during investigation with one goal, to identify inconsistencies in the statements or to evaluate statements of witness and of the suspect. As a confrontation subjects we can have suspects, accused and witness, so theoretically we can performe confrontation in the following combinations: witness – witness, witness – suspect (accused), and suspect (accused) – suspect (accused).

PROBLEMS RESULTING WHEN DEFINING CONFRONTATION

Some obscurities may occur when defining confrontation, whether is it criminal procedural or criminal action. Confrontation like many other criminal procedure actions have dualistic character (criminal procedural or criminal action). Considering that, confrontation is prescribed by the law of criminal proceeding and it is clear that it is primarily criminal procedural act. In general, under the law provisions of the criminal procedural some legal acts were determined,

1 M. Skulic, Criminal Procedure Law, Belgrade, 2009, p. 175-194.

and they are necessary for the execution of certain procedural actions, among which the special place belongs to the enquiries. It is understandable that the content of procedural actions can not be solved with criminal procedural laws, because these operations have been under the constant influence of the scientific knowledge and under the results of judicial and police practise. The elaboration of tactics and techniques involved in the confrontation like in many other criminal procedural actions (crime scene investigation, reconstruction, recognition), has been left to the criminology to find perfect science and practical experience-based methods. Therefore we can conclude that confrontation is criminal procedural and criminal action undertaken during the investigation or at the main search in order to remove obscurities in the statements of persons. Some authors define confrontation as a simultaneous examination of two previously examined persons,[2] but this understanding is not completely true, because the term "simultaneous" means that something is happening at this moment (simultaneous, at once, at the same time), but here we can speak about simultaneous (coexist) confrontation but it is not co-expression. Since we can not talk about simultaneously use of statements of confronted persons, it would be proper to define confrontation as a direct conversation between two individuals, who discuss about important facts of criminal act, guided by the judge at the trial, and by the prosecutor or police officer in the investigation. Considering many facts that arrise in terms of planning, preparation and execution of procedural steps, and interpretation of results, confrontation is performed only exceptionally and only when it comes to important circumstances that can not be otherwise determined. Confrontation should not be performed because of irrelevant facts or some insignificant detail in their testimony,[3] but it needs to be execute when there is a discrepancy in a relation to the important fact that can not be eliminated by the other activities, such as re-examination of individuals.[4] Considering that confrontation has never been mandatory for the authority in charge of the process, authority will not order confrontation if they do not expect clarification.

If the statements of the two individuals are different in important facts, criminal procedural laws allow their confrontation. First we have to emphasise that at the same time we can confront two individuals, and this is the only exception to the rule that witnesses, suspects (accused), may be heard. In fact it is assumed that witness and the suspect were interrogated without the presences of others, which is a legal obligation and tactical rule. Experience has shown us, that witness who has not been examined yet and who listens to the testimony of another witness may unknowingly come under influence of his testimony. It may happen that a witness who has intension to give false testimony, adapts his subsequent testimony to the witness testimony he had previosly heard.[5] In the presences of other persons accused and witness may be heard during the confrontation. On this occasion we are going to define the concept of disagreement.

Verb conciliate is synonym with verb agree and it means that something needs to be harmonized,[6] so in this case there must be agreement (compability, coincidence) of witness testimony with the testimony of another witness, suspect or of the accused one. The division of opinion among criminology experts has resulted in avoiding the use of the legal term *disagreement*, so the experts thought that confrontation has been performed to *clarify the contradictions* between witness testimony.[7] Other authors as a motive for the procedural steps takes the emergence of differences in the witness testimony.[8] The term "difference"[9] is a wider term than

2 V. Vodinelic, *Criminalistics,* Belgrade, 1970, p. 143; B. Bayer, *Yugoslav criminal procedure law,* Zagreb, 1989, p. 142 and 164.
3 D. Krapac, *Criminal procedure law, first book*, Zagreb, 2000, p. 259
4 B. M. Saver, A. I. Vinberg, *Criminalistics,* Belgrade, 1948, p. 136.
5 B. Bayer, *Yugoslav criminal procedure law,* Zagreb, 1989, p. 171.
6 *Dictionary of the Serbian language*, Novi Sad, 2007, p. 1183 and 1241
7 B. Markovic, *Textbook of criminal court proceedings for the Kingdom SCS,* Belgrade, 1926, p. 341; T. Vasiljevic, T; *Criminal Procedure Law,* Belgrade, 1977, p. 268; B. Petric, *Comment of Criminal Procedure Code, the book first,* Belgrade, 1986, p. 438; N. Ogorelica, *Criminal Procedure Law,* Zagreb, 1989, p. 342; M. Milosevic, C. Stevanovic, *Criminal procedure law,* Beograd, 1997, p. 264; C. Stevanovic, *Criminal Procedure Law,* Belgrade, 1994, p. 256; M. Kokolj, *Criminal procedure law,*Bijeljina, 2009, p. 143; B. Simonovic, M. Matijevic; *Criminalistics tactics,* Banja Luka, 2007, p. 386.
8 B. Bayer, *Opus citatum,* p. 142; D. Krapac, *Opus citatum*, p. 259; D. Dimitijevic, *Criminal procedure law*, Belgrade, 1975, p. 232; M. Ilic, *Lectures from the criminal procedure law,* Sarajevo, 1956, p. 293; B. Banovic, *Criminal procedure law*, Belgrade, p. 153.
9 Difference - is not identical with other, which is a litlle bit disserent from other, different (*Dictionary of the Serbian language*, *Opus citatum*, p. 1119)

"opposition"[10]. It is clear that every opposition (a contradiction) at the same time is distinction, but every opposition is not a contradiction, and opposition may not by it self be a contradiction. Inconsistency is a general term (*summum genus*) for terms difference and opposition. We belive that this terminological distinction between expressions does not have great significance as long as confrontation has been conducted to reveal important facts in the statements. The main task for procedure administrator is that during each particular confrontation he must confront two previously examined persons who has different statements, but not on any fact, only in terms of important facts.

Under the important facts (relevant facts, clue and control facts)[11] we must imply facts relating to the elements of the crime,[12] the essential features of the real, the actual criminal event. Considering the scope of disagreements over important facts in the relation to the testimony, procedural action can be done as fully confrontation or partly confrontation.[13]

If the disagreements are extensible, when the hearing is conducted in the confrontation over the entire statement then we can talk about full confrontation, and if discrepancy are related only to the parts of the statement, then it is partial confrontation.

CONFRONTATION IN THE CRIMINAL LEGASLATION OF BOSNIA AND HERZEGOVINA

Confrontation is prescribed as a procedural action in the Criminal Procedure Code of Bosnia and Herzegovina[14] (hereinafter referred to as CPC BH), chapter VIII (enquirie) within the norms that are prescribed by the examination of witnesses. In the article 85. paragraph 2. CPC BH confrontation of witness with other witnesses and with the accused one is possible during the criminal procedure. In an identical manner confrontatio is prescribed in other criminal procedural laws that aplly in Bosnia and Herzegovina: article 150. of the Criminal Procedure Code of Republic of Srpska,[15] article 99. of the Criminal Procedure Code of Federation Bosnia and Harcegovina,[16] article 85. of the Criminal Procedure Code of the Brcko District of Bosnia and Herzegovina.[17] Legislator did not explain reason or confrontation technique, but he did it later in the paragraph 9. article 86. CPC BH, where he prescribed that witnesses can be confronted if their testimonies are different regarding to important facts. The same provision also prescribes the manner of conducting the procedural action by facing up to two witnesses questioned individually about each circumstance where there is disagreement with each other, and the statements are recorded in the minutes. Considering that one provision (article 85. paragraph 2.) only approximately provides possibilty of conducting confrontation where main participiantes were specified, including mandatory participation of at least one witness, it is possible to implement confrontation between two witness or between witnesses and accused. This legal definition made some confusion. Interpretation of this standard we can say that it is not possible to implement confrontation between two suspects, or accused persons. Interpretation of other norm who prescribes reason and tactics of confrontation of two witnesses, lead us to the question whether does these rules apply to confrontation of witness and the suspect. Here we need to point out that we do not understand why did the legislator in Bosnia and Herzegovina in 2003. abandon solution of process regulation of confrontation as it was in the past in the CPC SFRJ and CPC

10 Opposition - character, a condition that is in contraditin to something, a sharp distinction; philosophical relation of existing differences, contradistions and their expressions of oppinions in society in general (*Dictionary of the Serbian language*, *Opus citatum*, p.1291).
11 H. Sijercic-Colic, *et. al. Comentary on the Criminal Procedure Code,* Sarajevo, 2005, p. 262.
12 B. Petric, *Opus citatum,* p. 438.
13 H. Sijercic-Colic, *et. al. Opus citatum*, p. 262; V. Vodinelic, *Criminalistics,*1996, p. 336.
14 „Official Gazette" of Bosnia and Herzegovina, number 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09 and 93/09
15 „Official Gazette" of the Republic of Srpska, number 53/12.
16 „Official Gazette" of the Federation Bosnia and Harcegovina, number 35/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09 and 12/10.
17 „Official Gazette" of the Brcko District of Bosnia and Herzegovina, number 44/10.

SRJ,[18] or as it has been set out in the current criminal procedure legislation in many countries.[19] In this criminal procedure legislation that we have mentioned confrontation is prescribed in the same chapters as the questioning of the suspect or the accused.

At first we could conclude that confrontation of two suspects or accused persons by the CPC BH is not allowed. However, the logical interpretation of the law could not be taken as true, but to understand it easy we will dissociate confrontation of co-defendants at the trial from co-accused in the investigation.

In terms of facing two accused persons we must systematically examine this issue and we have to take into consider that the accused could not be tried in absentia, and that the accused must be continuously present at the trial (article 247. of CPC BH), except in cases where he is removed from the courtroom for violating Order and Discipline (article 242. paragraph 2. CPC BH), or when he is removed from the courtroom by applying measures to protect witnesses.[20] Considering that the accused is able to ask questions to co-defendants in accordance to his right to a defence, and in accordance with the principles of contradiction, equality of participants and fair trial (witnesses and experts), and he can give explanations about these statements (article 259. of CPC BH). There must not be put into the question exercise of wrights of the accused person to defend, or his right to confront witnesses.[21] Accused may give a statement as a witness by applying paragraph 2. article 259. of CPC BH, and he will be in the same position as the second witness, he will be subjected to direct and cross examination, so we can conclude by provisions that apply to confrontation of witnesses or the accused, that accused may face with other accused and the other defendants if they agree to testify as a witness. If one of the accused remain silent, confrontation with co-accused can not be made.

But, special situation is with co-suspects, which has been carried out during investigation. On one side, CPC BH does not expressly provides possibility of confrontation between suspect and witness, on the other hand any of its provisins does not explicitly provide possibility to confront one suspect with other suspects (confrontation of co-suspects). Analysing this situation, we must keep in mind that the main goal of testing the suspect is to put his knowledge into the evidence and into reasonable doubt that he could defend himself from prosecution, and to refute the evidence. When will the prosecutor or authorized official announce the "probable cause" to a suspect, it depends on what do they have at the moment, but there is no doubt that suspect must be aware of everything that stands in front of him (substantive evidence and verbal evidence), so he can defend himself on the court.[22] In such situations we can present co-suspect testimony to a suspect, or we can confront them. During interrogation process of the suspect some evidence can be presented to him, so we do not see the reason why would prosecutor or some other official body reveal evidence who had been taken during the investigation or to relevant expertise (fingerprints, traces of gunpowder), or to present a witness to him, on the other side not allowing co-suspect to confront with the suspect. Although the suspect and his lawyer have the right to examine documents and other items who were collected during the investigation, except in the

18 „Official Gazette SFRJ", number 4/77, 14/85, 74/87, 57/89 and 3/90, and „Official Gazette SRJ", number 27/92 and 24/94.

19 Have a look: articles 232. and 245. CPC of Macedonia ("Official Gazette" number 15/97, 44/02, 74/04, 83/08, 67/09 and 51/11); articles 91 and 103. CPC of SRJ-Serbia ("Official Gazette SRJ" number 70/01, 68/02 and "Official Gazette RS" number 58/04); articles 89. and 99. CPC of Serbia ("Official Gazette RS" number 72/11 and 101/11); articles 102. and 114. CPC of Montenegro " "Official Gazette Montenegro" number 57/09); articles 278. and 289. CPC of Croatia ("Official Gazette" number 121/11); articles. 229. and 241. CPC of Slovenia ("Official Gazette number 32/12); article. 170. CPC of Albania ("Official Gazette, Fletorija Zyrtare", No. 5 to 7 of 1995); articles 211. and 364. CPC of Italy (Codice di procedura penale – Gazzetta ufficiale della Repubblica Italiana, n. 250 del 24 ottobre 1988); article 94. CPC of Slovakia (No.141/1961, As Amended No.422/2002); articles 142. and 172. CPC of Ukraina (Enacted by the Law of 28 December 1960 (1000 – 05), BBP, 1961, # 2, p.15)…

20 article 10. of Law on Protection of Witnesses under Threat and Vulnerable Witnesses BH, „Official Gazette of Bosnia and Herzegovina", number 3/03, 21/03, 61/04 and 55/05.

21 Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14 of the International Pact on Civil and Political Rights, speaking about right to a fair trial, right of a defendant in a criminal procedure to examine witnesses against him or to find someone else to conduct the examination and to provide attendance and examination of witnesses on his behalf under the same conditions that apply to those who testify against him

22 H. Sijercic-Colic, *et. al. Opus citatum*, p. 240.

case of files and items that their disclosure would endanger the purpose of the investigation[23].

Not so rare situation that the prime suspect takes a guilt of criminal offense upon himself, he acknowledges offence in its totality (to protect accomplices).

The reason for the false recognition of the suspect and taking undivided responsibility may be: fear of reprisal, bad financial situation and receive monetary compensation; immaturity and pliability and desire to "rise to the pedestal of the great criminal". The question is how we should handle such situations in the investigation, that is secret and where we have principle of confrontation, and where prosecutor or the authorised person may inforce the confrontation between two suspects. Considering that we have concluded that we may face co-accused at the main trial, who accept to testify as a witness, applying the arguments of analogy similarities (*argumentum a simile*), it is possible, during investigation, to conduct two suspects, but it must be prosecutor's decision. Using this type of confrontation purpose of investigation may be achieved.

CONCLUSION

On the teritory of former Republic Yugoslavia, Bosnia and Herzegovina was the first one who has conducted a mixed sistem of criminal procedure. This reformed criminal procedure is combination of Anglo-Saxson system with accusatory elements, and european continental system with traditional investigative elements. That is how our system of criminal procedure took basic principles from the accusatory system such as orality, public, and contradiction of the main proceedings, but has also kept some principles of inquisitorial procedure. Most inquisitorial elements are reflected in the investigation that has been carried out by the prosecutor. Because of many "innovations" in criminal procedure that has been made in last ten years, there were 17 amendments of criminal law but also lot off doubts for many theorists. One of these oversights were possibilty for legal prescription of confrontation for co-accused persons, in theory and in practise it can cause seriously doubts. Therefore it is necessary to standardize the possibility of confrontation between suspects under the provision which regulate questioning of the suspect in the Criminal Procedure Code of Bosnia and Herzegovina. It is also necessary to be prescribed the purpose and tactics of co-suspect confrontation.

REFERENCES

1. Banovic, B; *Criminal procedure law*, The Official Gazette, Belgrade, 2008.
2. Bayer, B; *Yugoslav criminal procedure law*, The Official Gazette, Zagreb, 1989.
3. Dictionary of the Serbian language, Serbian array, Novi Sad, 2007.
4. Dimitrijevic, D; *Criminal procedure law*, Modern administration, Belgrade, 1975.
5. Krapac, D; *Criminal procedure law, first book*, Informant, Zagreb, 2000.
6. Ilic, M; *Lectures from the criminal procedure law,* Faculty of Law, Sarajevo, 1956.
7. Kokolj, M; *Criminal procedure law,* Law College, Bijeljina, 2009.
8. Markovic, B; *Textbook of criminal court proceedings for the Kingdom SCS,* Geca Con, Belgrade, 1926.
9. Milosevic, M; Stevanovic, C; *Criminal procedure law,* Beograd, 1997.
10. Ogorelica, N; *Criminal Procedural Law,* Zagreb, 1989.
11. Petric, B; *Comment of Criminal Procedure Code, the book first,* Official Gazette, Belgrade, 1986.
12. Saver, B. M; Vinberg, A. I; *Criminalistics,* Education, Belgrade, 1948.
13. Sijercic-Colic, H; *et al, Commentary on the Criminal Procedure Code,* The Council of Europe and the European Commission, Sarajevo, 2005.
14. Simonovic, B; Matijevic, M; *Criminalistics tactics,* The International Association of Criminologists, Banja Luka, 2007.

23 Case files are an integral part of the criminal case, especially pleadings and transcripts, devices for sound and optical recording, objects and documents related to the purpose of the trial, cases indicate another criminal offense, items that should have been seized or which may be used to determine the facts in a criminal proceeding, data who were stored on the device for the automatic or electronic data processing.

15. Skulic, M; *Criminal Procedure Law,* Belgrade, 2009.
16. Stevanovic, C; *Criminal Procedure Law*, Scientific book, Belgrade, 1994.
17. Vasiljevic, T; *Criminal Procedure Law,* Scientific book, Belgrade, 1977.
18. Vodinelic V; *Criminalistics,* Education, Belgrade, 1970.
19. Vodinelic V; *Criminalistics,* Institute for books, Belgrade, 1996.
20. *Criminal Procedure Code of Bosnia and Herzegovina*, „Official Gazette" of Bosnia and Herzegovina, number 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13.
21. *Criminal Procedure Code of the Republic of Srpska*, „Official Gazette" of the Republic of Srpska, number 53/12).
22. *Criminal Procedure Code of the Federation of Bosnia and Herzegovina*, „Oficial Gazette" of the Federation of Bosnia and Herzegovina, number 35/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09 and 12/10.
23. *Criminal Procedure Code of the Brcko District in Bosnia and Herzegovina*, „Official Gazette" of the Brcko District of Bosnia and Herzegovina, number 44/10.
24. *Criminal Procedure Code*, „Official Gazette SFRJ", number 4/77, 14/85, 74/87, 57/89 and 3/90 and „Official Gazette SRJ" 27/92 and 24/94.
25. *Criminal Procedure Code*, „Official Gazette SRJ", number 70/01, 68/02 and „Official Gazette RS", number 58/04.
26. *Criminal Procedure Code*, „Official Gazette RS", number 72/11 and 101/11.
27. *Criminal Procedure Code of Macedonia*, „Official Gazette" number 15/97, 44/02, 74/04, 83/08, 67/09 and 51/11.
28. *Criminal Procedure Code of Montenegro*, „Official Gazette Montenegro", number 57/09.
29. *Criminal Procedure Code of Croatia*, „Official Gazette" number 121/11.
30. *Criminal Procedure Code of Slovenia*, „Official Gazette" number 32/12.
31. *Criminal Procedure Code of Albania*, „Official Gazette, Fletorija Zyrtare", number 5 to 7 of 1995.
32. *Criminal Procedure Code of Italy*, Codice di procedura penale – „Gazzetta ufficiale della Repubblica Italiana", n. 250 del 24 ottobre 1988.
33. *Criminal Procedure Code of Slovakia*, No.141/1961, As Amended No.422/2002.
34. *Criminal Procedure Code of Ukraina*, Enacted by the Law of 28 December 1960 (1000 – 05), BBP, 1961, # 2, p.15.
35. *Law on Protection of Witnesses under Threat and Vulnerable Witnesses of Bosnia and Herzegovina*, „Official Gazette of Bosnia and Herzegovina", number 3/03, 21/03, 61/04 and 55/05.

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THE EFFICIENCY OF THE OMBUDSMAN IN CONTROL OF ADMINISTRATIVE AUTHORITIES IN THE REPUBLIC OF SERBIA

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Abstract: The Ombudsman in the system of the Republic of Serbia is like an unarmed knight in charge of administering justice. The aim of the research carried out in this paper is to provide answer to the question of whether there are and what are the ways and instruments or achieving impact without repressive means. After a brief analysis of the legal framework of the existence the institution of Ombudsman, as well as its tasks and powers in the Republic of Serbia, a brief comparative overview of the institutes in some developed countries is given, in order to find a possible solution of the primary problem through analysis.

The problem which will be discussed in this paper, is the efficiency of the Ombudsman in the control of administrative authorities, as well as possibilities to enhance the impact and effectiveness of instruments at his disposal.

Keywords: Ombudsman, efficiency, control, public administration.

INTRODUCTION

The complexity and the continuity of the negative impact directly and indirectly suffered of by administrative authorities, have led both to the necessity of introducing new and more efficient instruments of control, and the need for more intensive use of the existing mechanisms. When speaking of the necessity of administration control, it implies both the control of state and the control of public, or transferred, authorities, and according to the latest amendments in the Law on Administrative Disputes, also the control of the other holders of public authority whose legal documents decide on the rights and obligations of certain categories of the population . In addition, it includes the control of the activities of administrative authorities, and control of legislation that is the result of the activities of administrative authorities.

Due to a number of destructive socio-pathological phenomena whose appearance was fuelled by the process of switching from one to the other socio-political system (the so-called transition), as well as due to the changes in the structure of the government itself, transfer of responsibilities to local self-governments and even to the non-state economic actors, a need for expansion and intensification of control in our country emerged.

In these conditions, opportunities for the creation of unlimited and uncontrolled power have opened. Therefore, constant alertness and awareness of the malignant properties of any government and its tendency toward uncontrolled and destructive expansion and distancing from the source of legitimacy, are necessary.

The Ombudsman as a protector of citizens' rights represents an upgrade of the existing system of control mechanisms. It was conceived as a body that would be beyond jurisdiction of any of the functions of government. This is from today's perspective an utopian goal, which in this case has been only partially achieved. Ombudsman is a reflection of a social community's will to limit its own power , it is a form of institutionalized humanity of state power. Given his/her powers, he/she is some form of authorized whistleblower, that is, a reminder to those in power of the fact that their work is monitored and evaluated between the two election periods.

In this short paper, the Ombudsman as a relatively new instrument of control of administrative authorities in Serbian law, was first described through a display of solutions of this institution in comparative law of some European countries, with the aim to present specificities existing in some solutions. We will try in the best possible way to present solutions in the positive law of the Republic of Serbia, with emphasis on the instruments that were given to the Ombudsman, and in particular his/her efficacy.

THE CONCEPT OF OMBUDSMAN

Ombudsman is a Swedish word meaning confidant, representative, commissioner. The institution of Ombudsman was created gradually in Sweden, starting from the first half of the 18th century, and it got its present form in the Swedish Constitution of 1809. The constant need for broad and effective control of government has led to the creation of a number of institutional and non-institutional forms and controls. In addition to judicial control, there was a need for the existence of extra-judicial, parliamentary institution that would control not only the legality, but also the expediency, regularity and efficiency of administrative authorities' work. Thus, the Ombudsman originated in Sweden, the country of developed parliamentary regime.

It is difficult to formulate a single definition of this institute. Considering the specific features that appear in comparative law, it is indisputable that the Ombudsman is a form of external, non-judicial, but not purely parliamentary control of government. Its control of the administrative authorities includes both the legality and the functionality. Therefore, the Ombudsman is also called the protector of citizens.

The Ombudsman is an independent state body. It is not the parliamentary body, the parliament does not issues order directly to it, even though it is usually elected by parliament. Not inspecting authority administrative or supervisory control. It's not a judicial body either[1].

THE INSTITUTION OF OMBUDSMAN IN COMPARATIVE LAW – SPECIFICITIES OF CERTAIN SOLUTIONS SWEDEN

Sweden is the mother of the institution of the Parliamentary Ombudsman, which was established in 1809, and therefore considerable space in this paper will be devoted to the Swedish model of ombudsman.

The precursor of the institution of ombudsman in Sweden was the Chancellor of Justice (*Justitiekansler*), whose task was to ensure the implementation and enforcement of law and supervise the work of civil servants, during the exile of King Carl XII.

Until the adoption of the Constitution in 1809, the intensity of the impacts of the King and Parliament were changing in Sweden. In 1766, the Parliament became dominant, including the right to appoint the Chancellor of Justice, which lasted until 1772 when King Gustav III managed to regain his absolute power and consequently the right to appoint the Chancellor of Justice. [2] After him, the throne went to one of the greatest Swedish kings absolutists - Gustav IV Adolf, who was dethroned in a mutiny in 1809, after which a parliamentary meeting was held. At that meeting, the adoption of the new Constitution was decided. This Constitution could be called a milestone in the Swedish legal system. It introduced the system of division of power between the Parliament and the monarch – the king was appointing the Chancellor of Justice, while the Parliament was appointing the Parliamentary Ombudsman.

The task of the Parliamentary Ombudsman was to supervise, as a representative of the Parliament, the implementation of the legality of the officials and judges.[3] In 1915, system of two parliamentary ombudsmen was established, on the initiative of the Parliament, whose representatives believed that it was necessary to separate the functions of control of military authorities, and hence the military ombudsman was established.

The reintegration of military and parliamentary ombudsman occurred in 1968, when the Parliament elected 3 ombudsmen, who made a single institution. In 1975, The Parliament, due to an increase in workload, has adopted a new Instructions for the Parliamentary Ombudsmen, which contained new rules for the organization of their service and their duties and powers.[4]

1 М. Јовичић,*Омбудсман – чуварзаконитости и праваграђана*, Београд, 1969, p. 19.
2 Д.Миленковић, *Упоредини преглед институције омбудсмана*, Комитет правника за људска права, Београд 2002.
3 М. Јовичић, *Омбудсман-чувар законитости и права грађана,* Институт за упоредно право, Београд, 1969, pp. 10-11
4 B. Wieslander, *The Parliamentary Ombudsman in Sweeden*, The Bank of SwedenTercentenary Foundation,1994, pp. 16-17; Claes Eclund,

These rules were further changed and supplemented with new Instructions for the Parliamentary Ombudsmen of 13 November 1986, which are still in force.[5] In the Constitution of Sweden (the Instrument of Government) of 1809, in chapter 12, entitled the Parliamentary Control, it is established that the Parliament will choose one or more Ombudsmen, whose main function, as a parliamentary body, is to supervise the implementation of laws and regulations.[6][7] The Law on Parliament (The Riksdag Act) stipulates that the Parliamentary Ombudsmen' Office consists of four ombudsmen, elected by the Parliament, one of them being the Chief of the Office. All four of them have separate fields of work such as tax collection, enforcement of court decisions, the ordinary courts, public prosecutor's office, police and prisons, the military, local government and administrative courts, social welfare and education.[8]

The Chief of the Office is administrative director, who is responsible for internal administration, appointment of staff, etc.[9] The Parliament appoints ombudsmen for a term of 4 years. At the request of the Committee on the Constitution, the Parliament may vote no confidence in the Ombudsman, in which case his mandate ceases before the expiry of the mandate period.

In their work, ombudsmen are independent and their work cannot be subject to the control of another ombudsman.[10]

Initiation of proceedings before the Ombudsman starts with an appeal, which must be submitted in writing, or it can be launched by the Ombudsman, on his/her own initiative. Appeal may be submitted by anyone on the territory of Sweden, who is suffering the consequences of the decisions of state bodies, for whose control the Ombudsman is in charge, regardless of the citizenship. The staff of the Ombudsman is obliged to assist the complainant when writing an appeal, with no fees charged. Appeal, in addition to the fact that it must be in writing, it also must be signed, otherwise it will not be accepted as an appeal, but as a basis for a possible launch of an independent investigation by the Ombudsman.

Each appeal will be considered as timely, but the Ombudsman will initiate proceedings only related to violations that occurred up to two years before filing an appeal. Only on specific grounds Ombudsman may commence an investigation if the case occurred more than two years before the filing of the appeal. The requirement of prior exhaustion of all other remedies before the courts or the administration, is not set, although in practice ombudsman does not intervene until the end of the court proceedings. Ombudsman can intervene at an earlier stage also in cases where the appeal relates to the procedure.[11]

After completion of the procedure, the primary means available to the Ombudsman is recommendation, which expresses his/her views in a particular matter. Besides the legally nonbinding recommendation, he/she is also authorized to launch immediate criminal prosecution of officials in cases of criminal acts committed in the performance of official duties, and to take disciplinary action against those persons before the authorities in charge for establishment of disciplinary accountability and enforcement of disciplinary sanctions. Powers relating to criminal prosecution are the remains of the long tradition of the Ombudsman in Sweden, which at the point of its origin in 1809, had the character of a public.[12]

The Ombudsman has a statutory duty to submit an annual report to the Parliament on its activities, initiatives, collected appeals and others. The Ombudsman's report is published and is available to everyone.[13]

5 Act with Instructions for the Parliamentary Ombudsmen issued on 13. November 1986.
6 Д. Миленковић, *Јавна управа-изабране теме*, Факултет политичких наука, Београд 2012.
7 *The Instrument of Government*, 1809, Ch. 12, Art. 6
8 C. Eclund, *Švedski parlamentarni ombudsmani*, Zbornik radova Pravnog fakulteta uNovom Sadu, br. 3-4, 1990.
9 Д. Миленковић, *Јавна управа-изабране теме*, Факултет политичких наука, Београд, 2012.
10 *Act with Instructions for the Parliamentary Ombudsmen*, 1986, Art. 2.
11 *Act with Instructions for the Parliamentary Ombudsmen*, 1986, Arts.17-20; Bengt Wieslander,The Parliamentary Ombudsman in Sweeden, The Bank of Sweden Tercentenary Foundation, 1994, pp. 50-51.
12 *Act with Instructions for the Parliamentary Ombudsmen*, 1986, Art. 6; Claes Eclund и Шведскипарламентарни омбудсмани, Зборник радова Правног факултета у Новом Саду, бр. 3-4, 1990, p. 10.
13 *Act with Instructions for the Parliamentary Ombudsmen*, 1986, Art. 11.

FRANCE

The Mediator, a French ombudsman, was introduced by the Law of 1973, which is still in force.[14] The mediator is an independent body responsible for citizens' complaints concerning the performance of activities of public administration, territorial public bodies, public institutions and all organizations that perform public service. The independence of the French Ombudsman was established by the provision of the amendments to the Law on the Mediator of 1989, which says that within its jurisdiction, ombudsman will not receive any instructions from any authority.[15] This is very important, given the specific way of appointing a mediator.

The French mediator is appointed by the Ministerial Council for a period of six years, after which he/she can not be re-elected, which is exceptions compared to the predominant features of the ombudsman in other countries. Therefore, the mediator is not a delegate of the Parliament, but the Government. To ensure his/her independence, as the sole reason for the termination of a mediator's mandate before its expiration is his/her inability to further perform the function.[16] The mediator initiates proceedings at the request of a natural person, on the initiative of members of the Parliament or on his/her own initiative. If he/she thinks that a strict application of the law in a particular case would be unfair, mediator may initiate changes in the law to eliminate the deficiencies.

GREAT BRITAIN

The British Ombudsman was introduced by the Law on Parliamentary Commissioner of March in 1967, with the aim to control the acts and actions of administrative authorities.

The specificity of this institution in Britain, among others, is in the fact that the Parliamentary Commissioner is appointed by the King, on the proposal of the Prime Minister, which is consistent with the opinion of the leader of the opposition and the opinion of a special committee of the House of Commons for the election of parliamentary commissioner. [17] He/she is elected for an indefinite period, and may be dismissed by Crown on his/her own request, with the approval of both Houses of Parliament, when he/she meets the requirements for retirement and in case of inability to perform duties.

Appeals are not submitted directly to the Parliamentary Commissioner, but through the members of the House of Commons, and after the procedure the Commissioner submits a report to the House. The problem in Britain is a ban on interference of central authority in the affairs of local authorities, which also applies to the Parliamentary Commissioner, as the central body.

AUSTRIA

The specificity of the Austrian Ombudsman model is its collegiality . In Austria, the function of the Ombudsman is performed by the People's Representative, established in 1977 by the federal Law, which in 1983 was incorporated in the Constitution, so that today the most of provisions governing the work of this body are regulated by the Constitution.[18] This collegial body consists of three members, one of whom is chairman , their terms last six years with the possibility of unlimited re-election. Members are elected by the Austrian National Assembly. Provinces can delegate control over the work of their administration to the federal People's Representative, and can also establish provincial ombudsmen.

14 С. Лилић , Д. Миленковић, Б. Ковачевић-Вучо, *Омбудсман међународни документи упоредно право законодавство и пракса*, Београд 2002, pp. 62-66.
15 Op. cit., pp. 62-66.
16 Op. cit., pp. 62-66.
17 Op. cit., pp. 67.
18 Op. cit., стр. 78.

GREECE

The specificity of the Greek Ombudsman is reflected in the fact that he/she is not an autonomous and independent body of the Parliament, but a separate administrative body. The legal basis for its existence is the Law on the Ombudsman and Inspectors for Public Administration of 1997. [19] It is defined as an independent administrative body whose mission is to intervene in the relations between citizens and the state, government and local self-government organizations and other legal subjects of public law in with the aim of human rights protection.[20] It cannot be controlled by the executive authorities, has four assistants who are independent in their work.

The Ombudsman is elected by the Ministerial Council following consultations with the Committee on Institutions and Transparency, according to the rules prescribed by Parliament, [21] and assistants are elected on the Ombudsman's proposal by the Ministry of Interior, Public Administration and Decentralization for a term of 5 years.

Within its jurisdiction, the Ombudsman supervises the work of state bodies, local authorities, other public authorities and public enterprises and institutions of public interest.

COMMON FEATURES

Ombudsman is, conditionally speaking, an independent body which in a predefined procedure adopts legally non-binding recommendations, which then submits to the authority against which the complaint was made, in which he/she points to possible violations and recommends on how to act in order to eliminate the consequences of misconduct.

"After two centuries of development of the Ombudsman as an institution, its important features are: to individually and independently investigate complaints of citizens on an unfair –illegal and irregular work of authorities; he/she is elected by parliament in a special procedure that guarantees the integrity, authority, neutrality and independence; decisions he/she makes are not formally binding, but act by the power of personal institutional authority of ombudsman; procedure that he/she leads is relatively informal, adaptable to the circumstances of the case and achieving of the goal of protection; pays more attention to ethics, objectivity, purposefulness and fairness of the acts of authorities towards citizens and less to the formal (il)legality; usually has a special role to protect and promote human rights; once elected, the ombudsman is emancipated in relation to a body that has elected him/her (is not required to work by order of parliament, but to report on their work) which is why it is considered one of the institutions, often crucial, of the so-called "fourth branch of government."[22]

OMBUDSMAN IN THE REPUBLIC OF SERBIA

LEGAL FRAMEWORK

The Constitution of Serbia of 2006 defines the Protector of Citizens as an independent body that protects the rights of citizens and controls the work of the state administration, authorities responsible for the legal protection of property rights and interests of the Republic of Serbia, as well as other agencies and organizations, enterprises and institutions entrusted with public authority.

In addition to the Constitution, the Law on the Protector of the Citizens ("Official Gazette of the Republic of Serbia", No. 79/2005 and 54/2007) represents the basis for the functioning of the institution of Ombudsman. The Protector of Citizens is established by this Law as an independent body that shall protect the rights of citizens and control the work of government agencies, the

19 Op. cit., p.72.
20 Op. cit., p. 72.
21 Op. cit., p. 73.
22 С. Јанковић, *Локални омбудсмани у Србији*, Правни билтен, Локална самоуправа: Прописи и пракса, бр. 4, 2010.

body authorized for legal protection of property rights and interests of the Republic of Serbia and other bodies and organizations, enterprises and institutions which have been delegated public authority (hereinafter: administrative authorities).[23]

The Protector of Citizens should ensure protection and promotion of human freedoms and rights.[24] The Law further specifies that the term "citizen" covers not only local nationals but also any physical person who is a foreign national, as well as any local or foreign legal person whose rights and responsibilities are determined by the administrative authorities, hence the object o protection is broadened to all persons.

ELEMENTS THAT DETERMINE THE EFFICIENCY OF THE PROTECTOR OF CITIZENS INDEPENDANCE IN WORK

The Protector of Citizens is independent and autonomous in performance of his/her duties established by the Law and no one has the right to influence his/her work and actions.[25] He/she is appointed by the Assembly of the Republic of Serbia following the proposal of the National Assembly Committee for Constitutional Issues,[26] or of any parliamentary group in the Assembly. He/she is appointed for a period of five years and the same person may be elected at most twice in succession.

He/she is accountable to the national Assembly, and submits a report to it.

His/her independence in work relates to independence in terms of executive function of government, and is achieved through a number of provisions of the Law, which provide that the proposal and appointment process, including the decision on revocation in case of fulfilment of certain conditions, is performed by legislative body.

Certain remarks could be made on the manner of nominating candidates for the office of the Ombudsman, and the lack of possibility for direct nomination by the citizens, either through a precisely defined procedure defined for this purpose, or through the ability to propose candidates through a referendum. Through this way of proposing, the goal of independence and de-politicization of the personality of the Ombudsman would be achieved. His/her legitimacy would be more direct, and thus would enjoy a greater reputation among the citizens, who would bear part of the direct responsibility for the election candidate.

A very important element, which can greatly affect the independence of any authority including the Ombudsman, is the way, or source of funding. The funds for the work of the Protector of Citizens are provided in the Republic budget, based on the proposal for funds for the following year, and delivers it to the Government for inclusion as an integral part of the proposed Republic budget, while the proposal must be pursuant to methodology and criteria in force for other budget spending units.[27]

This way of funding opens up the possibility for possible retaliation or attempts to influence the independence of the Ombudsman by the representatives of the executive functions of government. These possibilities can be expected especially in times of crisis in which the budget deficit and the introduction of restrictive measures aimed at saving, with the pretext of saving, and through financial reprisals, the functioning of the Protector of the Citizens and related services can seriously be destabilized.

REQUIREMENTS FOR ELECTION

By setting high criteria in terms of qualifications, work experience, moral and professional qualities, which the candidate for Protector of the Citizens or Deputy Protector must comply

23 The Law on the Protector of the Citizens ("Official Gazette of the Republic of Serbia", No. 79/2005 and 54/2007), Article 1.
24 Op. cit., Article 1.
25 Op. cit., Article 2.
26 Op. cit., Article 4.
27 Op. cit., Article 37.

with, realization of function of efficiency and personal authority of Protector is assumed. The Law stipulates that a person is eligible for the position of the Protector of Citizens if they are nationals of the Republic of Serbia with a bachelor's degree in law and a minimum of ten years experience in legal matters in related to the purview of the Protector of Citizens, to posses high moral and professional qualities and has significant experience in the protection of civil rights.

Deputies of the Protector of citizens are appointed by the Assembly following the recommendation of the Protector of Citizens to a five-year term of office and the same person may be elected at most twice in succession. A person is eligible for the position of Deputy Protector of citizens if they are nationals of the Republic of Serbia with a university degree, at least five years of experience in jobs related to the purview of the Protector of citizens, are of high moral character and qualifications and have significant experience in the protection of civil rights.

In addition to the general requirements, it specified that the function of the Protector of the Citizens or his/her Deputies is incompatible with another public office or professional activities, as well as any duty or task that might influence their independence and autonomy.[28]

The Protector of the Citizens and his/her Deputies must not be members of political parties, perform have public, professional or other functions, duties or tasks.

ORGANIZATION

The Protector of the Citizens is established as a singular body. He/she may have four deputies to help him/her in performing the duties, within the powers delegated to them by him/her, in particular ensuring special expertise for the performance of duties under the Protector of Citizens' competency, primarily in respect to the protection of rights of persons deprived of their liberty, children's rights, rights of national minorities and rights of disabled persons. Thus, the specialization of ombudsman in certain fields was carried out, without the establishment of specialized ombudsman. The Protector of Citizens designates a deputy who will replace him/her when absent or prevented from performing his/her duties.

To perform specialised and administrative tasks, establishment of administrative service of the Protector of Citizens is stipulated, managed by the Secretary General. Secretary General must hold a degree in law and have minimum five years experience and meet the requirements for employment in administrative authorities.[29] The Protector of Citizens employs staff in the administrative service on the basis of a general act on the organization and job classification of the administrative service, which is approved by the National Assembly.

The Secretary General and other employees of the administrative service are subject to regulations on labour relations in government bodies.

END OF OFFICE

The following reasons for the end of office were listed: the end of mandate, unless he/she is re-appointed, death, resigning from office, loss of citizenship, meeting requirements for mandatory retirement, becoming permanently physically or mentally unable to carry out his/her duties, dismissal.

The Assembly without debate adopts a decision, which finds that the conditions for the termination of office were met for the above reasons, except in the case of dismissal.

It remains unclear what is the permanent physical incapacity to perform the function, and whether this provision is a form of discrimination against certain categories of the population in terms of opportunities to be elected to this position. It is also remains unclear whether by the fulfilment of the legal requirements for retirement of Ombudsman whose official mandate is still in progress, his **term of office** will cease automatically, or he/she, according to the regulations governing labour relations, can continue his/her work.

The National Assembly, with the majority of votes of the total number of deputies dismisses the Protector of Citizens, upon the proposal of the majority number of the members of the Com-

28 Op. cit., Article 9.
29 Op. cit., Article 38.

mittee or at least one third of the total number of deputies, **if he/she incompetently or with negligence in performs his/her duties**, if he/she holds other public function or engages in professional activity, duty or task that might influence his/her independence and autonomy, or if he/she acts contrary to the law regulating the prevention of the conflict of interests in performing public functions, if convicted for a criminal offence which makes him/her unsuitable for this function.

In the event of end of office of the Protector of Citizens, until the election of a new Protector of Citizens, a Deputy designated by the Protector of Citizens to replace him/her when absent or prevented from work shall perform this function.[30]

Serious objections could be made to the decision, which allows members of the Parliament, who are members of political groups that may participate in executive power, to have the opportunity to propose the dismissal of the Protector of Citizens **due to improper and negligent performance of his/her function**. The reason is more than obvious, this provision is a hole in the deck that can sink a ship. This provision allows a serious interference with the work of the Protector of Citizens, especially by political parties that have a large number of MPs. It does not have to be direct pressure; awareness of the fact that a certain group of 83 members has the ability to due to vague reasons propose the dismissal, and that for the dismissal only 125 votes are needed, is sufficient. The existence of **improper and negligent performance of duties** can be identified only by a body or individual expert in conducting those activities.

The provisions related to the end of office of the Protector of Citizens are also applied to his/her Deputies, and the proposal for their dismissal may also be made by the Protector of Citizens.

In some situations, the National Assembly, upon proposal by Committee, by majority votes, may reach a decision to suspend the Protector of Citizens.[31] These are situations where it is not sure yet, but there are indications that circumstances will occur that the make the Protector of Citizens unsuitable for performing this function. The Law lists two situations in which the Assembly may suspend the Protector of Citizens: if he/she has received measure of remand and if he/she is convicted for a criminal offence, which makes him/her unsuitable for this function but his/her sentence is still not enforceable. The Assembly will abolish a decision on suspension as soon as the reasons for suspension are terminated.

POWERS AND INSTRUMENTS

Control of administrative authorities and the protection of the rights of citizens as the main function of the Protector of Citizens are carried out through the powers vested in him/her by law. The Protector of Citizens has the power to supervise the respect of the rights of citizens, establish violations resulting from acts, actions or failure to act by administrative authorities, if they are violations of the laws, regulations and other general acts, and control the legality and regularity of the work of administrative bodies.

He/she has the power to propose laws within his/her jurisdiction, launch initiatives with the Government or National Assembly for the amendment of laws or other regulations or general acts, if he/she deems that violations of citizens' rights are a result of deficiencies of such regulations, launch initiatives for new laws, other regulations and general acts, if he/she considers it significant for exercising and protecting citizens' rights.[32] In the process of drafting of regulations, he/she gives his/hr opinion to the Government and National Assembly on draft laws and regulations if they concern the issues relevant for the protection of citizens' rights.

The Protector of Citizens is not authorized control the work of the National Assembly, President of Republic, Government, Constitutional Court, courts and public prosecution's office,[33] however, the President of the Republic, the Prime Minister and members of the Government, the Speaker of the National Assembly and officials in administrative agencies are obligated to

30 Op. cit., Article 16.
31 Op. cit., Article 13.
32 Op. cit., Article 17.
33 Op. cit., Article 17.

receive the Protector of Citizens at his request at latest within fifteen days.[34]

Although he/she cannot directly, indirectly he/she can initiate proceedings before the Constitutional Court for the assessment of legality and constitutionality of laws, other regulations and general acts, which govern issues related to the freedoms and rights of citizens[35]. He/she may appear in a double role, depending on whether he/she initiates proceedings on his/her own initiative, or a citizen's initiative.[36]

In the first case, the Protector of Citizens is the supervisor of legality of certain public authorities in directly or indirect way, and in the second case he/she represents in the broader sense advocate of the citizens or **advocate of the public interest.** He/she is authorized to initiate the procedure for the control of legality or constitutionality before the competent authority in a designated procedure, stepping as a representative of the public interest. He/she can also appear in the role of protector of the private interests of a person whose rights have been violated by the act or action of the government, in order to protect the public interest by providing good services, mediation and giving advice and opinions on matters within his/her competence.

Therefore, he/she can act preventively with the view of improving the work of administrative authorities and protection of human rights and freedoms[37], but also repressively, by recommending the dismissal of an official who is responsible for violation of citizen's right, i.e. through initiating disciplinary proceedings against an employee of the administrative authorities who is immediately responsible for performed violation.[38]

Certain elements of investigative and prosecutorial functions may be detected in the power of the Protector of Citizens to submit request, i.e. to file a motion to initiate misdemeanour, criminal or other appropriate proceedings, if revealed that activities of an official or an employee of the administrative authorities contain elements of criminal or other punishable act.[39]

He/she is authorized to carry out certain **investigative actions** not precisely defined, but their goal is defined, as well as obligation of administrative authorities to co-operate with the Protector of Citizens and enable his/her access to their premises and information available to them, which are of importance for the proceedings he/she runs, to enable him/her to interview any employee of administrative authorities when it is of significance for the proceedings he/she runs.[40]

If he/she finds that there were shortcomings in the work of administrative authorities, the Protector of Citizens will **make a recommendation to the authority on how the perceived lack should be eliminated**, and the administrative authority shall, within 60 days of receipt of the recommendation, inform the Protector of Citizens whether they acted in accordance with the recommendation and eliminated the shortcomings, or to inform him/her of the reasons why they didn't act in accordance with the recommendation.

His/her function of whistleblower evident in a situation where administrative authority fails to comply with the recommendation, when **the Protector of Citizens may notify the public, Assembly and the Government, and may recommend the establishment of responsibility of the official** managing this authority. [41] Determining of liability is carried out in a procedure, and influence of the personality of the Protector of Citizens, as well as his/her powers in terms of data availability, should speed up and ensure the objective course of the proceedings.

34 Op. cit., Article 23.
35 Op. cit., Article 19.
36 Op. cit., Article 24.
37 Op. cit., Article 24.
38 Op. cit., Article 20.
39 Op. cit., Article 20.
40 Op. cit., Article 21.
41 Op. cit., Article 21.

CONCLUSION

Although at first glance it may seem that the Ombudsman in the legal system of the Republic of Serbia was introduced for formal reasons, in order to meet certain requirements set in the integration process, a detailed analysis leads to the opposite conclusion. Control of the administration by the Ombudsman is a successful combination of legal (for example, initiation of proceedings, as can also be done by the public prosecutor) and political control of administrative authorities (in particular, the opening of a parliamentary debate about the responsibility of the minister in charge of some administrative body), which is in the modern conditions is necessary to overcome the shortcomings of the existing forms of administrative and judicial control of administrative authorities.[42]

As already said, the Protector of Citizens has the power to request from the administration under investigation to submit documents and other evidence, if necessary. As a rule, he/she does not have the authority to order corrective action or impose sanctions, but is limited to making recommendations to administration and relies on the pressure of public, parliament or the government as regards the implementation of the imposed measures.

Public pressure, although not legally binding, in democratic systems, and more and more in our country, has a huge impact, simply because wider discontent of the masses could undermine the legitimacy of the government. This is especially evident in low-population countries like ours, where it is possible that in the protest in which dissatisfaction is expressed, large share of the electorate of total of 6-7 million people participate.

In a sense, today the Ombudsman is one of the basic institutions of human rights, same as at the beginning of the last century, the judiciary was an institution of legality and the rule of law[43]. As pointed out, the essence of the institution of ombudsman is reduced to "its immanent eligibility to pierce magic bureaucratic circles and make impenetrable authoritarian administrative system more transparent, that is, accessible to parliamentary control and the general public." The effectiveness of this body comes primarily from its ability to, based on its report to parliament, draw the attention of the public and Parliament to citizens' complaints.

The mere awareness of the Ombudsman's control has a positive impact on the entire administrative system, making it transparent and righteous. [44] Control of the administrative authorities by the Ombudsman is a necessary instrument to overcome the shortcomings of the existing forms of administrative and judicial control of the administration in terms of its constant adaptation and mutation, with a tendency to establish unlimited power based on limited legitimacy.

REFERENCES

1. Бачанин Н., Управно право Крагујевац, 2000.
2. Борковић Иво: Управно право. Народне новине, Загреб 2002.
3. Bonnard R., Le controle juridictionnel de l adminisration, Paris, 1934.
4. B. Wieslander, The Parliamentary Ombudsman in Sweeden, The Bank of Sweden-Tercentenary Foundation,1994;
5. Васиљевић Драган: Управно право. Криминалистичко-полицијска
6. Данић Ј. Данило., Развитак административног судства у Србији и остале скупљене расправе из јавног права, Београд 1926.
7. Денковић Драгаш : Добра управа. Правни факултет Универзитета у Београду, 2010.
8. Денковић Драгаш, Омбудсман као заштитник законитости и права грађана, Анали Правног факултетау Београду, 2/1968.

42 Комитет правника за људска права,Београдски центар за људска права, Заштитник грађана - препоруке у пракси, p. 10.
43 Op. cit.
44 Op. cit.

9. Денковић Драгаш, Медијатор-француски омбудсман, Анали Правног факултета у Београду, 1-4/1983.
10. Duguit L., Traite de droit constitutionnel, II, Paris, 1921.
11. Диги Л., Преображаји јавног права, превео с француског Живојин П. Ристић, Београд, 1929.
12. E.C.S Wade, A.W Bradley, Constitutional and Administrative Law, Tenth edition by AW Bradley, Longman Group UK Limited, England, 1987.
13. Jacobini B., An introductionComparative Administrative law, Oceana Pubns, 1991.
14. Зборник радова са Саветовања правника у Будви, 10-12. јун 1996.
15. Јовичић М., Одговорност носилаца јавних функција, Београд, 1968.
16. Јанковић С., *Локални омбудсмани у Србији*, Правни билтен, Локална самоуправа: Прописи и пракса, бр. 4, 2010;
17. Кулић, Димитрије, Омбудсман и друштвени правобранилацсамоуправљања, Институт за правна и друштвена истраживања Правног факултета у Нишу, Ниш, 1985.
18. Кулић, Ж., Зашто нам треба омбудсман, Правни живот, 9/1995, стр. 765-778.
19. Кулић, Ж., Омбудсман је потребан свима, Правни зборник, 1-2/1998, стр.144-151.
20. Кутлешић В., Организација власти, Београд, 2002. академија, Београд 2011.
21. Лилић С.,: Управно право, Савремена администрација, Београд 2007.
22. Лилић С., Управно право, Управно процесно право, Правни факултет Универзитета у Београду, Јавно предузеће ‘’Службени гласник’’, Београд 2008.
23. Лилић С.,Миленковић Д., Ковачевић-Вучо Б., Омбудсман међународни документи упоредно право законодавство и пракса, Београд 2002.
24. Марковић Р., Управноправо, Београд, 2002.
25. Марковић Р., Уставно право и политичке институције, Београд, 1995.
26. Марковић Р., Извршна власт, Београд, 1980.
27. Mayer Otto, Deutsches Verwaltungsrechts, I, Munchen – Leipzig, 1895.
28. Милков Д., Судска контрола управе, Зборник радова „Управа у условиматранзиције“, Будва, 1995
29. Милков Д., Аустријски модел омбудсмана, Архив за правне и друштвене науке, 4/1991, стр. 493-510.
30. Милков Д., Институционални вид заштите грађана-омбудсман, Архив за правне и друштвене науке, 1/1992, стр. 173-185.
31. Милков Д., Управна контрола управе, Гласник права 3, 1992.
32. Миленковић Дејан, Јавна управа и административна правда: Управни трибунали у англосаксонском праву, Факултет Политичких наука, Годишњак 2009.
33. Миленковић Дејан, |Јавна управа, Факултет Политичких наука, Београд 2012.
34. Миленковић Д., *Упоредини преглед институције омбудсмана*, Комитет правника за људска права, Београд 2002.;
35. Милосављевић Богољуб : Управно право. Правни факултет универзитета "Унион", Београд 2008.
36. Pearson Linda (Facultu of law the Universitu of New South Wales), Tribunal Reviuw and Reworm: Quinsland s proposed Quinsland Civil and administrative tribunal
37. Поповић Славољуб, Управни спор у теорији и пракси, Београд, 1968.
38. Пусић Еуген: Наука о упрви. Правни факултет, Загреб 1986.
39. Пусић Еуген, Наука о управи, Загреб, 1973.
40. Радиновић Д.,Омбудсман и извршна власт, Београд 2001.
41. http://ombudsman.yucom.org.rs/zastitnik-gradana-pravni-okvir/

42. Claes Eclund, Act with Instructions for the Parliamentary Ombudsmen issued on 13. November 1986.;
43. C. Eclund, *Švedski parlamentarni ombudsmani*, Zbornik radova Pravnog fakulteta uNovom Sadu, br. 3-4, 1990;
44. Зборник радова Правног факултета у Новом Саду, бр. 3-4, 1990.;

Legislation:

1. Устав Републике Србије (2006)
2. Закон о министарствима, Службени гласник, 65/2008.
3. Закон о полицији, Службени гласник, 101/2005.
4. Закон о државним службеницима, Службени гласник, 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008.
5. Закон о спречавању сукоба интереса при вршењу јавних функција, Службени гласник, 43/2004.
6. Закон о јавним службама, Службени гласник, 42/91, 71/94, 79/2005, 81/2005, 83/2005.
7. Закон о територијалној организацији Републике Србије, Службени гласник, 129/2007.
8. Закон о локалној самоуправи, Службени гласник, 9/2002, 33/2004, 135/2004, 62/2006, 129/2007.
9. Закон о председнику Републике, Службени гласник, 111/2007.
10. Закон о Влади, Службени гласник, 55/2005, 71/2005.
11. Закон о јавном тужилаштву, Службени гласник, 63/2001.
12. Закон о заштитнику грађана, Службени гласник, 79/2005.
13. Закон о државној управи, Службени гласник, 79/2005.
14. Закон о општем управном поступку, Службени лист СРЈ, 33/1997, 31/2001.
15. Закон о управним споровима, Службени лист СРЈ, 46/1996.
16. Закон о управним споровима, Службени гласник, 111/2009.
17. Статут Аутономне покрајине Војводине, Службени лист АП Војводине, 17/91.
18. Одлука о покрајинској управи, Службени лист АП Војводине, 21/2002.
19. Повеља Уједињених нација
20. Универзална декларација о правима човека
21. Међународни пакт о грађанским и политичким правима
22. Факултативни протокол уз Међународни пакт о грађанским и политичким правима
23. Међународни пакт о економским, социјалним и културним правима
24. Европска конвенција за заштиту људских права и основних слобода са протоколима
25. Закон о Заштитнику грађана
26. Закон о забрани дискриминације
27. Закон о заштити података о личности
28. Закон о слободном приступу информацијама од јавног значаја

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GROUP AS A CONVENIENT MODE OF INTERNATIONAL CRIMINAL RESPONSIBILITY

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Abstract: Immediately after the WW II the concept of individual criminal responsibility (ICR) got its great breakthrough into the international sphere. It came drifting on the wings of cosmopolitanism and was presented as an antagonistic version of collective criminal responsibility. In years to come, due to the complexities of the establishment, the initial enthusiasm to institute ICR faded away. It was not before the last decade of the 20th century and the establishments of two ad hoc Tribunals that we can speak about ICR at the international level. With two ad hoc tribunals WW II cosmopolitan view relieved its renaissance making ICR a legal hype. Yet, in processes before said and later established ad hoc international and internationalized courts and tribunals ICR suffered certain modifications. A concept of a group appeared as a procedural and substantive necessity for the establishment of the ICR.

Due to the collective character of wars it was theoretically and practically impossible to focus on one person and consider that person as an exclusive perpetrator of international crimes. The environment of group ensued as a mode within which individuals gather to commit international crimes. Nowadays, in the international criminal law the environment of group portrays individual criminal responsibility thus presenting the crucial mode of international criminal responsibility. The way group entered into international criminal law discourse led certain authors to consider group responsibility as a sui generis character of international criminal law. Yet is the introduction of group environment a moniker for a different type of the international criminal responsibility?

Keywords: international crimes, cosmopolitanism, international criminal responsibility, individual criminal responsibility, group responsibility, collective responsibility.

INTRODUCTION

With the beginning of processes before the international military tribunals the concept of individual criminal responsibility (ICR) got its great breakthrough into the international sphere. It came drifting on the wings of cosmopolitanism and was presented as an antagonistic version of collective criminal responsibility in the world after World War II. To serve the cosmopolitan purpose, every relevant international organization and institution of that time was in the search for the most appropriate mode of ICR. The liability of individuals was envisaged to succeed the complex theory of state criminal responsibility and be a legitimate grounding for the condemnation of certain states' politics. The first institutional approach was the adoption of the UN Declaration of Human Rights in 1948 when the world "have entered a phase in the evolution of global civil society, which is characterized by a transition from international to cosmopolitan norms of justice. […] Cosmopolitan norms of justice, whatever the conditions of their legal origination, accrue to individuals as moral and legal persons in a worldwide civil society."[1]

After the initial enthusiasm to establish global cosmopolitan norms of justice and the great success of Eichmann trial, due to the theoretical stupor and practical torpor, the cosmopolitan view of individual criminal responsibility, dismally faded away. It was not before the last decade of the 20th century and the establishments of *ad hoc* Tribunals for the Former Yugoslavia and Rwanda it relieved the renaissance. Both *ad hoc* Tribunals, as well as later established international and internationalized tribunals,[2] returned the cosmopolitan view in the international academic circles thus making of it one of the keywords of our times. The approaches toward cosmopolitanism are different. To some it is "an attitude of enlightened morality that does not place 'love of country' ahead of 'love of mankind' (Martha Nussbaum); for others, cosmopoli-

1 Seyla Benhabib, *Another Cosmopolitanism* (Oxford University Press 2006), 15-16
2 About the difference between international and internationalized tribunals: Mr. sc. Marin Bonačić, 'Model internacionaliziranih kaznenih sudova: karakteristike i usporedba s *ad hoc* međunarodnim kaznenim sudovima' (1) 2012 Hrvatski ljetopis za kazneno pravo i praksu, 31-73

tanism signifies hybridity, fluidity, and recognizing the fractured and internally riven character of human selves and citizens, whose complex aspirations cannot be circumscribed by national fantasies and primordial communities (Jeremy Waldron). For a third group of thinkers, whose lineages are those of Critical Theory, cosmopolitanism is a normative philosophy for carrying the universalistic norms of discourse ethics beyond the confines of the nation-state (Juergen Habermas, David Held, and James Bohman).'[3] In the international criminal law it presents a theoretical basis for the establishment of ICR serving as an emblem of ethical universalism.

Through cosmopolitan norms of justice, at the international level, theories of cosmopolitanism served as theoretical grounding for the establishment of the responsibility of those who participated in the commission of international crimes. Due to the collectivity and globality of war, as an emblem of ethical universalism, the cosmopolitanism had to assume more global approach to the issue of ICR and observe individuality through the concept of the group. As in the practice of international courts and tribunals international crimes have been considered as acts of groups more than acts of individuals,[4] the 21st century cosmopolitan peception of ICR actuates in the environment of group.

THE ENVIRONMENT OF GROUP

Before international criminal courts and tribunals, due to the relationship between international criminal law and war, the collective character of war, the connection of war to state politics, actions of states, and etc, international crimes have for a long time been considered as collective acts, while ICR was observed as a part of group's activity. Before said international bodies, group has been observed as an ensemble of people joint with the same goals. Paradoxically, regardless of its collective character, the group liability presents a new mode of individual, based on the concept of group activity, not collective responsibility.[5]

To understand that, it is important to make a distinction between group liability and collective responsibility. Such a discernment is based on the standard of moral agency.[6] Yet, the distinction itself is very complex as the existence of group is based on the presumption of some sort of agency, which substance depends on the way group is created. Group can be created unintentionally, intentionally, with goals, aimlessly, with the purpose, joint features, or for any other reason relevant to its members. Regardless of the manner groups assemble in the majority of cases groups don't have the agency. For the group to have agency, members of the group have to transfer their authority and ability to make decisions on the group. In a way the transfer is conducted, the group may obtain the agency in two ways. "According to one[…], group agents exist when a collection of people each authorize an independent voice as speaking for them in this or that domain, committing themselves to be bound by it just as an individual is bound by what he or she affirms or promises. According to the other, group agents exist only when something much richer transpires; only, in an organic metaphor, when a collection of people are animated by a common purpose and mentality. We call the first approach the 'authorization theory' of group agency, the second the 'animation theory'."[7] Even if in both approaches the individual has to give up its individuality for the sake of the separate group identity, not one of those approaches grants the existence of the group's agency which is a pathway toward the collective responsibility. To gain such responsibility three more requirements have to be satisfied "*First requirement.* The group agent faces a normatively significant choice, involving the possibility of doing something good or bad, right or wrong. *Second requirement.* The group agent has the understanding and access to evidence required for making normative judgments about the options. *Third requirement.* The group agent has the control required for choosing between the options."[8]

3 S. Benhabib (n 1) 17-18

4 Randle C. DeFalco, 'Contextualizing Actus Reus under Article 25(3)(d) of the ICC Statute' (2013) 11 Journal of International Criminal Justice, 716

5 François Tanguay-Renaud, 'Criminalizing the State' (2013) 2 Criminal Law and Philosophy, 261. More on the principles of the establishment of the collective responsibility see: Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press 2011) 153-200

6 Moral agency presents an entity's ability to make moral judgment and acts in accordance with them.

7 C. List and P. Pettit (n 5) 7

8 C. List and P. Pettit (n 5) 158

In the international criminal law, last requirements are officially disregarded, as the intention is not to establish collective, but individual criminal responsibility using the structure of responsibility, yet not having the responsible group. In a very interesting analysis, Neta Crawford identifies three types of responsibility of groups relevant for the establishment of ICR.[9]

Organizational responsibility – this responsibility is based on the fact that in modern bourgeoisie states, the individual cannot act alone and that the group organization is a prerogative of individual's existence.

State responsibility – according to Crawford state is traditional medium for the acts of individuals. It, however, has independent and autonomous collective responsibility.[10]

Political/public responsibility – this is a typically Arendetic type of responsibility, within which Crawford attempts to set ICR premises on the basis of the political/public responsibility of all citizens.[11]

Traditionally, the group responsibility necessary for the creation of ICR is the organizational. Crawford traces back this type of responsibility to the Nuremberg processes, yet she is very unclear what presents organizations. Descriptively she links organizations to military, hierarchical, professional, governmental, cultural, bureaucratic organizations.[12] The relevance of this type of responsibility is to serve as a framework for the establishment of ICR, where natural persons "responsible for what a group does as designers of the group's organizational structure, as members of the group, or as enactors of the group's deeds: that is, as the agents who carry out its wishes. Or they may bear responsibility under more than one of these headings."[13] The organizational type of responsibility supported with common purpose, plan, hierarchy and bureaucracy in the international criminal law practice and theory is nowadays observed in concept of two:

Joint criminal enterprise (JCE), and

Control theory, Article 25 (3) of the ICC Statute.

JOINT CRIMINAL ENTERPRISE

The concept of JCE was first time mentioned in the Appeal Judgment in the Tadić case before International Criminal Tribunal for the Former Yugoslavia (ICTY). Even though, the concept of JCE wasn't prescribed by the ICTY Statute, the Appeal Chamber considered that the ICTY's "Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions."[14] Those conditions, according to the Appeal Chamber, present the objective element for the establishment of ICR of any international crime and are envisaged in the following criteria: "i. *A plurality of persons*. They need not be organised in a military, political or administrative structure […] ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise. iii. *Participation of the accused in the common design* involving the perpetration of

9 Neta Crawford, 'Individual and Collective Moral Responsibility for Systemic Military Atrocity' (2007) 2 The Journal of Political Philosophy, 198-206

10 N. Crawford (n 9) 202

11 N. Crawford (n 9) 203-206

12 N. Crawford (n 9) 200

13 C. List and P. Pettit (n 5) 163-164

14 Prosecutor v. Duško Tadić, (IT-94-1), Judgment of the Appeals Chamber of 15 July 1999, International Criminal Tribunal for the Former Yugoslavia, § 190 (Tadić Appeal)

one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."[15]

The interpretation of Tadić Appeal has in academic circles led to the differentiation to three different JCE categories "The first category is a "*basic*" form of JCE, which is characterised by cases all participants, acting pursuant to a common purpose, possess the same criminal intention. The second category is a "*systemic*" form of JCE, characterised by the existence of an organised system of ill treatment. The third category is an "*extended*" form of JCE, which involves responsibility of a participant in a JCE for a crime beyond the common purpose but which is nevertheless a natural and foreseeable consequence of carrying out the crimes forming part of the common purpose ("extended crime")."[16] To establish the responsibility through the JCE, thus, the plurality of persons, acting jointly and being convened with common intentions have to participate in the commission of international crimes, or at least in the commission of one crime.

Due to the lack of precision and clarity, the quest for the participation in the commission of at least one crime in the Kvočka et al case the standard of significant participation was introduced. [17] In later cases, the standard set in Kvočka was confirmed and even upgraded with the idea that the concept of significant participation presents "formal, yet flexible tool to exclude individuals from JCE liability who made minimal contributions to massive group crimes. For example, in Milutinović and others, the accused Milan Milutinović, who had served as the President of Serbia, been a member of the Supreme Defence Council (SDC) of the Federal Republic of Yugoslavia (FRY) and was also a close confidant of Slobodan Milošević, was acquitted of charges related to crimes committed throughout Kosovo."[18] The concept of significant participation was one of the leading parameters for the establishment of the ICR through JCE, in for e.g., cases of Krajišnik[19] and Brđanin.[20]

Given the fact that the significant participation standard enabled the establishment of the responsibility of undisclosed number of people, before the ICTY certain delimitating standards with the purpose to confine the application of JCE were established. For an individual to be prosecuted under the concept of JCE before tribunals preconditions were set to:

Plurality of persons,[21]

Common purpose that amounts to or involves the commission of a crime[22]

15 Tadić Appeal, § 227

16 Prosecutor v Popović et al (IT-05-88-T), Judgment– volume 2 of 10 June 2010, International Criminal Tribunal for the Former Yugoslavia, § 1021 (Popović Judgment). Division of JCE responsibilities to basic, systemic and extended is accepted by academia. For e.g. see Kai Ambos, 'Amicus Curiae Brief in the Matter of the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav „Duch" Dated 8 August 2008' (2009) 20 Criminal Law Forum, 356

17 "The participation in the enterprise must be significant. By significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution. In general, participation would need to be assessed on a case by case basis, especially for low or mid level actors who do not physically perpetrate crimes. It may be that a person with significant authority or influence who knowingly fails to complain or protest automatically provides substantial assistance or support to criminal activity by their approving silence, particularly if present at the scene of criminal activity. In most situations, the aider or abettor or co-perpetrator would not be someone readily replaceable, such that any "body" could fill his place. He would typically hold a higher position in the hierarchy or have special training, skills, or talents. The Trial Chamber notes, however, that much of the post World War II case law discussed above did attribute criminal liability to mere drivers or ordinary soldiers made to stand guard while others performed an execution. In addition, many of the post war cases did not entail repeated participation in a system of criminality, as the accused typically participated on an isolated occasion only. Domestic laws to hold individuals accountable for directly or indirectly participating in a single joint criminal endeavor." Prosecutor v Kvočka et al (IT-98-30/1), Judgment of 2 November 2001, International Criminal Tribunal for the Former Yugoslavia, § 309

18 R. C. DeFalco (n 4) 720

19 Prosecutor v Momčilo Krajišnik (IT-00-39), Judgment of the Appeals Chamber of 17 March 2009, International Criminal Tribunal for the Former Yugoslavia, § 215 (Krajišnik Appeal)

20 Prosecutor v Radoslav Brđanin (IT-99-36), Judgment of the Appeals Chamber of 03 April 2007, International Criminal Tribunal for the Former Yugoslavia, § 430 (Brđanin Appeal)

21 Persons don't have to know each other by name "it can be sufficient to refer to categories or groups of persons" Krajišnik Appeal, § 156

22 Which doesn't need to be previously formulated but may be "materialise extemporaneously and be inferred from the fact that a plurality of persons act in unison to put into effect a joint criminal enterprise" Popović Judgment, § 1024

Participation of the accused in the common purpose[23]

The application of those preconditions is nowadays a standard before international courts and tribunals. Due to the broad application of JCE, in the academic circles questions regarding over-extensive application of the JCE have been raised. According to some thoughts, the responsibility can easily be established if an accused "(1) share the intention to commit the original, planned crime; (2) foresee that this second crime might be perpetrated by other members of the JCE; and (3) by participating, "willingly [take] that risk."[24] The over-extensive application may lead to quick and easy convictions.[25]

In relation to the traditional forms and modes of responsibility „JCE liability is distinct from other modes of liability like aiding and abetting. The JCE doctrine serves an important purpose in capturing culpability in the context of collective criminality. There are two main differences between aiding and abetting and JCE liability: i. *Actus Reus*. Contributions with substantial effect on the perpetration of the crime are required for aiding and abetting liability; whereas for JCE liability, it suffices if acts are simply directed to the furtherance of the common plan. ICTY now describes the correct level as 'significant' […] It is worth noting that the accused does not have to personally perform any part of the actus reus. ii. Mental state. The requisite *mens rea* for aiding and abetting liability is knowledge that the acts performed assist in the commission of the crime, whereas more is required for JCE liability –either intent to pursue the common purpose or such intent plus foresight that crimes outside the common purpose are likely to be committed."[26]

The crucial difference between the JCE liability and traditional forms of perpetration is that JCE doesn't have an accessory nature. The difference was best explained in thePerišić case where the awareness "of the essential elements of the crimes, including the mental state of the principal perpetrators"[27] was required for the establishment of aider's and abettor's responsibility. In the Perišić Appeal, said requirement was additionally burdened with the *specific direction* requirement.[28] That requirement was confirmed in Stanišić and Simatović case,[29] but nullified before the Special Court for Sierra Leone where in the establishment of Charles Taylor responsibility as aider/abettor through the standard of direct assistance.[30]

Without further questioning of differences among modes and forms of responsibilities, the consequence of such questions asked before courts and tribunals is that the concept of JCE as presented in the Tadić case and focusing on all-level perpetrators, has changed and is nowa-

23 "An accused may contribute to and further the common purpose of the JCE by various acts, which need not involve carrying out any part of the *actus reus* of a crime forming part of the common purpose, or indeed any crime at all. While a crime must have been committed for liability through JCE to ensue, the Prosecutor need not demonstrate that the accused's participation is a *sine qua non*, without which the crime could or would not have been committed. There is no requirement that the accused is present at the time and place of perpetration of the crime. The Appeals Chamber has held that, for liability for participation in a JCE, it suffices that an accused perform acts 'that in some way are directed to the furthering of the common plan or purpose.' The participation or contribution of an accused to the common purpose need not be substantive, but 'it should at least be a significant contribution to the crimes for which the accused is found responsible." Popović Judgment, § 1023-1027

24 Alexandra Link, 'Trying Terrorism: Joint Criminal Enterprise, Material Support and Paradox of International Criminal Law' (2013) 34 Michigan Journal of International Law, 459

25 Shane Darcy, 'Imputed Criminal Liability and the Goals of International Justice' (2007) 20 Leiden Journal of International Law, 378

26 Antonio Cassese and members of the Journal of International Criminal Justice, 'Amicus Curiae Brief of the professor Antonio Cassese and members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine' (2009) 20 Criminal Law Forum, 300

27 Prosecutor v Momčilo Perišić (IT-04-81), Judgment of 06 September 2011, International Criminal Tribunal for Former Yugoslavia, § 1629)

28 Prosecutor v Momčilo Perišić (IT-04-81), Judgment of the Appeals Chamber of 28 February 2013, International Criminal Tribunal for the Former Yugoslavia, § 36

29 Prosecutor v Jovica Stanišić and Franko Simatović (IT-03-69), Judgment of 30 May 2013, International Criminal Tribunal for Former Yugoslavia, § 1264

30 "While the existing jurisprudence has not explicitly dealt with the distinction between direct assistance and specific direction, the two, arguably, differ in that direct assistance relates to the act itself and does not require the possible mens rea behind the act whereas specific direction - although dealt with under actus reus ç requires the accused intending his/her acts to contribute to the commission of the crime(s). Direct assistance could be towards a legitimate military objective, while the specific direction requirement serves exactly to distinguish such contribution from one where the accused intended to assist in the commission of a crime." Kai Ambos and Ousman Njikam, 'Charles Taylor's Criminal Responsibility' (2013) 11 Journal of International Criminal Justice, 805

days elevated to the leadership level.[31] The 'upgrade' was conveyed under the auspices of the greater focus on subjective rather than objective elements, and crucial importance of the common purpose precondition. "The structure of this type of JCE-liability with criminal objectives at meta-level and specific crimes at micro level, generated a theory of liability where the crimes committed by those on the ground ('relevant physical perpetrators' or 'principal perpetrators') are imputed to those at leadership level. This is a very different form of JCE as conceptualized in the Tadić. "[32] At certain point such reconceptualization led to the deviation of JCE doctrine and its confusion to, in the Stakić case, the control theory and indirect co-perpetration.[33]

CONTROL THEORY, ARTICLE 25 (3) OF THE ICC STATUTE

Due to the mass and collective character of war and the treatment of international crimes as collective criminal projects, a contemporary international criminal "jurisprudence oscillates between the doctrines of Joint Criminal Enterprise (JCE) on the one hand and co-perpetration and indirect perpetration on the other, as modes of attribution of responsibility for international crimes."[34] As JCE doctrine derives from "the doctrine of joint enterprise in English law' and the Pinkerton conspiracy doctrine in US law"[35] and was a primary doctrinal basis for the establishment of ICR before ICTY and International Criminal Tribunal for Rwanda (ICTR), the doctrines of co-perpetration and indirect perpetration heavily rely on theories "developed in German legal doctrine and jurisprudence"[36] and presents crucial doctrinal basis before the International Criminal Court (ICC). Those doctrines are known as control theory.

Legal basis for the new ICC approach is Article 25(3) of the ICC Statute, especially paragraphs (a) and (d) which state as following: "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; […]

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

Be made in the knowledge of the intention of the group to commit."

On account of the long tradition in the implementation of JCE doctrine, at the beginning of the ICC work "it remained unclear whether the Court would read-in JCE as an available mode of commission under Article 25(3)(a) or (d)."[37] As Article 25 corresponds "with this criterion for differentiating between principals and accessories",[38] because of the clear distinction between the perpetrator, aider and abettor within the JCE doctrine and as "JCE's 'significant act' requirement"[39] is very strict while contribution liability under Article 25(3)(d) currently lacks any definitive *actus reus* threshold, the ICC bluntly rejected the application of JCE and in it is landmark judgment in *Lubanga* case opted for the doctrine of control.

31 Indicators of such practice are judgments in cases of Krajišnik, Brđanin, Martić, Šainović and others. More on this Elies van Sliedregt, 'The Curious Case of International Criminal Liability' (2012) 10 Journal of International Criminal Justice, 1179

32 E. van Sliedregt (n 31), 1179

33 Prosecutor v Stakic (IT-97-24-T),Trial Chamber Judgment of July 31, 2003, International Criminal Tribunal for the Former Yugoslavia, § 438 - 441

34 Neah Jain, 'The Control Theory of Perpretration in International Criminal Law' (2011) 12 Chicago Journal of International Law, 162

35 N. Jain (n 34) 162

36 Thomas Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept' (2011) 9 Journal of International Criminal Justice, 92

37 R. DeFalco (n 4) 722

38 N. Jain (n 34) 182

39 R. DeFalco (n 4) 722

While examining different approaches of the perpetrators' accountability and parameters for the distinction between the responsibilities of different parties to the crime, in the Decision on the confirmation of Charges the Pre-Trial Chamber (PTC) in Lubanga Case inclined toward German control theory.[40] With regards to the application of the Article 25(3)(a), in the Judgment, the Trial Chamber (TC) interpreted the participation of the accused through the essential contribution criteria.[41]. According to the TC "the wording of Article 25(3)(a), namely that the individual "commits such a crime […] jointly with another", requires that the offence be the result of the combined and coordinated contributions of those involved, or at least two of them. None of the participants exercises, individually, control over the crime as a whole but, instead, the control over the crime falls in the hands of a collective as such. Therefore, the prosecution does not need to demonstrate that the contribution of the accused, taken alone, caused the crime; rather, the responsibility of the co-perpetrators for the crimes resulting from the execution of the common plan arises from mutual attribution, based on the joint agreement or common plan."[42] In the viewing of the TC, according to Article 25(3)(a) person commits the crime jointly with another person if the following objective criteria are satisfied: "(i) the existence of an agreement or common plan between two or more persons that, if implemented, will result in the commission of a crime; and (ii) that the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime."[43] The essential contribution of the perpetrator is not in the "direct or physical link between the accused contribution and the commission of the crimes"[44] nor in the direct presence at the crime scene, but in the joint control over the crime.[45] The high standard of the essential contribution criteria serves to differentiate between the responsibility of the principal and accessory contributors to the crimes, as well as to enable the blameworthiness of those who are the most responsible for the most serious crimes, i.e. leaders.[46]

In the academic circles, such interpretation initiated a debate whether the ICC interpretation of the control theory presents a new form the responsibility modes not conceived under the classic German control theory. The notion of the control of the crimes has, within the classic German theory, three basic manifestations: (i) direct perpetration, (ii) indirect perpetration, and (iii) co-perpetration.[47] The ICC introduced the new, forth manifestation, which is the combination of the second and the third manifestation. It earned the title - 'indirect co-perpetration'. According to Olasolo, this ICC's manifestation departs from traditional application schemes and is applicable in two "types of scenarios: (i) When several political and military leaders who have joint control over one hierarchical organisation (or a part thereof), such as the military, the police, large paramilitary groups or certain organised armed groups, use it to secure the commission of the crimes; (ii) When several political and military leaders, who are each of them in control of a different hierarchical organisation (or a part thereof) direct their different organisations to implement in a coordinated manner a common criminal plan."[48]

40 "It stated that the notion of "coperpetration" in the same Article must therefore cohere with this criterion for differentiating between principals and accessories.125 Thus, only persons who have control over the crime by virtue of the essential tasks assigned to them for the commission of the crime and are aware of having such control can be considered joint or co-perpetrators. Since the notion of "control" is at the heart of the Lubanga Chamber's adoption of co-perpetration, it would have been helpful for the Chamber to have expanded on what exactly control, especially "joint control," encompasses." N. Jain (n 34) 182

41 The Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06), Trial Chamber Judgment of 14 March 2012, § 989 (Lubanga Judgment)

42 Lubanga Judgment, § 994

43 Lubanga Judgment, § 1006

44 Lubanga Judgment, § 1004

45 Lubanga Judgment, § 1005

46 "The Majority is of the view that the contribution of the coperpetrator must be essential, as has been consistently and invariably established in this Court's jurisprudence.2705 The Statute differentiates between the responsibility and liability of those persons who commit a crime (at Article 25(3)(a)) and those who are accessories to it (at Articles 25(3)(b) to (d)). It would be possible to expand the concept of principal liability (or "commission" or "perpetration"), to make it more widely applicable, by lowering the threshold that the accused's contribution be essential. However, lowering that threshold would deprive the notion of principal liability of its capacity to express the blameworthiness of those persons who are the most responsible for the most serious crimes of international concern." Lubanga Judgment, § 999

47 Hector Olásolo, 'Joint Criminal Enterprise and Its Extended Form: a Theory of Co-Perpetration Giving Rise to Principal Liability, a Notion of Accessorial Liability, or Form of Partnership in Crime?' (2009) 20: Criminal Law Forum, 268

48 H. Olásolo (n 47) 269

ICC's interpretation of the responsibility through the control of crime was criticised by Judge Van den Wyngaert in her concurring opinion in *Ngudjolo* case. In her opinion, there was nothing in the ICC Statute that could have enabled such interpretation,[49] it was just the "sole purpose of capturing complex forms of collective violence"[50] that brought that kind of interpretation. In academic circles it lead to the opinion that the concept of control theory interpreted in the form of 'indirect co-perpetration' presents "a truly potent prosecutorial tool; it allows the conviction of defendants who are substantially removed from the physical perpetrator of the crime along two axes" as well as enabling the cross-liability where the leaders "become responsible not just for individuals under their command, but also for individuals that their collaborators command."[51]

With the broad interpretation of the co-perpetration in regards to the Article 25(3)(a) questions were asked about the difference between that and the responsibility under the Article 25(3)(d). In Lubanga case the Trial Chamber considered that "the critical distinction between these provisions is that under Article 25(3)(a) the co-perpetrator "commits" the crime, whilst under Article 25(3)(d) the individual "contributes in any other way to the commission" of a crime by a group of individuals acting with a common purpose. The Majority's view is that a systematic reading of these provisions leads to the conclusion that the contribution of the co-perpetrator who "commits" a crime is necessarily of greater significance than that of an individual who "contributes in any other way to the commission".[52] To establish ICR under the Article 25(3)(d), according to the recent practice before ICC, three grounds have to be satisfied: (i) there must be an organization/group with the common criminal purpose; (ii) the accused must contribute to the commission of crimes; and (iii) the degree of such contribution has to be 'significant'.[53] The requirement of significant contribution in regards to the responsibility under Article 25(3)(d) is of the crucial importance as „ many members of a community may provide contributions to a criminal organisation in the knowledge of the group's criminality, especially where such criminality is public knowledge. Without some threshold level of assistance, every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of 25(3)(d) liability."[54]

The concept of significant contribution is practically identical to concept of 'significant participation', developed within the JCE doctrine. Yet the ICC rejected such bonding claiming that "JCE and 25(3)(d) liability are also not identical, as similar as they may appear. […]However, both 25(3)(d) liability and JCE emphasize group criminality and actions performed in accordance with a common plan, which, when coupled with the fact that JCE requires a lower threshold of contribution than aiding and abetting at the ad hoc tribunals, makes the modern formulation of JCE's concept of a "significant contribution" relevant to the present discussion."[55] In the Decision on confirmation of charges in the Ruto et al case, the PTC 2 abandoned the significant contribution requirement stating that "the contribution under subparagraph (d) is satisfied by a less than "substantial" contribution, as far as such contribution results in the commission of the crimes charged"[56] thus making the difference between the responsibility of individuals among different forms of group activity even less visible. Furthermore, with conflicting interpretations and unset standards, the conviction of accused became its own goal; whereas the group became the most convenient mean.

49 Reference in Jens David Ohlin, Elies van Sliedregt and Thomas Weigend, 'Assessing the Control-Theory' (2013) 26 Leiden Journal of International Law, 734
50 J. D. Ohlin, E. van Sliedregt and T. Weigend (n 49) 726
51 J. D. Ohlin, E. van Sliedregt and T. Weigend (n 49) 735
52 Lubanga Judgment, § 996
53 R. DeFalco (n 4) 725
54 Prosecutor v Mbarushimana (ICC-01/04-01/10), Pre-Trial Chamber I Decision on Confirmation of Charges of 16 December 2011 [Mbarushimana PTC Decision], § 277
55 Mbarushimana PTC Decision § 282
56 The Prosecutor v. William Samoei Ruto, Heny Kiprono Kosgey and Joshua Arap Sang (ICC-01/09-01/11), Decision on confirmation of charges of Pre-Trial Chamber 2 of 23 Januar 2012, § 353-354

CONCLUSION

Apart from the clashing interpretations, theoretical challenges and reinterpretation of criminal theory, the establishment of ICR through the environment of group led certain authors, such as Ohlin, to collective character of international crimes claim as *sui generis* international mode of liability,[57] at the same time wondering whether international crimes are *per se* collective and group acts. The support for this can be derived from the practice of international courts and tribunals, which ICR set on three crucial paradigms: i) responsibility is linked to some sort of armed conflict; ii) common plan, common purpose, politics and state are platforms upon which responsibility exist; iii) responsibility of leaders is an international crimes intrinsic feature.

However, setting individual criminal responsibility on the existence of collective criminal project and plan, forming widespread participation, creating undefined roles of perpetrators, mixing them with different modes of co-perpetration, as well as inventing new ones, international courts and tribunals brought new interpretations in international responsibility. The focus has been moved from the individual to group, thus provoking the re-conceptualization of group responsibility, i.e. re-consideration of JCE responsibility and the re-articulation of control theory. The broadness of leaders responsibility, on the other hand, with the extensive interpretations of responsibility through group, introduced individual's as associative responsibility and re-launch (in)famous Nuremberg claim - "guilt by association". [58] Leaving doors ajar to wide-ranging interpretations of any individuals' responsibility, the new international courts' and tribunals' practice unclosed them to the application of collective. The cosmopolitanism has been once again at the verge of extinction.

REFERENCES

1. Ambos K, *Amicus Curiae Brief in the Matter of the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav „Duch" Dated 8 August 2008* (2009) 20 Criminal Law Forum.
2. Ambos K. and Njikam O, *Charles Taylor's Criminal Responsibility* (2013) 11 Journal of International Criminal Justice.
3. Benhabib S, *Another Cosmopolitanism* (Oxford University Press 2006).
4. Bonačić M, *Model internacionaliziranih kaznenih sudova: karakteristike i usporedba s ad hoc međunarodnim kaznenim sudovima*, (1) 2012 Hrvatski ljetopis za kazneno pravo i praksu.
5. Cassese A. and members of the Journal of International Criminal Justice, *Amicus Curiae Brief of the professor Antonio Cassese and members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine* (2009) 20 Criminal Law Forum.
6. Crawford N, *Individual and Collective Moral Responsibility for Systemic Military Atrocity* (2007) 2 The Journal of Political Philosophy.
7. Darcy S, *Imputed Criminal Liability and the Goals of International Justice* (2007) 20 Leiden Journal of International Law.

57 Jens David Ohlin, *Organizational Criminality*, 2012, available: http://ssrn.com/abstract=2153818, 28 October 2013, 11

58 "An interlinked JCE is a different idea. Under this model, the doctrine of JCE is used to link the horizontal members of a JCE at the leadership level, and the doctrine is also used to vertically link one member of the leadership JCE with mid-level officers and the RPP on the ground. The JCEs intersect because they have at least one member in common, namely the indirect perpetrator at the leadership level. Under this model, all members of the leadership level would be vicariously responsible for the crimes committed by the RPP. As Gustafson indicates, the interlinked JCE model 'does not require the principal perpetrators to be included within the scope of a particular JCE, while, at the same time, it provides a method of tracing liability from these principal perpetrators to higher-level accuseds'.21 However, it is unclear why the argument does not also work in reverse. If the two interlinked JCEs allow a court to trace liability up to the leadership level, why do they not also trace liability back down to the RPP as well? The JCE doctrine mandates that all members of the enterprise are vicariously responsible for the actions of its members." Jens David Ohlin, 'Second Order Linking Principles: Combining Vertical and Horizontal Modes of Liability' (2012) 25 Leiden Journal of International Law, 774-776

8. DeFalco C. R, *Contextualizing Actus Reus under Article 25(3)(d) of the ICC Statute*, (2013) 11 Journal of International Criminal Justice.
9. Jain N, *The Control Theory of Perpretration in International Criminal Law* (2011) 12 Chicago Journal of International Law.
10. Link A, *Trying Terrorism: Joint Criminal Enterprise, Material Support and Paradox of International Criminal Law* (2013) 34 Michigan Journal of International Law.
11. List C. and Pettit P, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press 2011).
12. Ohlin D. J, van Sliedregt E. and Weigend T, *Assessing the Control-Theory* (2013) 26 Leiden Journal of International Law.
13. Ohlin J. D, *Organizational Criminality*, 2012, available: http://ssrn.com/abstract=2153818, 28 October 2013.
14. Olásolo H, *Joint Criminal Enterprise and Its Extended Form: a Theory of Co-Perpetration Giving Rise to Principal Liability, a Notion of Accessorial Liability, or Form of Partnership in Crime?* (2009) 20: Criminal Law Forum.
15. Ohlin J. D, *Second Order Linking Principles: Combining Vertical and Horizontal Modes of Liability* (2012) 25 Leiden Journal of International Law
16. Tanguay-Renaud F, *Criminalizing the State*, (2013) 2 Criminal Law and Philosophy.
17. Van Sliedregt E, *The Curious Case of International Criminal Liability* (2012) 10 Journal of International Criminal Justice.
18. Weigend T, *Perpetration through an Organization: The Unexpected Career of a German Legal Concept* (2011) 9 Journal of International Criminal Justice.

CASES

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v. Duško Tadić, (IT-94-1), Judgment of the Appeals Chamber of 15 July 1999.
Prosecutor v Kvočka et al (IT-98-30/1), Judgment of 2 November 2001.
Prosecutor v Stakic (IT-97-24-T),Trial Chamber Judgment of 31 July 2003
Prosecutor v Radoslav Brđanin (IT-99-36), Judgment of the Appeals Chamber of 03 April 2007.
Prosecutor v Momčilo Krajišnik (IT-00-39), Judgment of the Appeals Chamber of 17 March 2009.
Prosecutor v Popović et al (IT-05-88-T), Judgment– volume 2 of 10 June 2010.
Prosecutor v Momčilo Perišić (IT-04-81), Judgment of 06 September 2011.
Prosecutor v Momčilo Perišić (IT-04-81), Judgment of the Appeals Chamber of 28 February 2013.
Prosecutor v Jovica Stanišić and Franko Simatović (IT-03-69), Judgment of 30 May 2013.

International Criminal Court

The Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06), Trial Chamber Judgment of 14 March 2012
Prosecutor v Mbarushimana (ICC-01/04-01/10), Pre-Trial Chamber I Decision on Confirmation of Charges of 16 December 2011 [Mbarushimana PTC Decision].
The Prosecutor v. William Samoei Ruto, Heny Kiprono Kosgey and Joshua Arap Sang (ICC-01/09-01/11), Decision on confirmation of charges of Pre-Trial Chamber 2 of 23 Januar 2012.

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PREVENTION OF CONFLICTS OF INTERESTS OF PUBLIC OFFICIALS CONDITION FOR STRENGTHENING THE INSTITUTIONS OF A LEGAL STATE

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Abstract: The subject of this study is the prevention of the conflicts of interest as a condition for strengthening the institutions of a legal state and improving civil rights and freedoms in the Republic of Serbia. The study explains general and legal definition of the term conflicts of interests as well as their different types ("the real" conflict of interests, nepotism, pantouflage). It also gives the shorter historical overview of regulations used to prevent conflicts of interests in Serbia, parallel legal regulations in the neighboring countries, positive constitutional and legal regulations used to prevent conflicts of interests of public officials in the Republic of Serbia. Further described are also the mechanisms for prevention of the conflicts of interests of public officials (preventive and repressive),the position and jurisdiction of the Anti-Corruption Agency concerned with resolving the conflicts of interests and the Agency`s practice on this. The significance of efficient actions that are taken in prevention of conflicts of interests in order to strengthen the institutions of a legal state is also mentioned in the study.

Keywords: legal state, public official, conflict of interest, nepotism, pantouflage

DEFINING THE TERM CONFLICT OF INTERESTS

A state established on the Constitution and Laws, where institutions function efficiently in order to protect the public interest and achieved level of civil rights and freedoms (a legal state) is a condition needed for having an efficient democratic society of today.

Public interest of a society involves the protection of its core values written in the form of the Constitution and Laws. As opposed to that we have private interest which stands for any material or some other gain that one member of a society can acquire for himself/herself or someone associated to them. Public interest and private interest of those who "serve the country" are very often contradictory. The aim of every state is to provide efficient protection of public interest. The antagonism between public and private interests of public officials is known as **conflict of interest.**[1]

Conflict of interests occurs when "an employee in a public sector or a state official do his/her job under the influence of private interests".[2]To put it simply, conflict of interest is a situation when the influence of the private interest of an official who has public function or people related to him is at a level (that can be real or just seem to be) which compromises the public interest. Conflict of interests is, seen in this way, the possibility (realized or unrealized) of a state official to achieve his/her or the private interest of a person related to him/her at the expense of the public interest.

CONFLICT OF INTERESTS IN THE PAST

The first more serious measures to help prevention of conflicts of interests were introduced in different European countries during the 19th century, after the end of the bourgeois revolutions, while in England and the USA even earlier. The so-called "old democracies" had regulations for prevention of conflict of interests written in the highest legal acts and they developed efficient measures for their prevention.

In the history of modern Serbia some regulations for prevention of conflict of interests are presented in the Constitutions of the Kingdom of Serbia from1888 and 1903[3], which (almost

1 "Conflict of interests is a situation where a public official has a private interest that affects, can affect or may seem to affect the official`s public function, in a way that compromises public interest"-Art.2 Anti-Corruption Agency Act ("Official Gazette of the RS",No. 97/08, 53/10 and 66/11-CS)

2 Jeremy Pope, Антикорупцијски приручник (Jeremy Pope, Confronting Corruption: The Elements of a National Integrity System) Transparency International, Београд, 2004, стр. 171

3 www.sr.wikisource.org/sr/Устав_Краљевине_Србије_(1888); www.sr.wikisource.org/sr/Устав_Краљев_Србије_(1903).

in the same way) prohibit the royal members to be ministers or police officials to candidate for members of the parliament. They also described restrictions for other officials with regard to applying for a public function of a member of the parliament. The Constitution from 1888 in the paragraph 99 states that "officials and all others working in a public sector would lose their position if they were to be elected for a member of the parliament and accept the mandate". The Constitution from 1903 applies this ban to presidents of municipalities.[4]

The Constitution of the Kingdom of Serbs, Croats and Slovenes from 1921[5] is very important for the institute of conflict of interests because it adds some new restrictions apart from the ones already mentioned:"Members of the Parliament cannot be state purveyors or state contractors "(art. 72. p. 2); "Police, financial and forestry officials as well as the officials concerned with the Agrarian Reform cannot candida

te unless they have stopped working at that position a year before the elections"(art. 73 p. 1)[6]."Other state officials with a public function cannot candidate for the elections in the area of their territorial jurisdiction. "(art. 73 p. 2);" The officials elected for the members of the parliament will be available during the mandate." (art. 73 p. 3).

During the second half of the 19th century political history of Serbia had a good example of personal contribution in preventing conflict of interests. The leader of the Liberal party, a diplomat and a statesman, Jovan Ristić, during the elections for a president of the government, froze his function of a president of the party until the end of his mandate. Similar examples in the years to come, even until today, haven`t been seen. The ones remembered are undoubtedly numerous corruption affairs of people who, thanks to their relations with ministers or royal court members, emptied the budget of Serbia (among others, there is the infamous "sugar affair" conducted by Nikola Pašić `son).

During the socialist period, which was marked by a democratic union of power which was a model of state organization, and by "unmistakable" communists` decisions made when electing people for public functions, there was no room for doubt that conflict of interests can occur while holding a public functions. That is why the regulations of the Constitution concerning prevention of conflict of interests were really rudimentary.

Not even the Constitution of Serbia from 1990 had too much interest in regulating restrictions concerning conflicts of interests. This highest legal Act of the Republic had regulations concerning conflict of interest in art. 86 p. 7 which prohibited the president of the republic from having any other public or professional function. Regulations from art. 100 and 105 of the Constitution say that a prosecuting attorney cannot work on jobs that are, by the law, incompatible with the judges` (prosecutor`s) function. On the other hand we have a very questionable regulation from the article 91 page 2 of the Constitution which states that the president, vice presidents of the government and ministers elected among members of the parliament have the right to keep the mandate of an MP.[7]

THE FIRST ATTEMPT OF A COMPREHENSIVE REGULATION OF CONFLICTS OF INTERESTS

The first serious attempt to regulate and prevent conflicts of interests was done in the Republic of Serbia in 2004 when the Law on Prevention of Conflict of Interests in Discharge of Public Office was passed[8]. On this occasion a Republic Board for resolving conflicts of interests of people holding public office was formed as an independent organ.

The conflict of interests is defined as a situation where a public official has a private interest that affects or can affect his public function. (art. 1 p.2).A public official must not put private interest before public nor should he/she cause the conflict. (art.1 p.1).A public function is a

4 This will become a serious legal question in Serbia hundred and seven years later.-ref DM
5 www.sr.wikisource.org/sr/Устав_Краљевине_Срба_Хрвата_и_Словенаца_(1921)
6 a very advanced article of the Constitution that mentions prohibition of the pantouflage.-ref DM
7 this regulation actually derogates the principle of power division ,proclaimed in the Constitution from 1990
8 „Сл. гласник РС", бр. 43/04

function that an individual acquires after being elected, appointed and nominated to organs of the Republic of Serbia, autonomous provinces , municipalities, towns and the city of Belgrade as well as to the organs of public companies founded by the Republic, autonomous provinces , municipalities, towns and the city of Belgrade(art.2 p.1). The conflict of interests of an official appointed to organs of institutions and other organizations founded by the Republic, autonomous provinces , municipalities, towns and the city of Belgrade can be regulated by special laws (art. 2, p.3). According to the article 4 p. 1of the Law, public official must not have any dependent relationship with persons who could affect his unbiased performance, nor can he use his position in order to gain any kind of benefit for himself /herself or others associated persons. According to the law associated persons are both spouse and unwed partners of an official, immediate family members, and relatives to a second degree , adoptee of an official and his/her adoptive parent, immediate in-laws family members and any other legal or physical entity who could be considered to have some kind of interest gain from a relationship with a public official (art.4 p.3)Public official has the possibility to accept another public function only if the organ who elected, appointed and nominated him agrees and if that does not contradict the restrictions from that or another law.(art. 5p. 1)A public official cannot consult legal and physical entities with the exception of MPs, ministers and aldermen.(art. 2).However he could have scientific, educational and cultural activities and earn from the author`s, patent`s, and similar rights regarding intellectual property(p.3).

The Law also stated all the actions prohibited for the public official while he is performing his public function. According to the article 6 of the Law, the official must not use his function to influence the decision of the legislative, executive or judicial government body in order to gain some benefit for himself/herself or somebody else, acquire some right or advantage, conclude a legal deal or in any other way use his/her position to suit private interests. He/she must not acquire a new or already existing right if the equality among citizens is violated nor can he/she misuse the special rights gained when appointed to the position. He/she cannot accept, ask for or take any gift or favor that could affect their vote or the decision of an organ, body or an individual. He/she cannot influence the public tenders nor use his/her knowledge and information gained through having public function, which were restricted to public, in order to gain his/her or somebody else`s benefit or damage interests of others. He/she must not restrict public approach to knowledge and announcements that are of public interest and not considered state, military or service secrets by any law, regulation or a decision made by the authorized organ.

The law regulates the managing rights transfer in trade and industry subjects (art.8) as well as the restrictions regarding the function in public companies, institutions and other subjects (art.9) with the exception of MPs, ministers and aldermen (art.10). The obligation an official has ,which is stated by the Law, is that he has to notify the Republic Board and the organ that elected ,appointed and nominated him to the function about the existence of conflict of interests(art.7) and to notify them about the influence that is affecting official`s unbiased public function.(art.11)

The Law didn`t control the obligation of the official to get the permission from the Republic Board when starting a different public function or a different job. This committee would later on determine the conflict of interests. In order to sanction confirmed violation of the Law or other laws that regulate the conflict of interests while holding a public function Republic Board had at its disposal very modest measures that couldn`t be efficient.

After the violation of Law regarding conflict of interest was determined by the Republic Board following measures were used:

-the measure of non public warning, pronounced when the violation of the law which didn`t affect the official`s function occurred, that is due to being late with the obligation regulated by law, (art.26)

-the measure of public announcement of the recommendation for dismissal was pronounced to an official to whom the measure of non public warning was previously pronounced and he/she didn`t comply with the decision in due time. This measure also applies when the official, against the law, claims the managerial rights in a company or holds a function in a public company or institution and uses the state capital or other economic subjects. It also applies when the official violates the law again even after he had been pronounced non public warning as well as

when that violation of law affects his public function. (art. 27)

- the measure of public announcement of the recommendation for the official to resign was issued if there were conditions needed to issue the measure of public announcement of the recommendation for dismissal to those officials elected by the organ directly elected by citizens. (art.28)

-the measure of the public announcement on the decision on the violation of the Act was pronounced to an official elected by citizens (art. 28)

-the strictest measure applied was immediate dismissal, meant for cases when a member of the Republic Board,the secretary or other employees of the board violated the law.

The Law on Prevention of Conflict of Interests in Discharge of Public Office didn't have the regulations predicted for determining the responsibility of the officials nor did the Republic Board had authority to start the legal proceeding at the court.

REGULATING CONFLICTS OF INTERESTS IN THE NEIGHBORING COUNTRIES

Among the neighboring countries the first one to regulate the matter of conflict of interests was Croatia by adopting the Law on prevention of conflict of interests in public functions [9] from 2003(this law was replaced by the Law on prevention of conflict of interests from 2011[10] only to be changed again in 2012).According to that Law conflict of interests occurs when official`s private interest is opposed to the public interest, especially when it influences official`s impartiality at his public function or if it considered that affects or can affect him. In order to determine the range of public officials Croatian legislative body chose the method of enumeration (stating who is considered a public official) and this method was modified by the Law of the amendments of the Law prevention of conflict of interests from 2011[11], when the range was expanded. Jurisdiction over measures pronounced for conflict of interests is assigned to the Committee for deciding about conflict of interest, formed as a part of Croatian Assembly (the highest legislative organ).Certain sanctions are predicted in case of the violation of the Law: a warning, deductions from the salary (200-500 Euros), public announcement of the committee`s decision, a suggestion to acquit the official from his function or the notice to resign. State officials can be fined in the legal proceeding because of the violation of this law.

Slovenia adopted the Law on prevention of corruption[12] in 2004, which provided a legal foundation for forming Committee on prevention of corruption-an independent state body that dealt with prevention of conflicts of interest. After six-year-practice of Slovenian Committee in 2010 a new Law of integrity and prevention of corruption [13]was adopted and this better regulated the conflicts of interest. Conflict of interest is defined as a situation where official`s private interest affects, or it seems to affect his impartial and objective public function performance. In order to prevent conflicts of interests Committee has the authority to determine what functions or jobs are incompatible with official's current function. They can also issue a warning to the official or direct the public call[14] when conflict of interest is determined. What makes the law effective are high fines (from400 to 4000 Euros per official) that are issued.

Macedonia [15] (2007) as well as Montenegro[16] adopted their Laws on prevention of conflict of interest. Bosnia and Herzegovina, due to the complicated state organization, still doesn`t have a unique regulation to help prevent conflict of interest.

9 Act on Prevention of conflict of interest in discharge of public function („Narodne novine", br. 163/03, 94/04, 48/05, 141/06, 60/08, 28/09, 92/10)
10 Act on Prevention of conflict of interest („Narodne novine",.26/11)
11 Narodne novine", 12/12
12 Anti-Corruption Act („Uradni list Republike Slovenije", No 2/04)
13 Anti-Corruption and Integrity Act („Uradni list Republike Slovenije", No 45/10)
14 Measures are final before the committee, the official doesn`t have the right to appeal, but he/she can start a dispute
15 Закон за спречување судир на интереси („Службени весник на РМ", бр. 70/07, 128/09, 6/12)
16 Закон о спрјечавању корупције („Службени лист Црне Горе", бр. 1/09, 41/11, 47/11)

POSITIVE CONSTITUTIONAL AND LAW FRAME FOR PREVENTION OF CONFLICT OF INTEREST IN THE REPUBLIC OF SERBIA

The Constitution of Serbia [17] from 2006 in article 6 explicitly defines the prohibition of conflicts of interests: no one can have a state or public function that contradicts his/her other functions, jobs or private interest (art 1); conflict of interest is determined and dealt with by the Constitution and Law (art 2). The Constitution contains the regulations for prevention of conflicts of interests in some branches of state authority.

According to the article 102 page 3 of the Constitution a member of the Parliament cannot be a member of the parliament of the autonomous province nor a functionary in executive and judicial government organs and he cannot have any other functions, jobs and duties that are determined by the law as conflict of interests. Article 115 of the Constitution forbids the President of the Republic to have any other public function or profession. The article 126 names the incompatible functions of the government members (a member of the Government cannot be a member of the Parliament in the National Assembly, he cannot be a member of the parliament of the autonomous province and he cannot be an alderman in the parliament of a local government unit; he cannot be a member of the executive committee of an autonomous province or executive organ of the local government. The law regulates which other functions, jobs and duties are in conflict with the member of the government`s position. Incompatible judges` functions are determined in the article 152 of the Constitution that forbids political activity of the judges(p.1) and the law regulates which other functions, jobs and private interest are incompatible with judge`s function(p.2).Article 153 page 5 forbids court presidents to be elected as members of the High Court Council. Article 163 of the Constitution forbids any political involvement of the public prosecutors and their deputies (page 1) and determines by law which other functions, jobs and private interests are incompatible with prosecutor`s function(page2).Conflict of interest of the Constitutional Court`s judges is regulated by article 173page 1 of the Constitution that states that they cannot have any other public or professional function or a job, except from the professor at the Faculty of Law in the Republic of Serbia. All the articles concerning prevention of conflicts of interests mentioned above provide a solid foundation to help better legal regulation of this matter both by the general law and by regulations in laws that regulates segments of state government, territorial autonomy and local government, public institutions, companies and services.

Anti-Corruption Agency Act [18] from 2008(practiced since 1.1.2010. with amendments from 6.8.2010. and 7.11.2011.) defines the matter of conflicts of interests. It defines basic terms slightly differently from the previous Law on prevention of conflicts of interest (art. 2). "**Public official**" is any person elected, appointed or nominated to organs of the Republic, autonomous provinces, local government units, public companies` organs, economic associations, institutions and other organizations founded by the Republic of Serbia, autonomous province, local government unit or another person elected by the National Assembly;"**private interest**" is any kind of benefit or an advantage for the public official or a person associated to him; "**associated person**" is official`s spouse or unwed partner, immediate family members , second degree relatives, adoptee of the official, adoptive parent of the official as well as any other legal or physical entities who can be connected with the official through interest gain;"**conflict of interest**s" is a situation where a state official has a private interest that affects, can affect or seem to affect [19] official`s attitude at his public function in a way that compromises public interest.

Regulations for prevention of conflict of interests are defined in the third section of the law under the name of "Conflict of interests"(art.27-28). Article 27 of the Agency Act contains general norms about prevention of conflict of interest and states that an official is obliged to has his public function in a way that he doesn`t put his private interest before the public and that

17 „Службени гласник Републике Србије", бр. 98/06
18 „Службени гласник РС", бр. 97/08, 53/10 и 66/11-УС
19 In theory this division is described as a division on "real", "probable" ,and "potential" conflict of interest. Refer to: Зоран Стојиљковић, *Држава и корупција*, ФПИН – Чигоја штампа, Београд 2013, стр. 226

he should respect the regulations that determine his rights and obligations. He should have and maintain citizens` trust by doing his work in a responsible and fair way. He should avoid any kind of relationships with people that could affect his fairness while holding a public function and he should try and do everything in his power to protect the public interest if he cannot avoid that kind of relationship or if it already exists. a public official cannot not use his/her public function to gain any benefit or advantage for himself or a person related. This section also covers regulations concerned with prohibition of having other public functions as well as the exceptions and the rules of conduct of the functionary who intends to have another public function in the cases when he does it extraordinarily, the rules of conduct for the agency(art. 28);regulations concerning state official`s functions in a political party, that is, political subject, the prohibition for the state officials to use public resources and meetings they attend as public officials in order to promote political parties,or subjects, except in cases of protection of official`s safety; the obligation to always clearly state to public and others if his opinion is the opinion of the organ where he has a public function or if it is the attitude of the political party, political subject(except for the officials elected directly by citizens)(art 29);regulations concerning restrictions, conditions and process for doing a different job or practice (art 30),regulations about official`s obligations when doing a different job or practice at the time of starting the public function(art 31),regulations concerning official`s obligation to report and the way to report conflict of interest or doubt about its existence(art32),regulations about prohibition of starting a company or a public service, prohibition of managing function, supervision or representing private capital in a company, private institution or other private legal entities during the public function mandate that requires full-time work (art 33);regulations about conditions and restrictions for membership of state officials in the association and its organs (art 34), regulations concerning managerial rights transfer during public function (art 35), regulations concerning notifying of the Agency during the public tenders(art 36),regulations about reporting the influence on the official(art 37) as well as the regulations about prohibition of work or business cooperation after the public function ends (pantouflage)[20] (art 38).

The Agency Act provides new solutions in regulating conflict of interests. There are more state officials. The term conflict of interest is expanded. It is not any more the situation when a state official has (or can have) private interest that could prevail at the expense of the public, but it is also a situation where it seems that an official has such conflict of interest. It is obvious that the intention is not only to try and prevent the conflict of interests but to, through decisions about incompatible functions and jobs,(that are either in dependant relation or the one of supervision or control)prevent the official from even having any occasion to be in that kind of a situation. Other solutions are about the official`s obligation to ask for permission in an appropriate way when starting another public function or when having another job apart from his public function, official`s obligations about memberships of associations and their organs, obligations about managerial right transfer, obligation to notify that a company where he is the owner(or a co- owner)participates in public tenders and the prohibition of pantouflage.

To determine violation of the Act the proceeding is led before the Anti-Corruption Agency and certain measures are determined and pronounced to the officials: warning, public announcement of recommendation for dismissing; public announcement of decision about the violation of Act(pronounced when the official was elected direct by citizens or when his public function stopped)The strictest measure that the Act states is the confirmation of function abolition on the basis of the Act for the officials that were doing their function against the regulations of the Agency Act[21].

"Tougher "regulations for measures are defined. If the measure of public announcement for recommendation of dismissal is pronounced the Agency filed the initiative for dismissal to the organ that elected, appointed and nominated the official. The organ should inform the Agency about the measures taken after the public announcement for recommendation of dismissal was pronounced no longer than 60 days after the Agency`s measure."(art 51 p 4) When it is deter-

20 Pantouflage –French origin-describes a situation where an official after retiring from a public function, uses information, knowledge and contacts acquired during the period of holding a public function in order to find an employment in a private sector company that deals with work in the field the official had at his public function

21 " Later function of a public official who has been elected, appointed and nominated to another public function against the regulations of the Act will be cancelled according to the Act." (art. 28. p. 7 Agency Act)

mined that the official violated the Act the Agency informs the organ in order to start a disciplinary, offense, or criminal proceedings stated by the Act(art 57 p 1)" "the Agency`s decisions cannot influence criminal and material responsibility of the official." (p2) "The organs from paragraph1 of this article are obliged to, no longer than 90 days after they receive the notice, informs the Agency about the measures they took." The Act contains regulations about punishment (art 72-73) where nine qualifications are regarding the offence responsibility caused by conflict of interests.

ANTI-CORRUPTION AGENCY AND RESOLVING CONFLICTS OF INTERESTS

Anti-Corruption Agency, based on Anti-Corruption Agency Act, as an independent state organ[22], is competent for resolving conflicts of interests and determining the violations of not just the Anti-Corruption Act but other laws and regulations that regulate conflicts of interests when holding a public function. The Agency (through its organs: director and the Board) gives opinion and attitudes towards law application; brings the decisions where it gives approval to the public officials (or rejects the requests) for having another public function, job or activity. It also gives permission to start working or cooperating with a company or international organization that does activities related to the public official`s functions. The Agency also regulates first degree and second-degree actions for determining violation of Anti-Corruption Agency Act and other act and regulations regulating conflicts of interests.

Resolving conflicts of interests has preventive and repressive character. Preventive aspect is about expressing opinion about law enactment in resolving requests from clients for getting approval for having more than one public function or having function and another work and duties, as well as the requests for work or cooperation after the function ends. Repressive is about conducting proceedings for determining conflicts of interests, issuing legal sanctions and starting legal proceedings before the adequate courts.

The Agency has, in its four-year-long practice, done more than 5000 subjects. Just for the sake of comparison, during this period there has been more than 1200 decisions of law enactment, in more than 120 as a measure for violation of the Act the immediate determination of the function was conducted, while in more than 50 cases the measure of public recommendation for dismissal was pronounced. This applied to officials on every level of power. Taking into consideration that the number of unsolved cases of the Agency is not worth mentioning, The Anti-Corruption Agency`s work is respectable. In a relatively short period the Agency has managed to become an institution where its decisions are taken seriously with great respect, which is important .There has been a development in mechanism of self control of large number of officials which is supported by a great number of requests for the opinion and notifications about an existing doubt of conflicts of interest. But what are these results?

The fight concerning dealing with prohibition of having parallel functions of an MP and of a mayor, led during 2010, was marked by the fact that majority of the national parliament that passed the Anti-Corruption Agency Act managed to dispute some articles of the Act before the Constitutional Court[23] because the agency applied the Act. During this process the National Parliament passed the Act about amendments to the Agency Act[24] , where by protecting the acquired rights to having more public functions made a soft version of the Act. The struggle culminated with the initiative of the Agency for processing the Amendments to the Agency Act and was finalized by the victory of the decision of the Constitutional Court[25] that determined that is impossible to have parallel MP and mayor`s functions. That was the first tangible evidence of success of the Agency in resolving conflicts of interests.

Other examples of success, rather than just giving the number of the officials that were "attacked" by the Agency, can be seen in following examples.

22 The Agency was started on the 1st January 2010

23 A group of MPs, members of the ruling coalition submitted a suggestion to the Constitutional Court for grading of the Constitution of the article 82 Agency Act („Службени гласник РС", бр. 97/08)

24 „Службени гласник РС", бр. 53/10

25 Decision of the Constitutional Court No. IУз бр. 1239/10 од 7.7.2011 („службени гласник РС", бр. 66/11)

The first example is the one of a member of the High Court Council[26] that the Agency processed for determining the violation of the Act because he had already had a public function (dean of a state faculty)but he acquired the function without the Agency`s approval. After determining the violation of the Act the Agency noted the discontinuation of his public function but the organ that elected him had to make that decision (in this case the National Parliament). The official appealed to the Agency Committee that denied the appeal and confirmed the first degree decision. After finalizing the decision the Agency submitted it to the National Parliament to be executed. The decision wasn't executed due to the illegal decision of the current parliament`s majority and the official continued with his function although the agency determined lawful determination. After forming of new parliament`s majority in July 2012, the official was removed from the function as a member of the High Court Council upon his own request. The Agency made a request for starting the legal proceeding against him at the court.

Another example was the processing of a dean [27]of a state medical faculty in 2012 who made decisions to hire around ten members of his immediate family and relatives (among others his daughter, son, son-in-law, daughter-in-law).That was a classic case of nepotism where an official used his authority to gain benefits for members of his family[28] .The Agency confirmed he was in conflict of interests, which breached the Agency Act. The measure of public announcement for recommendation of dismissal from duty was issued. The official appealed to the Agency`s committee and was denied. After finalizing the decision the Committee of the faculty received the initiative to remove him from the function. They informed the Agency in due time that they have understood the measure suggested but that they wouldn`t execute it due to the dean`s achievements .Dean`s function ended after the mandate after which he was appointed by the new dean to the function of the vice dean for financials. According to the Agency Act this function isn`t considered to be a public function. In the meantime the official was suggested for the vice chancellor of the state university but his election was prevented by the efficient Agency`s campaign. Based on the request the Agency submitted to the court the official was punished and fined. Soon after,he was arrested on the suspicion of having done illegal actions while he was holding a public function.

The third example is one of a director of a clinic [29] founded by the capital city. The Agency started the procedure against him on the doubt of existing conflict of interests. It was determined that the official had conflict of interest because he, as a director, made a decision 11 times to conclude contracts with pharmaceutical companies to conduct clinical examination of medicines. On one hand he is obliged to let clinical resources to be used and on the other hand he made contracts with the same companies where he was appointed the main researcher. The decision from the Agency`s director was the measure for public announcement of dismissal. The committee denied the official`s appeal thus making the decision final. The official was removed from his position by decision of the organ who appointed him.

RESOLVING CONFLICTS OF INTERESTS AND STRENGTHENING INSTITUTIONS OF A LEGAL STATE

Conflicts of interest of public officials, as seen in practice, are the introduction of a serious corruption. Having in mind that corruption has a devastating impact on a legal state, efficient combat with any kind of conflict of interests is an important condition to protect and strengthen all the institutions of a legal state. The boundaries of efficient dealing with conflict of interests should always move up with every new successfully ended process. The need to resolve conflicts efficiently is determined by new national strategy for anticorruption in the Republic of Serbia for the period from 2013 to 2018[30]. Anti-Corruption Agency has a lot of importance in

26 Group of authors, *Водич кроз праксу Агенције за борбу против корупције,* Београд 2013, стр. 58
27 Group of authors, *Водич кроз праксу Агенције за борбу против корупције,* Београд 2013, стр. 116
28 Џереми Поуп, Наведено дело, стр. 173; у вези са наведеним види и: Сјузан Роуз-Ејкерман, *Корупција и власт – узроци, последице и реформа*, (Susan Rose-Ackerman, *Corruption and Government, Consequences and Reform*), Службени гласник, Београд, 2007, стр. 88
29 Group of authors, *Водич кроз праксу Агенције за борбу против корупције,* Београд 2013, стр. 93
30 „Службени гласник РС", бр. 57/13`

this, having dealt with this social problem firmly over the past four years and having achieved significant results. The results could have been better but there were numerous occasions when the agency worked with limited capacities[31].

The problem`s gravity and the practice done so far initiated the need to have better agency`s capacities (more employees and bigger authorities) and having more detailed law regulations as a stable base for efficient prevention of conflicts of interests. This was predicted by the Action Plan of the National Strategy for anticorruption fight. Considering all the "life "situations that lead to conflicts of interests and the effects of sanctions implemented so far suggestions for amendments to the Agency Act were given in order to have better efficiency and wider sanctions. The suggestions are so bold(for example restricting the official to only one public function and prohibiting reapplying on for the function previously sanctioned by the agency) that it seems that, although necessary, their adoption in the Parliament is almost impossible. But as Ernesto Che Guevara used to say "Let`s be realistic and ask for impossible."

REFERENCES

1. Група аутора, *Водич кроз праксу Агенције за борбу против корупције,* Београд, 2013;
2. Jeremy Pope, *Confronting Corruption: The Elements of a National Integrity Sistem*, TI Source Book, 2000;
3. Susan Rose-Ackerman, *Corruption and Government, Consequences and Reform*, Cambridge University Press, 2006;
4. Устав Краљевине Србије из 1888
5. Устав Краљевине Србије из 1903
6. Устав Краљевине Срба, Хрвата и Словенаца из 1921
7. Устав Републике Србије из 2006. („Службени гласник РС", бр. 98/06)
8. Закон о Агенцији за борбу против корупције („Сл. гласник РС", бр. 97/08, 53/10 и 66/11-УС);
9. Zakon o integriteti in preprečevanju korupcije („Uradni list Republike Slovenije, No 45/10);
10. Закон о спрјечавању корупције („Службени лист Црне Горе", бр. 1/09, 41/11, 47/11);
11. Zakon o sprječavanju sukoba interesa Republike Hrvatske („Narodne novine", br.26/11);
12. Закон за спречување судир на интереси („Службени весник на Република Македонија", бр. 70/07, 128/09, 6/12);
13. Зоран Стојиљковић, *Држава и корупција*, Београд, 2013.

31 In order to resolve conflict of interests a Department for resolving conflicts of interests was formed as a part of the Agency in 2009 containing 9 positions. I n 2012 the department was promoted to the rang of an independent department but the number of positions wasn`t raised. However, the department for resolving conflict of interests has never been occupied with more than 2/3 of working positions since the beginning of the agency`s practice.

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ELECTRONIC SURVEILLANCE AS A NEW MEASURE TO COUNTERACT CRIME

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Abstract: Due to the different stages in which electronic surveillance is applied, of which depends what do you want to achive with surveillance, tupically vary two ways of application that can be called previous and subsequent. The first type of program (so – called front door) means that the electronic surveillance applies with house custody as a substiute for imprisonment or within probation (criminal aspect) or electronic surveillance applies in the investigation as an altenative to custody or other measures to ensure the presence of the defendant at trial (criminal procedural aspect). Other programs (back doors) ae focused on the use of electronic surveillance after serving prison sentance, during probation. In the second case, electonic surveillance is used as a quick and easy way of checking the behaviour of the convicted person who is released on parole from prison facilities (criminal aspect).
Keywords: house prison, house custody, probation, parole, independent punishment, independent measure

CRIMINAL ASPECT OF ELECTRONIC SURVEILLANCE

Seen only in relation to prison punishment, electronic surveillance is undoubtedly an important alternative to this punishment. Electronic surveillance may be a direct alternative to imprisonment when the electronically controlled house prison is defined as autonomous sanction instead of imprisonment. Also, electronic surveillance may be a direct alternative to imprisonment and when it combines with work in public interest, suspended sentence or probation, when the convicted person literally does not go in jail.

As a partial alternative, electronic surveillance may reduce the term of imprisonment, or time spent in prison (when it combines with early parole,parole, conditional pardon, etc).

Finally, electronic surveillence may affect the reduction of hours that convicted person spends in prison during the day, if applies while convicted person work outside of prison or while convicted person is on semi-liberty as the examples from France[1] show.

The Criminal Code of the Republic of Serbia following four types o criminal sancions.

- penalties,
- precautions (suspended sentance and judicial admonition)
- security measures
- corective measures

Given the above could be talking about pluralistic system of criminal sanctions. However, it is a dualistic system of criminal sanctions where, on the one hand appear penalties, an on the other hand appear security measures. Precautions are an alternative to penalties and they are difficult to imagine without penalties, and corrective measures are acctually a special kind of security measures that apply to juveniles.

1 P.V. Tournier,P.V., *Towards prisons without inamtes?* Re: the Introduction of Electronic Monitoring in France, Penological Information Bulletin, decembar 2002, br.23-24, page 53.

System o penalties in Serbia legislation includes four penalties.

- prison,
- amercement
- work in public interest
- revocation of driver`s license

Under the Criminal Code (Article 45, paragraph 5 – 7) and the Law on execution of criminal sanctions (Article 174 đ), in Serbia electronic surveillance can be used as a direct alternative to imprisonment with electronically controlled prison sentence in the premises in which convicted person resides (so-called house prison), as a modality of imprisonment. This is because, although it is possible to predict more than one type of prison sentence, Serbian legislator opted for only one type: prison.

According to article 45 paragraph 5 of the Criminal Code (CC), for offenders who are sentenced to imprisonment less than one year, the court may order that the sentence execute on the premises in which the convicted person resides, if the personality of the offender, his earlier life, his behavior after the crime, the degree of the culpability and other circumstances under which the crime is commited, indicate that in this way the purpose of penalty will be achieved. It follows that the legislator prescribed that court (when deciding about house prison) sholud take into account only some of the circumstances which are according to article 54 paragraph 1 of Criminal Code important for sentencing.[2]

Convected persons who is sentenced to serve a prison sentence in the premises in which they reside musn`t leave these premises, except in cases prescribed by law which governing the enforcement of ciminal sanctions. If convected person once for more than six hours, or twice less than six hours, voluntarily leave the premises in which he resides, the court will order that the rest of the sentence execute in the institute for the execution of sentence or in prison (article 45 paragraph 6 of CC). Execution of a sentence of imprisonment in this way can not be detremined to a defendant who is convicted for crime against marriage and family if defendant live in the same household with victim (article 45 paragraph 7 CC).

It shold be noted that the use of electronic surveillance in the execution of a sentence of imprisonment in the premises in which convicted person resides is not addmissible under the ciminal law, but under the law on the execution of ciminal sanctions.

In the article 174dj paragraph 1 of the Law on Execution of Criminal Sanctions is envisaged that after the court decision that convicted person sholud serve sentence of imprisonment in the premises in which he resides, with the use of electronic surveillance, use of electronic surveillance implements an organizational unit within the Directorate for execuion sanctions in cooperation with the police.

Device for locating convicted person (transmitter with accessories) which is safe for health, install an expert, who gives detailed instructions to the convicted person about devices work mode.

Organizational unit within the administration of execution criminal sanctions in charge of the treatment and alternative sanctions handle with devices which remotely monitors the movement of the convicted person and his position in space. The way of execution of imprisonment wthout leaving the premises in which convicted person resides is regulated precisely by an act passed by the Minister of Justice.

2 Circumstances which affect on sentencing are: the degree of culpabilities, motives for crime , severity of injury or severity of threat to the protected object, circumstances under which the crime was committed, earlier life of offender, his personal situation,his conduct after the commision the crime, especially his behavior to the victim and other circumstances relating to the personality of the offender.

With electronically monitored house prison offender is apprehended but not in the penitentiary. That is way, between the sentence of imprisonmen which is not executed in penitentiary (which regardless o th place of execution doesn`t lose the essence) and imprisonment (which runs in penitentiary) is necessary to make a difference, and as a penalty, in addition to the prison sentence, should introduce deprivation of liberty which is not execute in penitentiary, meaning introducing house prison as an independent sentence.

Also, the possibility of using electronic surveillance in the execution of a sentence of imprisonment in premises in which convicted person resides, besides the Law on Execution of Criminal Sanctions, should be determined and by the Criminal Code because Criminal Code determines the type of criminal sanctions and the type of criminal penalties. Thus we have a situation that the article 174dj paragraph 1 of the Law on Execution of Criminal Sanctions provides possibility of using electronic surveillance in execution a sentence of imprisonment in premises in which convicted person resides,and the Criminal Code is not foreseen such possibility of using electronic surveillance.

Also, the electronic surveillance in Serbina criminal law in the future should apply on suspended sentence (with supervision) and probation, for which is needed to make a legal basis.

CRIMINAL PROCEDUAL ASPECT OF ELECTRONIC SURVEILLANCE

Electronic surveillance could be applied at various stages of treatmant of the suspected , accused or convicted person. It is possible that electronic surveillance is applied during the investigation or trial as a substitute for detention or bail, usualy applying in the form of so-called passive colateral with the consent of the defendant (for example in the UK, U.S., Australia,Canada, mostly in the form of house prison).

Unlike the previous Criminal Procedural Code (CPC) which is within one mesaure, prohibition of leaving the apartment or place of residence, where were included several mesaures, either as independent or adhesion (prohibition of leaving the apartment or place of residence, prohibition from visiting certain places, prohibition of meeting with certain persons or approaching to certain persons, order to defendant to report periodically to state authority, seizure of travel documents or driving license) in article 188 of the new CPC as an independent measures are foreseen: prohibition of leaving the apartment, prohibition of leaving place of residence, prohibition of approaching, meeting or communicating with a certain persons.

According to article 208 of the new CPC prohibition on leaving the apartment is independent measure (so-called home prison) separate from the prohibition of leaving the palce of residence. Comparate to the previous CPC according to which the measure prohibition of leaving the apartment was possible to apply just in case there are circumstances which indicate that the defendant could escape or hide, according to the article 208 paragraph 1 and article 211 paragraph 1 points 1,3 i 4 new CPC there is a possibility for the expanded application of the prohibition on leaving the apartment, so this measure is also applicable in the case of:

- if defendant is hiding or his idenity can`t be determined or defendant clearly avoide to come to the trial or if there are other circumstances which indicate on risk of escape.
- if special circumstances indicate that defendant in the short peiod of time is going to repeat the crime or complete an attemped crime
- if the crime for which defendant is charged is punishabled by imprisonment for more that ten years or punishable by imprisonment for more than five years for the crime which involving violence or defendant judgment on the court of first instance was five years or more imprisonment and method of execution or the seriousness of the crime led to public concern which may jeopardize the smooth and fair conduct of criminal proceedings.

Comparing to the previous CPC, extension measure of home prison or prohibition to leave the apartment is justified in case that special circumstances indicating that the defendant in a short peiod of time is going to repeat the crime or complete attemped crime or do a crime which threatens.

However, it is not justified extension of this measure in the two cases where the seriousness of the crime and particularly difficult circumstances of crime (in case of a crime for which the defandant is charged is punishabled by imprisonment more than five years, or punishabled more than five years for a crime which inolving violence or defendant judgment on the court of first instance was five years or more in prison and method of execution or the seriousness of the crime led to public concern which may jeopardize the smooth and fair conduct of criminal proceedings) would not justify the application of prohibition house apartment instead of detention.

On the other hand, it is not justified why the article 208 paragraph 1 of the new CPC doesn`t contain reason from article 211 paragraph 1 of the new CPC (if there are circumstances which indicate that the defendant will destroy, hide, change or falsify evidence or clues of crime, or if praticular circumstances indicate that the defedant will obstract the process by influencing on witnesses, accessories o accomplicies).

Exception in which the defendant may have leave his apartment without approval is in case if it is necessory for emergency medical intervention relating on defendant or to the person with he lives with in the apartment, or to avoide or prevent a serious threat to the life or health people or property with bigger value. Without delay defendant is obliged to inform trustees from administrative body responsible for execution of criminal sanctions about reasons for leaving apartment and place where is he currently located.

According to article 190 paragraph 1 of the new CPC, electronic surveillance may be used only as a adhesive masure in the case of the imposition mesaure of prohibition apartment (so – called home prison) and such a narrow use of electonic surveillance is not justified. Use of electronic surveillance as a control measure should be possible in the case of imposition measure of prohibition leaving place of residence or prohibition of approaching, meeting or communicating with a certain persons. Also, the use of electronic surveillance should be possible as an independent measure with the purpose to prevent defendant`s influence on the accesories or accomplices, or if there is a risk that the defendant is going to complete attemped crime, repeat the crime, or to commit a crime that he threatens with.

According article 208 of the new CPC with the measure prohibition of leaving apartment , as adhensive measures, can`t be imposed measures: 1) prohibition from visiting ceratin places, 2) prohibition of meeting with certain persons or approaching certain persons, 3) an order to defendant to report periodically to a specified state body, 4) temporarily seizure of passport or driving license.

However, according to article 188, article 189 paagraph 2 and article 197 of the new CPC, some of these measures may be imposed in addition to measure of prohibition of leaving apartment as independent measure (prohibition of approaching, meeting or communicating with a certain persons).

According the previous CPC, the first adhesive measure (prohibition of visiting certain places) and some part of the second adhesive measure (prohibition of approaching to certain persons) are incompatibile with the nature o measure prohibition of leaving the apartment, and some part of the earlier second adhesive measure now can be imposed as an independent measure (prohibition of meeting or communicating with certain person) so it is justified that new CPC omitted prohibition of visiting certain places and prohibition of approaching, meeting and communicating with certain person as adhensive measures with prohibition of leaving apartment

On the other hand, it is not justified that order the defendant to report periodically to a specified state body and temporarily seizure of passport or driving license are omitted as adhesive measures which could be applied with measure prohibition o leaving the apartment. Order the defendant to report periodically to the specified state body and temporarily seizure of passport or driving license may be a good preventive measures for implementation measure prohibition of leaving the apartment.

From the perspective of the right to pivacy, article 208 of the new CPC omitted to regulate that this measure can not limited the right of defendant to see family members and close relatives, unless such persons are not included in the measure fom article 197 of the new CPC (prohibition of approaching, meeting o communicating with defendant). The same applies to the right of the defendant to see with a lawyer ,which was provided in article 136 paragraph 3 of the previous CPC.

Measure prohibition on leaving place of residence in article 1999 of the new CPC is also defined as an independent measure. Conditions for the implementation of these measures are the same as conditions for implementattion measure of prohibition leaving apartment or prohibition of leaving place of residence from article 136 paragraph CPC previous CPC, that there are circumstances which indicate that defendant could:

- escape,
- hide, or
- go to unknown place or abroad

In the case of some of these circumstances the court may prohibit the defendant to leave without permission place of residence or territory of the Republic of Serbia. Under article 136 of the former CPC defendant without prior approval of the court could not leave apartment or place of residence.

According article 199 of the new CPC conditions for application these measure are set broader so that these measure can be imposed on that way that defendant without permission of the court may leave the place of residence but not the territory of the Republic of Serbia. Therefore, the name of this measure should be prohibition of leaving place of residence or territory Republic of Serbia (not just prohibition of leaving place of residence) because residence of the defendant can`t be on the whole territory of the Republic o Serbia, but just a certain place.

With measure prohibition of leaving place of residence, as adhnsive measure stil can be imposed:

- prohibition of visiting certain places
- order to defendant to report periodically to a specified state body
- temporarily seizure of passport or driving license

Article 199 paragraph 3 of the new CPC stipulates that the use of prohibition of leaving place of residence or adhesive measures can`t limited right of defendant to see family members , close relatives and lawyer, but it was missed to provide the exception from this right in cases when of these persons are included in the measure from article 197 of the new CPC (measure prohibition of approaching, meeting or communicaing with defendant).

As we already mentioned, it is not justified that measure prohibition of leaving place of residence isn`t accompanied with electronic surveillance as an adhesive measure, because the use of electronic surveillance could provide an adequate control and timely response during the application of these measure, especially in cases in which defendant go toward the border.

Measure prohibition of approaching, meeting or communicating with a certain person, according article 197 of the new CPC is an indepedent measure. Conditions for the implementation of these measure are that there are circumstances which indicate that the defandant will:

- obstruct the process by influencing on victims, witnesses, accessories or accomplicies
- repeat crime, complete attemped crime, commit a crime which he threatens with

As an adhesive measures with this measure, the court may order the defendant to report periodically to the police, trustee from the state bodie which is in charge for the execution of criminal sanctions or other state agency.

It is not justified that the measure prohibition of approaching, meeting or communicating with a certain person isn`t accompanied with electronic surveillance as an adhesive measure because the use of electronic surveillance could provide an adequate control and timely response during application of these measure especially in case prohibition of approaching to the victim.

PROPOSALS *DE LEGE FERENDA*

1. In article 43 of the Criminal Code, besides penalty of imprisonment, which executes in penitentiary, it should introduce and penalty deprivation of liberty which doesn`t execute in penitentiary (house prison as independent measure).

2. In the article 45 of the Criminal Code, after paragraph 5 should be added a new paragraph which explicity should provide possibility that the execution sentence of imprisonment without leaving premises where defendant resides can apply with measure of electronic surveillance.

3. Article 46 of Criminal Code should explicity provide possibility that the court`s parole decision may contain order that defendant must fulfill at least some of obligations stipulated in conditional sentence with supervision.

This solution could have application especially at early parole which exists in comparative law that under these conditions (that defendant must fulill some of obligations that are stipulated in the conditional sentence with supervision) in our criminal law in future could apply on defendant who has served lass than two-thirds of his prison sentence.

Electronic surveillance could have significant applications on the imposition on early or ordinarally parole with the obligation to refrain from visiting ceratin places, bars or events, which manifests the most important advantage of parole and electronic surveillance compare to sentence of prison (less retributive and cheaper measures).

4. In the article 73 paragraph 1 point 5 should provide possibility that the court may impose electronic surveillance with suspended sentence which include supervision. This option unless by Criminal Code should be provided and by the Law on Execution of Criminal Sanctions.

5. According to article 190 of the new CPC, electronic surveillance may be used only as an adhesive measure in the case of the imposition measure probation of leaving apartment. The use of electronic surveillance in the new CPC is limited to the case of controling measure probation of leaving apartment.

The use of electronic surveillance as control measure should be posssible in case of using measure prohibition of leaving place of residence and measure prohibition of approaching,meeting

and communicating with certain person. In this case the use of electronic sureillance could provide an adequate control and timely response during the application measure of prohibition leaving the place of residence in case where defendant refer to the border (in case if defendant try to leave the territory of Republic of Serbia) as well during the application measure of prohibition approaching, meeting and communicating with ceratin person, especially in case of prohibition approaching to the victim.

6. Also, the use o electronic sureillance in the new CPC should be possible as an independent measure to prevent the defendant`s influence on accesories and accomplices, or if there is a risk that defendant is going to complete attemped crime, repeat cime or commit crime that he treatens with.

REFERENCES

1. 1. **Albrecht**, H.J. , *The Electronic monitoring for adult offenders*, House of Commons Committeee of Public Accounts, published 12 October 2006
2. 2. **Bergmann**, S. *Training der burgerlichen Normzustandes Ethnographie zum Project elektronische Fuffessel*, Magisterabeit fur Institut fur Kulturantropologie und Europaische Ethnologie, Universitat Frankuft am Main, 2004
3. 3. **Black**, M., Smith, R.G., *Electronic Monitoring in the Criminal Justice System*, Australian Institute of Criminology, Canbera, may 2003
4. 4. **Fabelo**, T. *«Technocorrections»: The Promises, the Uncertain Threats, Sentencing and Corrections*, Issues for the 21st Century, Washington, Department of Justice, may 2000,
5. 5. **Gable**, R.K, Gable, R.S. *Electronic Monitoring: Positive Intervention Strategies*, Federal Probation, June 2005,vol.69, no1
6. 6. **Keeping** Track of Electronic Monitoring, Nacional Law Enforcement and Corrections Technology Center, Nacional Institut of Justice, Bulletin, October 1999
7. 7. **Neillis**, M. *The Ethics and Practice of Electronically Monitoring Offenders*, Seminar for the Glasgow School of Social Work 16th February 2006.
8. 8. **Prison** Privatisation Report International,no 74, october 2006, published by the Public Services International Research Unit University og Greenwich, London
9. 9. **Tournier**,P.V., *Towards prisons without inamtes?* Re: the Introduction of Electronic Monitoring in France, Penological Information Bulletin, decembar 2002, br.23-24

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SPORT EVENTS AS A FIELD FOR VIOLENT GAMES BETWEEN FANS: THE CASE OF THE REPUBLIC OF MACEDONIA AND ITS LEGISLATION

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Abstract: The attention and institutional reaction of every organization which treats these problems started shortly after the incident on Heysel Stadium, Belgium, on May 28th 1985. The question which still has no answer is the one if that was a hooligans clash or was a security omission. Few months later, the Council of Europe adopted the European Convention on Spectator Violence and Misbehavior at Sports Events and in particular at Football Matches.

Knowing the circumstances on the Balkan Peninsula we ask where are the ex-Yugoslav republics on this. How is it possible in democratic societies as ours declare, sport spectators and fans to become disposable goods? Is hooliganism the "privilege" of England or is it slowly, but surely becoming universal adjective for fan groups all around the world?

Macedonian stadiums today are places used for national, ethnic or religious matches. In our country, the Law for prevention of violence and misbehavior on sport events was adopted by authorities in 2004, using the example of Croatia and Serbia. But nine years later we still have the dilemma will its amendments decrease the risk of appearance of violence on sport events and are those amendments a reflection of the real situation in the Republic of Macedonia?

The paper gives a short historical overview of the problem of violence on sport events in Europe and the Balkan countries and examines the problems in Macedonia and its legislation. It is absolutely inevitable the necessity of solving the problem through interdisciplinary prism and not to let the legislation and its sanctions to be used as the only weapon of prevention.

Keywords: Council of Europe, convention, hooligans, sport events, violence.

INTRODUCTION: A HISTORICAL OVERVIEW OF THE PROBLEM OF SPECTATOR VIOLENCE AND MISBEHAVIOR - THE CASE OG ENGLAND

It is possible we will never answer the simple question what is the motive for spectators to start behave violently on the sport fields. Why sport games, from reason and possibility for relaxing and enjoyment, often know to turn into "war" which always, like under some rule, escalates very fast and characterizes with destruction of infrastructure of sport arenas and their closer area.

"The moment when an individual connects the rules of standard communication with society is the moment when a deviant behavior begins." [1] The reasons for such acts are numerous and are result of different nature.

We will agree that the appearance of violence and misbehavior on sport fields is not a phenomenon of the new era. Contrary, it is an act which has historical dimension, an act whose life begins during antique period[2], and during years it just evaluated and it is still alive. What is violence and how it can be defined?[3]

1 http://highered.mcgraw-hill.com/sites/dl/free/007337654x/673624/Coakley10e_ch07.pdf 196
2 NBP – Zurnal za kriminalistiku i pravo. Kriminalisticko – policijska akdemija, Beograd. 2012.. str. 89.
3 http://highered.mcgraw-hill.com/sites/dl/free/007337654x/673624/Coakley10e_ch07.pdf 196

Spectators' violence and misbehavior on sport fields becomes an area of interest somewhere in the middle of the 1980s. England is the country where this phenomenon is known because of the most serious incidents that happened on a football match. Everything has started in 1985 on Heysel Stadium in Brussels, Belgium, on the final of the European Champions Cup between Liverpool and Juventus. On that May 29th 65 people lost their lives. Even today this event is not totally cleaned out and still the reasons why it happened are unknown. But how time moves on, an opinion comes out that the main guilt should be looked for "into the bad police reaction, the amateur action for stadium security, and also undeveloped plan for evacuation and passive security." [4]

The European Union reaction after these events was decisive and very fast. Namely, on 19th of August 1985, the European Convention on Spectator Violence and Misbehavior at Sports Events and in particular at Football Matches[5] was accepted. From this Convention many recommendations came out, with nature and form which were not binding. But even in such conditions most of them were accepted and implemented from all the member countries with an aim to reduce the risks from violence on sport fields.

We also must mention Hillsboro, where in the incident in the Cup game between Liverpool and Nothingam, 96 people lost their lives. England is the first country where organized spectator groups were born[6], but also was the first country which started the process for institutional solution of the problem of violence on sport fields. From there the action was spread through all Europe. Namely, the violence on football matches was not unknown for Germany, Italy, France, Spain, the countries from the Eastern Block and the countries from ex-Yugoslavia. Actually Europe is the only territory where hooligans[7] compete between one another.

Hooligan violence pulls its origins from different places. Actually it is something deeply connected to the territory where fans are active. For example, in Italy, the Italian football culture is local or regional. This form of connection can be explained through the sense of affiliation. For fans, the most important in their lives is the city where they come from and the team they support, the city coat of arms and the colors of their team.

EUROPEAN INSTITUTIONAL AND NORMATIVE REACTION

European Union and its members seeing the seriousness of the problem and the consequences of the violent activities on the sport fields started a serious battle against this phenomenon. Namely, EU did not stop with the European Convention from 1985; rather it continued to follow it and to try to find new solutions for the violent acts in the sport arenas.

The new reality and the situation on field culminated in 1990s when Council of Europe brought three more Resolutions giving the Convention even stronger and more important place in the law framework. That's why as the most important benefits the Convention gives are:

Prevention - the text underlines the importance of deploying public order resources in stadia and along the transit routes used by spectators; separating rival groups of supporters; strictly controlling ticket sales; excluding trouble-makers from stadia and matches; prohibiting the introduction and restricting the sale of alcoholic drinks in stadia; conducting security checks, particularly for objects likely to be used for violence; clearly defining responsibilities between organizers and the public authorities; designing football stadia in such a way as to guarantee spectator safety; the development of social and educational measures to prevent violence and racism (develop fan embassies, improve club-supporter relations, promote fan coaching and stewards, etc.)"[8];

Cooperation - the Convention also highlights the importance of co-operation between the sports clubs and police authorities of all countries concerned during the organization of major

4 Sport i nasilje u Europi. Dominique, Bodin., Luc, Robene., Stephane, Heas. Knjiga Trgovina. Zagreb, 2007. str. 16.
5 http://conventions.coe.int/Treaty/en/Treaties/Html/120.htm
6 Sport i nasilje u Europi. Dominique, Bodin., Luc, Robene., Stephane, Heas. Knjiga Trgovina. Zagreb, 2007. str. 32.
7 Ibid, str. 11.
8 http://www.coe.int/t/dg4/sport/violence/convention_en.asp

international sports events in order to identify the possible risks and be able to prevent them. Preparatory meetings for the European Championships and World Cup, as well as evaluation meetings, are organized within the framework of the Convention[9];

Repression - Legal co-operation should allow the identification of trouble-makers and their exclusion from stadiums and matches; the transfer of legal proceedings to the country of origin for sentencing, extradition or the transfer of those found guilty of violence.[10]

Most important benefit of the Convention is the commitment to full cooperation between members. The Article 4 from the Convention (International Cooperation) says that "the Parties shall co-operate closely on the matters covered by this Convention and encourage similar co-operation as appropriate between national sports authorities involved. In advance of international club and representative matches or tournaments, the Parties concerned shall invite their competent authorities, especially the sports organizations, to identify those matches at which violence or misbehavior by spectators is to be feared. Where such a match is identified, the competent authorities of the host country shall arrange consultations between those concerned. Such consultations shall take place as soon as possible and should not be later than two weeks before the match is due to take place, and shall encompass arrangements, measures and precautions to be taken before, during and after the match, including, where necessary, measures additional to those included in this Convention.[11]

There are a number of different ways police forces can co-operate in the field of dealing with football hooliganism. One way of doing this is through the exchange of information between the countries that are involved. As a result foreign police forces can gain more information about how fans operate and who suspected troublemakers from different countries are. This has helped recent tournaments by stopping many hooligans before they even arrive at the host country. On another level, foreign police officers can operate as spotters in foreign countries. They can look out for known troublemakers and direct local authorities to arrest them. This type of knowledge is invaluable in the fight against hooliganism. In order to facilitate police co-operation many European countries have set up national intelligence offices, for example the British National Criminal Intelligence Service. One of the areas it deals with is football related violence. By keeping a database of known and potential troublemakers, they are able to share information with foreign counterparts who are then more aware of the threat from hooligans. They also gather intelligence to prevent hooligan activity both in stadia and away from them. This is a vital tool in the battle against hooliganism.

The above mentioned examples and actions are few of the many which today are used by European countries. They should be guide and motive for other actions by other countries and an example how things should be solved in this area.

THE PRACTICE IN ENGLAND

Very often England is indicated as the best example of country where sport fans and their fan clubs are functioning very well and as country where the law against violence on sport fields functions more than good. But before we make conclusions we should be very careful and objective. The law brought in the time when Margaret Thatcher was Prime minister was not brought only to cover the area connected to sport fans and hooligans. It was a law more connected with the very bad organization of football matches. The Hillsboro incident was the last of the many mistakes. The question is has Macedonia ever tried to copy the proactive way of working by which England is known?

As an illustration for the proactive working we will mention just a few from the many measures and activities used in England. They are the following:

- dismantling of the fences in the area for spectators;
- dismantling of the fences which physically are dividing the field from the spectator's area;
- no standing places;

9 Ibid;
10 Ibid;
11 http://www.coe.int/t/dg4/sport/Source/CONV_2009_120_EN.pdf 4

- cameras;
- replacement of the police officers with wardens (club fans) with severely defined role. [12]

In Macedonia's situation one of the biggest obstacles for implementing the England measures is the infrastructure, then mentality, the level of sport culture which is seriously different from the one on the West, the lack of conditions and lack of finances for their implementation, the level of democratization of the society, etc.

Statistical information in England is a proof of how effective the law is and how efficient the authorities are by using it. Total attendance in excess of 37 million at regulated football matches. The total number of arrests represents less than 0.01% of all spectators or 1 arrest for every 12,249 spectators. During 2010-11 season the total number of people arrested in connection with all international and domestic football ("regulated") matches involving teams from, or representing, England and Wales was 3,089. This represents a decrease of 9%, or 302 arrests, on 2009-10 totals."[13]

Analyzing the numbers it is obvious that Macedonia and the Balkans do not have such a number of spectators, but yearly we have relatively high number of incidents. Also we have a small number of games with high risk. Exactly these are the reasons why Macedonia should seek another angle from which will try to solve the problems connected with sport violence and misbehavior.

THE PROBLEM OF SPORT VIOLENCE IN MACEDONIA

The sport violence in the arenas on the territory of ex-Yugoslavia recently was connected with the war conflicts which happened between 1991 and 1995. It was an expected phenomenon knowing what happened during that period and it was also very easy to be canalized and transferred on the fields. Incidents often had deep national character and strong division on national, political and religious level.

We are mentioning ex-Yugoslav republics, because experts on this phenomenon think that today, four countries have serious problem with the appearance of extreme violence: Serbia, Croatia, Poland and Italy. [14]

We ask the question on which way Macedonia tries to face the violence and misbehavior on sport fields? Is there sport violence in Macedonia and is that as serious as the one in Serbia where there are "situations where some sport fan groups are becoming organized crime groups?" [15]

So we can explain the situation in our country it would be good to make a comparison with the situation in the same area in Serbia and Croatia. Although we as a country do not have such a serious problem, maybe as a result of the decreased number of fans or decreased number of spectators, the financial situation of the sport clubs and their successes and non successes, etc. But the one thing that brings Macedonia in the same line with Serbia and Croatia is the way of which the three countries are making effort to solve the problem of spectators' violence. As federative countries, all three of them have ratified the above mentioned European Convention on 9th of July 1990. [16] Macedonia as an independent country ratified the same Convention on March the 30th 1994. Also another common thing of the three countries is the fact they all have a special law which regulates this area.

Republic of Macedonia, normatively regulated this area in 2004 when for the first time was accepted Law for prevention of violence and misbehavior on sport fields. [17] The period before 2004, actually all the events before the new Law were sanctioned under other laws. The new law was an attempt to make a difference through an institutional work and to try and get the level of general prevention with incriminating the act of sport violence. But here we must mention the fact that Macedonia made a commitment to form a Coordinative Body (a commitment made with the ratification of the European Convention). The goals and tasks of the National

12 http://www.scribd.com/doc/104495234/Sport-i-Nasilje-u-Europi str. 12
13 http://www.politics.co.uk/reference/football-hooliganism
14 http://www.hoo.hr/downloads/Fair%20Play%20zbornik.pdf str. 71.
15 http://www.politika.rs/rubrike/Tema-nedelje/Sport-i-nasilje/t9979.lt.html
16 http://www.slvesnik.com.mk/Issues/AAF7B1701B1A4419B59366AA9CC31B58.pdf
17 http://www.slvesnik.com.mk/Issues/75394A658BBC9B439269FD640F57D7C6.pdf стр.5

Coordinative Body are implementation of the European Convention and the Law for prevention of violence and misbehavior on sport fields. [18]

After all the obligations Macedonia accepted by signing the European Convention it seems that here still the problem is being solved on incident level, namely when something unlawful happens all institutions, national bodies, agencies start talking how worried they are and how serious this problem is. Once more we will mention that Macedonia is doing the biggest mistake in copying examples from neighboring countries. Why? Because every country is a case on its own. It is incorrect to compare events and situations from different countries, like it is incorrect and a mistake to copy other country's laws in the area and then expect those to give the expected results.

Why is this even mentioned? Following the Croatia's example we are under good path to copy their situation around the procedure connected to the new law. From the first text of the law dedicated to this problem, till today Croatia's legal solution was changed and supplemented four times. It is nothing more than a proof of the non functionality of the law. [19] In Macedonia is almost the same situation. From 2004 till today our law was changed and supplemented a few times, which is again a proof for its inapplicability.

THE MACEDONIAN LAW: THE LAW FOR PREVENTION OF VIOLENCE AND MISBEHAVIOUR ON SPORT EVENTS - THE BEGINNING AND ITS EVOLUTION

GENERAL PROVISIONS

The first legal solution which regulates the area of violence and misbehavior on sport events entered into force in 2004. It was the first time for Macedonia to try to put sport violence into a framework of legal norms, and precisely determine and define the rights, obligations and duties of all actors (direct or indirect) in the area. It is still a question whether a mistake was made when Macedonian authorities copied in most of it parts the Croatian example (law).

Analyzing the general provisions of the Law for prevention of violence and misbehavior on sport events[20] from 2004 we can conclude that it is focused on preventive influence in the area, giving directions to the participants which measures should be undertaken during organizing a sport event so the security risks and the possibility of violence or misbehavior would be decreased.

The article 3 contains a list of the measures, behaviors, activities and reactions, which can be characterized as violence on sport fields, or misbehavior. Namely in the same article are listed almost all behaviors which can be seen on sport events, and which can escalate if are not sanctioned or prevented on time. Articles 4 and 5 contain the obligation for the organizer of the sport event to undertake measures and activities to secure the event and prevent any violent consequences. The organizer assisted by the local authorities makes an appropriate estimation and determines the required number of people (police officers and guards) for maintaining security on high level during sport event.

MEASURES USED TO PREVENT VIOLENCE AND MISBEHAVIOR ON SPORT EVENTS

The second part the Law explains the possible measures for prevention of violence and misbehavior on sport fields. They are divided into three parts which are complementing one another.

Preventive measures are defined into article 6 as all those measures which include providing primary behavior of the sport club and its fans, regular meetings with the fans, publishing

18 http://www.ams.gov.mk/sprecuvanje-nasilstvo

19 http://dalje.com/hr-hrvatska/navijaci-novi-zakon-o-navijacima-drze-suludim-nakaradnim-i-protuustavnim/336683

20 Службен весник на Р. Македонија, бр.89., 16 декември 2004 година

newsletters, and coordination with fans when they are travelling on a game where the club is a guest and of course the procedure of analyzing a possible game of high risk and the measures and activities for securing the event.

Together with the preventive measures there is the second package of activities which covers **measures that should be undertaken on the sport events.** The article 7 paragraph 1 requires from the organizer to have a wardens service which will secure the physical security during the game and will maintain the order. So they can work easily, but more efficiently and effectively, it is necessary to not permit entrance to people which are under alcoholic or drug influence, then to stop the selling process of alcohol in the sport objects, to stop the attempts of inserting different kinds of objects which can be used during violent acts, banners or flags with which fans are calling on religious, racial, national or other kind of intolerance, to warn or remove the spectators who are singing offensive songs or use offensive messages that can cause hate or intolerance, and to warn or remove spectators who with their behavior can cause violence.

Article 8 is continuing where the previous one stops and through it there is a possibility of objective decrease of the obligations around the organization of the game, the organized partially is amnestied from the responsibility, because he has an obligation to share the assessment of the security risks with the Ministry of Internal Affairs. Paragraph 2 from the same article highlights the obligation of mandatory hire of other institutions so the security structure. The institutions can be subjects which are not parts of an active security area. Institutions like that are medical services, the fire department, utility services etc.

The last part of the package of measures contains those **measures which are undertaken on sport games with high risk.** Article 9 defines the term sport games with high risk. Namely, those games are national or international games with significance on higher level, also games where high number of spectators is expected, especially fans of the guest team. The National Sport Federation decides which game is one of high risk.

When a game gets the adjective one of higher risk, automatically there is a list of additional obligations for the organizer. The primary obligation is connected with the duty for the organizer to inform the Ministry of Internal Affairs and the other institutions for the game of high risk and to give the information no later than 48 hours. Also, the organizer has an obligation to assign a person who will be responsible for implementation of the measures undertaken to prevent violence or misbehavior during the sport game. Also the organizer should have cooperation and a meeting with the sport clubs, and ask them to help around the organization of the game. Other important measures which the organizers should provide are special entrances for home and guest fans, physical separation between them, limitation of the number of tickets in sale which number depends from the conditions in the sport object and the opinion of the security, on the day of the game, the tickets should be sold on special places outside the sport arena, to secure technical equipment for recording and monitoring of the spectators, to secure a room for first aid, space for the vehicles of the guest team.

As addition to all the above mentioned measures, there is an obligation for the guest team, regulated with article 11. Namely, the guest team must no later than three days before their arrival report to the organizer for the all important elements of the club and its fans, and take everything which is asked from him so no action happens and escalates into violence or misbehavior.

Article 12 clearly states the role of the Ministry of Internal Affairs for the time of playing. The police officers have a duty and obligation during the game of high risk to undertake all necessary measures and activities so there won't be any violence or misbehavior.

PENAL PROVISIONS

The penal provisions are contained in the articles 13, 14 and 15, and using them the authorities want to sanction any unlawful behavior and in such way influence on decreasing the number of future negative or unlawful acts. The Law from 2004 provides only fines; there is no prison as penalty. Subjects of sanction can be the organizer, the sport club and also other actors who with their behavior will act contrary from the norms of the Law.

In this form the Law was into force till 2008, when as a result of its incompleteness, but also other reasons, was changed and supplemented.

SHORT REVIEW OF THE CHANGED AND SUPPLEMENTED LAW FOR PREVENTION OF VIOLENCE AND MISBEHAVIOUR ON SPORT EVENTS FROM 2008

Analyzing the 2008 changes we may say that the most remarkable change is the one that makes the Law more severe, using criminal policy based on higher fines. The article one states that the penalty provisions from 2004 are becoming misdemeanor. For a clearer picture for the height of the new fines we will just mention the change from article 15 paragraph 1. In 2004 there was a fine from 10 000 to 300 000 denars for the sport club if they do not report to the organizers on time and do not undertake the necessary measures. With the changes from 2008, the fine is between 1500 to 5000 Euros.

Also the changes from 2008 provide some sort of institutional strengthening and a possibility of an easier application of the Law in practice. After article 15, in 2008 there is a new one article 15-a which asks the subjects to send a request to the Ministry of Internal Affairs before the beginning of the court procedure.

The conclusion which is inevitable if we make comparison between the Law in 2004 and the one after its changes in 2008 is the one that the legal authorities chose severe penalties thinking that he will additionally strengthen the preventive influence of the law. But even this step has not been a successful one. A good example is the case of the Kale in Skopje, where directly involved were members of two footballs fan groups and that event again actualized the need of new changes and supplements of the law, but in a different direction than the one with severe penalties.

SHORT REVIEW OF THE CHANGED AND SUPPLEMENTED LAW FOR PREVENTION OF VIOLENCE AND MISBEHAVIOUR ON SPORT EVENTS FROM 2011

In article 2, after paragraph 1, they were three new paragraphs added, and every of them has strictly defined who can be an organizer of a sport event, then is defined which part of the sport arena can be determined as sport field, and at the end it is defined who is masked person and which situations can be seen as ones caused by masked person. Into direction of increasing the preventive security is the change of article 12 where a paragraph 2 was added, where is an obligation for the Ministry of Internal Affairs in no more than 24 hours before the game of high risk to check the sport arena where the game will be played and to see if the organizer took every measure he was obligated to take. If some disadvantages are found, than the Ministry should advise the organizer to remove them.

There has also been added a new article 12-a into the Chapter of Penal Provisions and for the first prison is mentioned as a possible sanction for perpetrators of the norms of this law. This legal solution gives right to conclude that sport violence is nothing we should underestimate and that's why it is something for which every serious step should be made. The penalty for violent behavior on sport events, contained in paragraph 1 is from three months to one year of imprisonment, in paragraph 2 the penalty is prison from six months to three years for each one who will commit a crime from paragraph 1, but into a group; and paragraph 3 provides the most severe sanction for the organizer of the groups which will commit the crime from paragraph 1 and the penalty is one to five years of prison.

It is unclear who can be seen as an organizer of the fan group. And it is illogically to search an organizer in a fan groups, because there are only four fan groups in Macedonia which are

registered as citizen organizations. So who will he be? Is that the president of the organization or is that the leader of the group during the match.

With such sanctions, choosing prevention through more severe sanctions, using prison as possible measure of sanctioning is just an attempt for a wider area of preventing the phenomenon. Intimidation of potential perpetrators should be strong enough to act in direction of push them from situations of violence on sport fields.

For the court procedure from 2008, in 2011 there were some changes made. Now the procedure is before the Ministry of Internal Affairs where a Commission of three members works and decides in cases of misdemeanor.

SHORT REVIEW OF THE PROPOSAL OF THE LAW FOR CHANGING AND SUPPLEMENTING THE LAW FOR PREVENTION OF VIOLENCE AND MISBEHAVIOUR ON SPORT EVENTS

In November 2013, public was introduced to the new one, third in a row procedure for changing and supplementing the Law for prevention of violence and misbehavior on sport events. The reason for this new step is the situation in Macedonia in this area[21] and the conclusion that there were some changes in the behavior of fan groups. The new norms more deeply explain what violent behavior is, how it can be manifested on sport fields (which mostly is incarnated in destroying sport objects) and in most cases confront in direction against subjects present to suppress violence (we think of police officers, people from agencies for security, and guards). The authorities conclude that fans are those that attack people who are not even fans of the other club, use hate speech, they cause hate and intolerance, and become more aggressive using pyrotechnics.[22] Also the negative situations on the sport fields are connected to subjective reports by journalists, who with such activities are only stimulating the ambient of violence.

Maybe what causes the biggest attention is the article 9[23] which is some sort of addition to the article 10 from the previous law. It is proposed that buying tickets will be controlled by the Ministry of Internal Affairs; they will be bought only with identity cards, also there is an obligation of making a records of tickets which were sold and people who bought them (block, row, seat); then if there are people from the guest fan group that are not on the list sent before the game, they will not be permitted to enter the game. From a security aspect it is a good provision, but we have to ask the question do we have structural conditions in Macedonia to implement such legal solution? Are there sport objects which have conditions to fulfill the requirements in the above mentioned provision? Does running lists of guest fans and keeping the same for three years after the game is not a possibility for some type of abuse?

At the end the Law will result with a situation in which only few sport clubs will be able to respond on the new requirements and measures before and during the sport games.

CONCLUSION

When a country signs an international document, a country accepts all the obligations; a country implements them but also builds conditions for their successful implementation. To make a good system and to know how to prevent a phenomenon, one country should learn its own characteristics and its own possibilities. Cooperation is imminent part of the whole process. Laws, measures, activities should be written and built through active work. Everything should be made using others opinions.

It is absolutely necessary every change of a law to be subject of a public opinion and public debate. All relevant institutions should mandatorily be included in the process of proposals and

21 http://www.mvr.gov.mk/DesktopDefault.aspx?tabindex=0&tabid=331&Show=1&itemID=76 стр.2
22 http://www.mvr.gov.mk/DesktopDefault.aspx?tabindex=0&tabid=331&Show=1&itemID=76 стр.2
23 Ibid, 6.

suggestions, but also in the process of its implementation. Fan groups should also be included as relevant institutions because are directly affected by the law and its provisions.

In England there is a system for sanctioning the fans that are violent or are misbehaving through freezing of their season tickets, and for the more aggressive ones there is ban to buy tickets. But in Macedonia the situation is totally different. Here we still discuss for substandard sport fields, fields without spectators places, no seats, toilets, phenomenon of sport violence, and the number of spectators is not even higher than 200 on a game.

We are not against a law in the area, but we are against one sided, non objective and mostly non confirmed accusation of fan groups and fans for violent acts on sport fields.

REFERENCES

1. Bodin, Dominique., Luc, Robene., Stephane, Heas. Sport i nasilje u Europi. Knjiga Trgovina. Zagreb, 2007.
2. European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches. Strasbourg, 19.08.1985. available at http://conventions.coe.int/Treaty/en/Treaties/Html/120.htm
3. Far play I nasilnicko ponasanje nogometnih navijaca u savremenoj Hrvatskoj I drugim zemljama Jugoistocne Europe. prof. dr. Gilad, Weingarten. available at
4. Fair play as a part of sports culture. Lalic, Drazen. avaiable at http://www.hoo.hr/downloads/Fair%20Play%20zbornik.pdf
5. Football, violence and social identity. Bonney, Norman., Richard, Giulianotii., Mike, Hepworth. First published 1994, by Routledge, 11 New Fetter Lane, London, EC4P4EE.
6. Navijači novi zakon o navijačima drže suludim, nakaradnim i protuustavnim. available at http://dalje.com/hr-hrvatska/navijaci-novi-zakon-o-navijacima-drze-suludim-nakaradnim-i-protuustavnim/336683
7. Pantella, Marko. Italian Hooliganism: The State takes the offensive. available at www. http://soccerlens.com
8. Petkovic, Zeljko. Prevencija kriminaliteta na sportskim stadionima kroz planiranje okolisa. available at http://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=117946
9. Предлог на закон за изменување и дополнување на законот за спречување на насилството и недостојното однесување на спортските натпревари. http://www.mvr.gov.mk/DesktopDefault.aspx?tabindex=0&tabid=331&Show=1&itemID=76
10. Savkovic, Marko., Dzordzevic, Zarko.Na putu prevencija nasilja na sportskim terenima (priredbama) : predlog regionalnog okvira saradnje.. Beogradski centar za bezbednosni politiku, decembar, 2010.
11. Службен весник на Р. Македонија. бр. 89/4, 142/08, 135/11. available at http://www.slvesnik.com.mk/
12. Спречување на насилството на спортските терени. available at http://www.ams.gov.mk/sprecuvanje-nasilstvo
13. Stojanovic, D. Sport i nasilje. Vodze kao bosovi. available at http://www.politika.rs/rubrike/Tema-nedelje/Sport-i-nasilje/t9979.lt.html
14. The prevention of football hooliganism: A transnational perspective. available at http://www.cafyd.com/HistDeporte/htm/pdf/4-16.pdf

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INTRODUCTION INTO PRINCIPLES OF UNBORN LIFE PROTECTION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract : Issue which was investigated in this paper concerns protection of unborn life which was recognized under the European Convention on Human Rights and Fundamental Freedoms. Answer on the question whether the unborn child conceived through sexual intercourse is protected under the provisions of European Convention and which is the scope of its protection was reached through analysis on case law mostly concerning to guarantees introduced in Art 2, Art 3, and Art 8 of the Convention. Eight principles applied by Convention institutions in cases which concerns questions of abortion and unborn life protection, involved parties and they rights, victim status, recognition of unborn child's legal capacity, procedural requirements safeguarded to unborn and human rights requirements for abortion permissibility, are described. Investigation in this article is limited to Conventional status and protection of unborn children conceived through sexual intercourse because there is significant difference in their treatment as compared to treatment of unborn children created artificially. Short reference to that is made in conclusion.

Keywords: unborn life, protection, principles, capacity, victims, abortion, temporal limitation, grounds for abortion.

INTRODUCTION

Answer on the question what is the standing of human right guarantees in respect to abortion and unborn life protection, what is the scope of the protection provided to unborn life conceived through sexual intercourse under the European Convention on Human Rights and Fundamental Freedoms (herein and after: Convention), could be reached through analysis on case law concerning Art 2, Art 3, and Art 8 provisions. In general, the Court has already held that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere. The reasons for such position are that the issue of such protection has not been resolved within the majority of the Contracting States themselves and that there is no European consensus on the scientific and legal definition of the beginning of life. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. In the absence of such common approach regarding the beginning of life, the examination of national legal solutions as applied to the circumstances of individual cases is of particular importance also for the assessment of whether a fair balance between individual rights and the public interest has been maintained.

In such circumstances, certain principles were applied by Convention institutions in the deciding on relation between abortion and unborn life protection. It is to be noted at beginning that relevant principles in interpretation of unborn life protection under the Convention in regard to naturally conceived children were introduced by Commission in its first merit case *Paton v. United Kingdom* (Application No. 8416/78, Decision of the Commission 1980). Consequent case law had reaffirmed those principles and some of them were extended. Bearing in mind scientific progress in tangent areas and development of techniques of artificial creation it is important to reach clear standing on protected entities beginning and kind of the protection they enjoy.

FIRST PRINCIPLE-VICTIM STATUS, WHO CAN CLAIM?

Father

In *Paton v. United Kingdom* case was concerning expectant mothers intention to terminate initial stage pregnancy and father's opposition against it. It was noted than that because he is closely affected by termination of wife's pregnancy, father may claim to be a victim. Although this principle introduces certain scope of father's capacity in respect to unborn life protection which is mostly inherent in the Art 8, it is hard to argue that it entitles father to prevent mother from having her pregnancy terminated. This is the case even when prior consultations with him are compulsory.[1]

It is important to point that Convention institutions took restrictive position in regard to father's capacity only in the situations in which abortion was performed in initial stage of pregnancy and on the medical grounds (i.e. provisions of Eight principle). Accordingly, an interference with the father's right to participate in decision making process which might be assumed[2] or even recognized[3] under Article 8, would be justified as being necessary for the protection of the rights of another person (in the cases which falls within the Eight principle).[4] It is possible, that unlimited interference which steps out of the scope of the Eight principle would be regarded as unjustified and furthermore could constitute breach of Art 8 and Art 12 guarantees in respect to father.[5]

Mother

There is no doubt that mother could claim to be a victim on the same grounds as father or even on the broader grounds as it was introduced in *Bruggemann & Scheuten v. Germany*. Similarly in *Open Door and Dublin Well Woman v. Ireland*[6] it has not been asserted that two applicants were pregnant, but since they were belonged to a class of women of child-bearing age which could be adversely affected by the restrictions on assisting pregnant women to travel abroad to obtain abortions imposed (on private agencies) by the national court injunction, they could claim to be victims. It was considered in those cases that applicants are not seeking to challenge in *abstracto* the compatibility of national laws with the Convention since they were run a risk of being directly prejudiced by the measure complained of. Victim standing to a mother was confirmed in *Vo v. France*.[7]

SECOND PRINCIPLE – GENERAL APPLICABILITY OF ART 2 ON UNBORN LIFE; AND

THIRD PRINCIPLE – RECOGNITION OF AUTONOMY TO UNBORN LIFE UNDER THE ART 2

Distinction between general applicability of Art 2 on unborn life (second principle) and its recognition under the right to life guarantees (third principle) was done to point out that biological fact of life was recognized to pre-natal stage independently in respect to its other interests which could be also safeguarded through Art 2 provisions.[8] There are potential difficulties and legal uncertainty caused by the Court's interpretive practice which relies on an unclear distinction between substantive and procedural guarantees of Article 2.[9] Because of that it is possible

1 See *Boso v. Italy,* Application No. 50490/99, Decision from 5 September 2002.
2 See *Bruggemann and Scheuten v. Germany*, Application No. 6959/75, Report of the former Commission, 12 July 1977.
3 *Paton v. United Kingdom,* … § 26.
4 See *R.H. v. Norway* Application No. 17004/90, Decision of 19. May 1992.
5 See *Boso v. Italy*.
6 *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992, Series A Application No. 14234/88; 14235/88.
7 *Vo v. France* Application No. 17004/90, judgment of 8 July 2004, § 86
8 Refer to the Fifth principle.
9 Plomer, A. *Foeutus right to life, The case Vo V France*, Human Rights Law Review, 5:2, Oxford University Press, 2005, pp 313

that even if the Court finds no substantive violation for a loss of life, it may find a procedural violation.[10]

Commission introduced possibility that Art 2 provisions in general may apply to unborn with certain condition fulfillment. In the *R.H. v. Norway*, Commission reaffirms second principle and points that in certain circumstances foetus may enjoy a protection under Art 2, notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Art 2 protects the unborn life.[11] Further, finding the case admissible for merit decision under the Art 2 which wasn't concerns ethical, moral, or anything else which may arise[12] but pure protection of unborn life, Commission established Conventional recognition of it as protected value (third principle).[13] However, in that particular case unborn life was not observed in the isolation from that of mother.[14] In regard to this fact it is important to note that it does not necessarily have restrictive effects on unborn life autonomy. In support to this pregnancy and its termination do not, as a matter of principle, pertain uniquely to the sphere of the mother's private life.[15] This standing of the Commission was marked as potential cast doubt upon the private life nature of pregnancy itself.[16] Such non-private nature of pregnancy may goes in favor of unborn life autonomy rather than toward its deletion.

However, it is to be considered that in *Paton v. United Kingdom* unborn child was recognized as autonomous victim under the Art 2. In this respect the Commission in its reasoning on complaints under the Art 8, observes that „applicant who under Art 2 claims to be a victim of violation of right to life of the foetus of which he was potential father, under the Art 8 invokes right of his own."[17]

Twelve years later in the *R. H. v. Norway* in the part of decision concerning to complaints that no measures were taken to avoid the risk that the 14 week old foetus would feel pain during the abortion procedure, which in applicants point of view constitutes inhuman treatment or torture prohibited through Art 3 provisions, Commission states that it has not been presented with any material which could substantiate the applicant's allegations of pain inflicted upon the foetus. In this way Commission left opened possibility for different approach if there is material which could substantiate that pain was inflicted upon the foetus. This separates unborn life from that of the mother since it is independently recognized as potential victim and goes in favor to support opinion that unborn life is already recognized as autonomous under the Convention.

Finally, in the *Vo v. France* the Court also observed unborn life as connected with that of the mother, but this time because there was no conflict between the rights of the mother and the father or of the unborn child and the parents. First, it could be considered that on this occasion Court left opened possibility (similar to that in *R.H. v. Norway*) that in the case of the conflict between the rights of the mother and the unborn child it could take into consideration interests of unborn life separately from the one of the mother. Second, since the Court in the present case had said that, "the life of the foetus was intimately connected with that of the mother and could be protected through her" reasonable consideration could be drown toward that that the foetus has a 'life' in the view of the Court although "not one that necessarily the Court does not decide one way or the other requires the full protection given to 'everyone' under Article 2."[18] From the other hand it is true that when foetal rights claims have been asserted based on Article 2 substantive protections, the Convention institutions repeatedly conclude that foetus do not enjoy an absolute right to life,[19] but they were not absolutely excluded right to life enjoyment

10 See Zampas, C. Gher, J. M. *Abortion as a Human Right International and Regional Standards* Human Rights Law Review 8:2 ,Oxford University Press 2008, pp 261.
11 This position could be considered for early recognition of following need on of margin of appreciation reduction in this area.
12 *Paton v. United Kingdom* … § 22
13 *Paton v. United Kingdom* … § 4, 17
14 *Paton v. United Kingdom* … § 19.
15 Also in the *Brüggemann and Scheuten v. Germany*, … pp. 100
16 Wicks, E. *A, B, C v Ireland: Abortion Law under the European Convention on Human Rights,* Human Rights Law Review, 5:2, Oxford University Press, 2011 pp 560.
17 *Paton v. United Kingdom,* … § 25.
18 Wicks, E. *The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties*, Human Rights Law Review Vol.12:2, Oxford University Press 2012, pp 209
19 Zampas, C. Gher, J. M. *Abortion as a Human Right International and Regional Standards* Human Rights Law Review 8:2 ,Oxford University Press 2008, pp 264

neither. The protection of that right rather could be regarded as subject to implied limitations than as non-existent. Therefore reason for not outweigh of the foetus' potential right to life over the interests of the pregnant woman was not that that the foetus is intimately connected with and cannot be isolated from the life of the pregnant woman.[20] Reason for such output in *Paton* case is to be found in the quality of involved interests on the behalf of the mother.

FOURTH PRINCIPLE – SEPARATION OF LIFE PROTECTION FROM LEGAL CAPACITY

Further, in *Paton v. United Kingdom* Commission discussed on meaning of the terms "everyone" and "life" used in Art 2 and Convention in general. Distinction made by Commission on this occasion between those two terms is of the great importance.[21] It provide as with direction on which is the scope and what is the kind of right to life guarantees applicable on unborn life. Term "everyone", refers to someone's personality recognition before law (*personhood*),[22] it reflects legal capacity recognized before national law and safeguarded by the Convention provisions. Term "life" refers to biological fact and Convention positions on it. Recognition of this biological fact was done separately from recognition of person's legal capacity. Therefore life and legal capacity are not casually conditioned when it is about beginning of their Conventional protection.

Such approach is important since it introduces that life could be safeguarded by Convention provisions independently of its legal capacity recognition. It should be noted here that Commission used phrase "at that stage of the "right to life" of foetus" when explaining justification for pregnancy termination. It is important because this indicates that under the Convention foetus has right to life whose scope of protection depends on its gestational stage. This could be reasonable inducement to consideration that right to life protection is inherent in biological fact of life, but it is not to be excluded that such protection is constructed of two levels. First level is absolute right to life protection afforded to persons and the "other is a lesser protection given to all human life, from conception onwards, on the basis of human dignity."[23] Therefore unborn life protection, at least in its initial gestational stages, is more and more attached to protection of dignity than to explicit right to life protection. Developments in the field of dignity protection could constitute new relevant circumstances to be taken into account by the Court when deciding on relations between Conventional guarantees, unborn children and abortion.[24] Especially since extensive separation of dignity from biological fact of life it is not sustainable and dignity could rather present the bridge to connect life and right to life than autonomously protected value.

The clearest distinction amongst protection of unborn life and its recognition as person under the Convention was done in *Vo v. France* when the Court stated that unborn life "require protection in the name of human dignity, without making it a 'person' with the 'right to life' for the purposes of Article 2."[25] In its following case *A.B.C. v. Ireland*, the Court added another separation amongst pre-natal life protection and its legal capacity recognition. The moral status of unborn life before the national law is recognized as ground for its wide protection even with out of recognition of its legal capacity. [26]

20 As pointed in the Zampas, C. Gher, J. M. *Abortion as a Human Right International and Regional Standards* Human … pp 264.
21 For critical view on such position of the Commission refer to Plomer, A. *Foetus right to life, The case Vo V France*, Human Rights Law Review, 5:2, Oxford University Press, 2005, pp 317 and 319.
22 Same at: Wicks, E. *The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties*, Human Rights Law Review Vol.12:2, Oxford University Press 2012, pp 209
23 Wicks, E. *The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties*… pp 209.
24 More on this issue under the Eight principle.
25 *Vo v. France* § 84
26 See *Open Door and Dublin Well Woman v. Ireland*… and *A*, *B and C v. Ireland,* Application No. *25579/05,* Judgment from 16 December 2010.

FIFTH PRINCIPLE – PROCEDURAL SAFEGUARDS

In defining the meaning of term "everyone" used in Convention Commission finds that that it does not refers to unborn,[27] with an exception in Art 6 (1).[28] Of course, this does not mean that unborn life is excluded from right to life protection as we have previously explained. Applicability of Conventional procedural guarantees on unborn life constitutes fifth principle. In the interpreting whether the unborn life is covered with meaning of term "life" from the Art 2 of the Convention, Commission offers three possible approaches. They reads "as not covering foetus at all; as recognizing right to life to foetus with certain implied limitation; or as recognizing absolute "right to life" of foetus." Last approach Commission excluded mostly because this approach would constitute prevalence of unborn over already born life in conflicted situations. Remaining two approaches are going to be examined under the Sixth principle.

In the *Vo v. France* the Court implies that there are two distinct ways in which a violation of Article 2 may occur, namely by a substantive and/or a procedural breach.[29] Court was observing whether the absence of a criminal remedy to punish the unintentional destruction of a foetus constituted a failure on the part of the State to protect by law the right to life within the meaning of Article 2 of the Convention. In this way the Court had unequivocally extended procedural requirements inherent in Article 2 of the Convention on unborn. In regard to positive obligation of the State to protect the life the Court found that in the specific sphere of medical negligence, the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. It also regarded that disciplinary measures may be envisaged.[30] As Plomer observes the question of whether the remedies provided by the State may be adequate or compliant with Convention law can only arise on the presupposition that the victim had a substantive and fundamental right which required protection under Article 2, and which the State has failed to safeguard through the provision of appropriate remedies or penalties.[31] Therefore unborn child was observed as party with protected interests.

SIXTH PRINCIPLE – LIMITED RULING

In analyzing two remaining approaches Commission limited its interpretation just on initial stage of pregnancy which was concerning in present case. On that way it avoided to provide an answer whether the unborn life is covered with right to life guarantees through whole pregnancy.[32] Second limitation implied by Commission concerns reasons for suspension of eventual right to life protection. Interpretation was limited just to answering whether such suspension is justified on the grounds of protection of life and health of pregnant woman.[33]. According to this principle the Conventional institutions interpreting relations between Conventional guarantees, unborn children and abortion, in narrow manner just in the light of concerning case circumstances. In such way it provides strict answers and avoids introduction of any general rule.

In *Paton v. United Kingdom* Commission considered, and Court consequently repeated, that it was not called in present case to decide in general terms whether Art 2 does not cover unborn life at all or whether it recognize unborn life with implied limitation. It focused its interpretation just on initial stage of pregnancy and its termination on the grounds of medical indications on the side of mother. In those circumstances, Commission found that unborn child's right to life is subject to an implied limitation. Termination of pregnancy was found justified in its early stages in order to protect the life and health of the woman.

27 This is not ultimate standing of Convention institutions, see *Vo v. France* § 85 and Wicks, E. in *The Meaning of 'Life':* … pp 217.
28 See *Paton v. United Kingdom* … § 7 and 9.
29 Plomer, A. *Foeutus right to life, The case Vo V France*, Human Rights Law Review, 5:2, Oxford University Press, 2005, pp 325.
30 *Vo v. France* § 90.
31 Plomer, A. *Foeutus right to life, The case Vo V France*, … pp 325.
32 See *Paton v. United Kingdom,* … § 22.
33 *Ibid.*

SEVENTH PRINCIPLE – MARGIN OF APPRECIATION

Referring to national legislation and judicial positions as to fact of almost absolute relevance when deciding in *Paton v. United Kingdom* whether the unborn life enjoys Conventional protection presented *de facto* introduction of margin of appreciation doctrine in this field. In following case law Commission reaffirmed seventh principle noting that in such a delicate area the Contracting States had to have certain discretion.[34] Important extension of this principle was done by the Court. Court declared that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere.[35] Leaving within the States margin of appreciation to decide when the right to life begins Court extended seventh principle to its maximum limits. This was foundation for establishment of the widest scope of this principle and it may even look like it could consume all other principles (with an exception of sixth principle). Because of that answer on the question if someone's life is protected under the Convention depends on residency of pregnant women. This fact has directed some authors to conclude that international law does not provide any protection of unborn life. [36]

Following to this the Court pointed that the regulation of abortion rights is not solely a matter for the Contracting States. Fourth principle could be the most affected with such extension. Although in the *Vo v. France* the Court left possibility to attach beginning of right to life protection to beginning of legal capacity recognition, different options were not excluded. Courts direction on evolutive interpretation of the Convention, as "living instrument which must be interpreted in the light of present-day conditions", left the opened possibility for different interpretations in accordance to fourth principle. In general the Courts position is that when there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. [37]

EIGHT PRINCIPLE – PERMISSIBLE ABORTIONS

Abortion was found justified when it was performed in initial stage of pregnancy and with aim to protect life and health and/or well being of pregnant woman. This principle is composed of the time limit and medical indication and/or well being reasons as ground for abortion permissibility. Convention institutions approved abortion as correspondent to human right guarantees only when it was done in accordance to those provisions. In the Court's opinion taken in the *Boso v. Italy*, such provisions strike a fair balance between, on the one hand, the need to ensure protection of the foetus and, on the other, the woman's interests.[38]

Time limits – initial stage of pregnancy

In its case law Convention institutions were not gave general definition on length of initial/early stage of pregnancy. Conclusion on that could be reached through concerning cases. In the *Paton v. the United Kingdom*[39] in which temporal dimension was first time applied concerned termination of pregnancy which occurred proximately at tenth week of gestation. Also in *Boso v. Italy* exact information on when termination occurred were not presented to the Court, and it was concluded based on procedural provisions of national legislation to be happened during the first twelve weeks. In *R. H. v. Norway* abortion occurred between 12th and 18th week of pregnancy.

34 *R.H. v. Norway, …* § 168.
35 Vo v. France § 82
36 Refer to Vodinelić Rakić, V. *Kompatibilnost Jugoslovenskog prava sa odredbama Evropske konvencije o ljudskim pravima,* Counsel of Europe, Beograd 2002, pp 36-37.
37 *Evans v. the United Kingdom* Application No. 6339/05, judgment of 10 April 2007 § 77; *X, Y. and Z. v. the United Kingdom,* judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, § 44; *Frette v. France,* Application No. 36515/97, § 41, ECHR 2002-I; *Christine Goodwin,* Application no. 28957/95, judgment of 11 July 2002 § 85.
38 *Boso v. Italy.*
39 See *Paton v. United Kingdom, …* § 2 – 4.

It is to borne in mind that introduced temporal limits through national legislation are applied just in respect to able body unborn while unborn with disability does not falls within the scope of equal legal protection. In the certain way such broad States appreciation deprives this group of unborn of the presented Conventional recognition. Therefore it could be regarded that scope of disabled children rights, in general, are narrower as compared to able body children in an analogous position. Using disability as ground for different treatment opposes to universal[40] and regional[41] human rights instruments. Discussions on this issue are not that new[42] and there are national legislators who are reviewing their legislation in regard to this ground for abortion.[43] Some other characteristics of unborn were already recognized at regional level as prohibited to be the ground for abortion or *in vitro* created embryos destruction.[44] True, this source allows abortion and destruction if there is potential disability but conceptual novelty is in prohibition on sex (body characteristic) to be taken as grounds for it.

Grounds for abortion – medical indications

In respect to grounds for abortion there is diverse of approaches taken in Council of Europe member states. Law permits abortion on health grounds (medical indications) on well-being grounds, and on request. For now, protection of life and health of pregnant woman - medical indications and/or well-being reasons were found as only acceptable grounds for abortion. Although there are considerations that since Convention does not expressly guarantee any health or reproductive rights, or any determined standard of medical care, Convention institutions had carefully avoided stating whether "legal and safe abortion should or should not be available under domestic law, (...) and if so, on what conditions"[45] still the Court did developed certain standards in regard to abortion on medical grounds. Considering the medical indications there are two possible types of abortions. First type is *life-saving abortion* and second type is *health-preserving abortion*.

Life-saving abortion

The Convention institutions had indicated that in case of conflict between mother's interests safeguarded under the Art 2 and proportional interests of the unborn, prevalence would be on the protection of the mother's interests.[46] Criteria for determination of relevant risk toward mother's life were indirectly introduced in the *A, B and C v. Ireland.* In this case one of the applicants feared that her pregnancy posed a risk to her life and she complained under the Art 2. In deciding on those complaints the Court pointed to *L.C.B. v. the United Kingdom* and *Osman v. the United Kingdom*,[47] as cases encompassing relevant criteria under which there was no evidence of any relevant risk to the applicant's life in the *A, B and C* case. Bought cases pointed by the Court were concerning the scope of the States positive obligations to take preventive measures to protect the life. Bought of those cases were followed with infringement to applicants health but with out of fatal consequences. In very wide approach it could be considered that common ground for Courts decisions delivered in those cases were lack of certain causal link between alleged States omission and consequences, and lack of certainty that available measures would

40 Art 7 of the Convention on the rights of Persons with Disabilities at http://www.un.org/disabilities/default.asp?id=259 October 2013. Also see Convention on rights of Child http://www2.ohchr.org/english/law/crc.htm October 2013.

41 See COE Recommendation 874 (1979) on European Charter on the rights of the Child, chapter *VI a)*, at http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta79/erec874.htm#1 October 2013

42 See Joseph, R. *Human rights and the unborn child*, Martinus Nijhoff publishers, Netherlands 2009, pp 141-179, in regard to national law Dakić, D. *Lex artifitialis*, Collection of Papers, 2th International students scientific conference, University of Banja Luka, 2009, pp 134.

43 British Parliamentary Inquiry into Abortion on the Grounds of Disability, July 2013.

44 COE Resolution 1829 (2011) at http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1829.htm October 2013 ,

45 Krzyanowska-Mierzewska, *How to Use the European Convention for the Protection of Human Rights and Fundamental Freedoms in Matters of Reproductive Law*: The Case Law of the European Court of Human Rights, (Astra, 2004) at Part III.7. available at http://www.astra.org.pl/pdf/publications/astra_guide.htm

46 *Paton v. United Kingdom,* Application No. 8416/78, Decision of the Commission 1980 § 19. Same recognition at Zampas, C. Gher, J. M. *Abortion as a Human Right International and Regional Standards* … pp 265

47 *L.C.B. v. the United Kingdom,* Application No. 14/1997/798/1001, Judgment from 9 June 1998; *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports* 1998-VIII.

effectively prevent negative consequences. Translating this into requirements for relevant risk it could be considered that it is needed to be established casual link between pregnancy and/or birth and health complications of such gravity which could/are lead to the fatal consequences, and it should be established that abortion was the only one effective measure to prevent death. Threat to a health with out of those elements the Court has placed under the Art 8 of Convention. Lack of any effective domestic procedure for establishing relevant risk, with no matter whether it was followed with any consequences, the Court characterized as breach of Art 8 provisions.[48] The Court has never confirmed whether threat of suicide constitutes relevant risk.[49]

Health-preserving abortion

Similar to the right to life, some international and regional human rights instruments protect women's right to health. The WHO defines 'health' as "a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity".[50] It could be regarded that this imposes an obligation on governments to provide adequate healthcare and conditions conducive to enjoying good health.[51] In the abortion context, the right to health can be interpreted as requiring governments to take positive measures to avoid women's exposure to the health risks of unsafe abortion and to ensure pregnant women's access to abortion when their health is at risk.[52]

In *Tysiąc v. Poland*[53] it has been invoked before the Court question whether an individual has been involved in the decision-making process in respect to therapeutic abortion, to a degree sufficient to provide her with the requisite protection of hers interests. In this case the Court pointed importance of time factor in deciding on pregnancy. Court considered that the Polish State had not complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion. From the relevant case law it is to be considered that therapeutic abortion contains two aspects. First one was already explained and it concerns expectant mother's life and health, and second one concerns physical and mental condition of unborn.

Most of the Council of Europe member states fail to define degree of malformation which would be needed to justified abortion.[54] Contrary to this in *Boso v. Italy,* Court defined that degree. It needs to be established that the child will be born with a condition of such gravity as to endanger the woman's physical or mental health.[55] It follows that physical and mental condition of unborn is observed as part of the woman's physical or mental health. Eugenic was not directly introduced as provision covered under this principle.

CONCLUSION

When dealing with protection of prenatal life under the human rights guarantees, Convention institutions applied eight principles. In the light of those principles it may be considered that certain protection to prenatal life was provided under the provisions of European Convention. This protection stands independently in the respect of mother and its legal capacity recognition before national law. Protection of his/hers life is limited with proportional interests of involving parties. From the Court's case law it could be concluded that proportional interests are ones which are concerning threats to life and health of the woman. Prenatal life is recognized under the Convention as autonomously protected entity through substantive and procedural guarantees

48 *A, B and C v. Ireland,* … §§ 250 and 267.
49 See Zampas, C. Gher, J. M. *Abortion as a Human Right International and Regional Standards* … pp 262 supra note 82.
50 Constitution of the World Health Organization, signed 22 July 1946, which entered into force on 7 April 1948, at the preamble.
51 Zampas, C. & Gher, J. M. *Abortion as a Human Right – International and Regional Standards*, … pp 265, 278
52 Report of the International Conference on Population and Development, Cairo, 5^13 September 1994, A/CONF.171/13/Rev.1 (1995), Chapter VIII C. Women's Health and Safe Motherhood at para. 8.25
53 *Tysiąc v. Poland* Application No. *5410/03* judgment from: 20 March 2007.
54 In Dutch it is possible to euthanize newborn on ground of its disability, see E. Verhagen, P. Sauer, *The groningen protocol d euthanasia in severely Ill newborns*. N Engl J Med 2005.
55 *Boso v. Italy*.

of Art 2. Scope of its protection grows through gestation. Father and mother were recognized as entitled parties for its protection before Court.

Therefore abortion could be observed as derogation of unborn life protection. Abortion is not human right and it is justified in initial stage of pregnancy, mostly on the grounds of medical indications on the mother's side. Eugenic was not recognized as ground for abortion. It is to be noted that well-being of woman was recognized as proper ground for abortion. In *R. H. v. Norway* which concerned abortion on the grounds of social indications (it was concluded that that the pregnancy, birth or care for the child might place woman in a difficult situation of life), Commission found no violation of Conventional guarantees.

It is to expect that developments in the field of dignity protection could confront application of Second, Third and Eight principle from the one side and Seventh principle from the other side. Scope of the Seventh principle is going to be under the strike especially in regard to use of malformations as grounds for abortion. Developments in the field of artificial reproduction created new entities, members of human race, which are contrary to trends in respect of dignity safeguard completely left out of the human rights protection.

REFERENCES

1. *A*, *B and C v. Ireland,* Application No. *25579/05,* Judgment from 16 December 2010.
2. *Boso v. Italy,* Application No. 50490/99, Decision from 5 September 2002.
3. *Bruggemann and Scheuten v. Germany* Application No. 6959/75, Report of the former Commission, 12 July 1977
4. *Evans v. the United Kingdom* Application No. 6339/05, judgment of 10 April 2007 § 77;
5. *L.C.B. v. the United Kingdom,* Application No. 14/1997/798/1001, Judgment from 9 June 1998.
6. *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992, Series A Application No. 14234/88; 14235/88.
7. *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports* 1998-VIII
8. *Paton v. United Kingdom,* Application No. 8416/78, Decision of the Commission 1980
9. *R.H. v. Norway,* Application No. 17004/90, Decision of 19. May 1992.
10. *Tysiąc v. Poland* Application No. *5410/03* judgment from: 20 March 2007.
11. *Vo v. France* Application No. 17004/90, judgment of 8 July 2004.
12. *X, Y. and Z. v. the United Kingdom,* judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II.
13. Plomer, Aurora *Foeutus right to life, The case Vo V France*, Human Rights Law Review, 5:2, Oxford University Press, 2005.
14. Wicks, Elizabeth *A, B, C v Ireland: Abortion Law under the European Convention on Human Rights,* Human Rights Law Review, 5:2, Oxford University Press, 2011.
15. Wicks, Elizabeth *The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties*, Human Rights Law Review Vol.12:2, Oxford University Press 2012.
16. Zampas, Christina and Gher, Jamie M. *Abortion as a Human Right International and Regional Standards* Human Rights Law Review 8:2 ,Oxford University Press 2008.
17. British Parliamentary Inquiry into Abortion on the Grounds of Disability, July 2013.
18. COE Recommendation 874 (1979) on European Charter on the rights of the Child, at http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta79/erec874.htm#1.
19. COE Resolution 1829 (2011) at http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1829.htm.
20. Constitution of the World Health Organization, signed 22 July 1946.
21. Convention on rights of Child http://www2.ohchr.org/english/law/crc.htm.

22. Convention on the rights of Persons with Disabilities at http://www.un.org/disabilities/default.asp?id=259.
23. Report of the International Conference on Population and Development, Cairo, 5^13 September 1994, A/CONF.171/13/Rev.1 (1995).
24. E. Verhagen, P. Sauer, *The groningen protocoldeuthanasia in severely Ill newborns*. N Engl J Med 2005.
25. Joseph, Ritha *Human rights and the unborn child*, Martinus Nijhoff publishers, Netherlands 2009.
26. Krzyanowska-Mierzewska, *How to Use the European Convention for the Protection of Human Rights and Fundamental Freedoms in Matters of Reproductive Law*: The Case Law of the European Court of Human Rights, (Astra, 2004) at Part III.7. available at http://www.astra.org.pl/pdf/publications/astra_guide.htm.

TOPIC

FORENSIC LINGUISTICS

FORENZIČKA LINGVISTIKA

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ARGUMENTS FOR AUDITORY - INSTRUMENTAL APROACH IN FORENSIC SPEAKER RECOGNITION

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Abstract – This paper presents arguments for the use of hibrid auditory-instrumental method in forensic speaker recognition. Auditory approach is based on forensic linguistics and forensic phonetics, while instrumental approach is based on forensic acoustics, speech signal processing, mathematical statistics and their strong connection with forensic phonetics. Boath aproaches are based on expert knowledge; they integrate forensic markers, that are identified by subjective and objective analysis, and give forensic opinion. This paper gives a number of examples how important and irreplaceable is the role of forensic expert in spite of more often intentions of fully atomatic forensic speaker recognition. New researches in the field of forensic speaker recognition show necessity of auditory and instrumental symbiosis, which minimize potential forensic errors that may be caused by inter- and intra-speaker variations in speech expression. There can be a number of variations: subjective (psycho-emotional, health, conscious or unconscious), objective (noise masking, recording conditions and techniques, telecommunication channel), situational (length and quality of record, adaptation to the interlocutor, use of foreign language) etc. Presented arguments should contribute to better understanding of all circumstances that lead to forensic expertise, which is meaningful for all involved sides in a case. On the other hand, this arguments should give additional knowledge to forensic experts themselves in order to improve quality of forensic expertise.

Keywords: forensic speaker recognition, auditory-instrumental method, inter-speaker and intra-speaker variabilities, forensic linguistics, forensic phonetics, forensic acoustics.

INTRODUCTION - What is FSR?

Every person on this planet has certain set of biometrics features, which makes him unique and identifies him in an unique way. The well known features that uniquely describe person’s identity are fingerprints, structure of retina (layer at the back of eye), DNA, hand geometry (shape of hand), facial thermogram (image of infrared camera that detects heat patterns on human face) etc. All these features have at least one marker sign that makes person different from any other person, even in the case of monozygotic twins. One of these biometric features is human voice.

Voice allows person to have verbal communication with other people. From acoustical (physical) aspect, voice makes speaker look like source of acoustical signal by which he transmits a voice message. On the other side, speaker materialize his language into speech, which is system of verbal (abstract) signis by which he encodes idea that he wants to announce to interlocutor [1]. However, besides verbal (linguistic) information, speech signal contains nonverbal information or extralinguistic (individual characteristics) and paralinguistic information (emotions, attitudes, intentions) [2]. Extralinguistic information in speech signal makes base for speaker recognition.

Speaker recognition includes perceptive and/or acoustical analysis of speech sample and determination of its belonging to certain person. Process of recognition can be done in several ways [3]: (i) by instrumental (computer) way, usually for commercial needs in terms of speaker

verification or speaker identification, (ii) by „naive“ (non-expert) listener, which relies on his auditory-perceptual system in recognition process (example in „voice line-up“ experiment) and (iii) by expert listener, that in addition to his auditory abilities also has skills in acoustic (instrumental) analysis of the speech signal. In this third case it is the forensic expert who compares two voice samples, a suspected (known) voice and a questioned (unknown) voice, and makes decision of their similarity (originate from the same person) or dissimilarity (originate from different persons). This kind of speaker recognition is called *forensic speaker recognition* - FSR.

Currently there are three methods in FSR [4]: *auditory-perceptual method* (in literature also known as oral-perceptive and oral-acoustic method), *auditory-instrumental method* and *automatic method*. Auditory-perceptual method is based on men's auditory perception and comparision of recordings, which is done by an expert who note the differences between recordings and brings a conclusion about their similarities. This method also includes auditory(oral)-spectrographic speaker recognition that is based on visual monitoring of spectrogram, so-called „voiceprint“.

Auditory-instrumental method (in literature known sometimes as semi-automatic method) beside auditory analysis also includes acoustic analysis which is based on measurement of different kinds of features in speech signal and their statistical analysis; so, it is about the integrated subjective-objective expert method. *Forensic automatic speaker recognition* (FASR) is based on methods of automatic speaker recognition customized to the forensic needs.

This paper analyse FSR and presents several arguments in favor of hybrid auditory-instrumental method as an optimal method for today's level of developement in forensic science.

A BRIEF HISTORY OF FORENSIC SPEAKER RECOGNITION – PAST APPROACHES

The history of forensic speaker recognition is rather long. The first use of individual identification by speech sounds in criminal cases dates back to 1660, in the trial of King Charles I of England [5]. The first scientific investigation was performed in 1937, in the court case of abduction of Charles A. Lindbergh's son that occurred in 1932 [6]. When sonagraph was created on the basis of Steinberg's idea in 1934 [7], not only the inter-speaker similarities but also the intra-speaker similarities in speech patterns were focused [8]. The term "voiceprint" was first invented in 1944 by the two researchers at Bell Laboratory, Grey and Kopp [9]. They reported that speaker identification by visual examining of spectrograms could offer good possibilities. Kersta [10] claimed that inter-speaker spectrographic differences were greater than intra-speaker differences. For this type of comparison special skills are not required and the main task for researcher is to visually compare spectral energy concentrations of some speech samples [11]. The features that are commonly analyzed and compared are: formant transitions, central frequency and formant bandwidth, spectral compositions of fricative and plosive, time proportion of some segments, intonation contoure formes and other details in three-dimensional space intensity-frequency-time.

But, it is well known fact that the speaker can not repeat the same speech expression twice on the absolutely same manner. Also intra-speaker variations in repeated speech expression can be higher than inter-speaker variations of two different persons. Therefore, opposed to papillar ridges in fingerprints, the spectrograms are not invariant, so the term „voiceprints" in comparison to „fingerprints" is not suitable. Because of this facts, there was many controversial opinions about usability of „voiceprints" for FSR [12]. Nowadays „voiceprints“ are rarely used as a method for FSR, but they are used as a very useful instrumental tool in acoustic analysis of speech signals.

Current approaches to FSR

Auditory-instrumental FSR

Auditory-instrumental methods mean a combination of linguistic judgments, made by the examiner listening to the speech material, combined with the use of acoustic (instrumental) measurements traditionally used by phoneticians to describe speech [13]. In the former category examiner recognized such factors as dialect, foreign accent, grammar, idiosyncrasies, speech errors, pathological speech manifestations etc.; they all belong to *forensic linguistic*. In the latter examiner typically find measurement of fundamental frequency mean and standard deviation, formants, speaking rate, time-spectral features of consonants etc.; they all belong to *forensic phonetic*. The main speaker's features in verbal expression are listed in Table 1 [3].

The auditory-instrumental method consists several steps and all analyses are carried out bearing in mind the situational context and the physical and psychological states of the speaker [14].

The first step for forensic expert is listening to speech samples and makes global observation about category of speech situation (monologue, dialogue, read, spontaneous, imitation, disguised, style, etc.) and physical and emotional speaker features (gender, age, communicative, relaxed, excited, drowsy, drunk, drugged, etc.).

In the next step linguistic and phonetic analysis is done [15]. Perceptual analysis gives information about: dialect and regional accent, lexical and syntactic characteristics, voice quality, articulation and problems in articulation, intonation and rythm, speech defects and pathology, but also about nonverbal manifestations and so on.

Table 1: Speaker's features in verbal expression.

SPEAKER'S FEATURES	
VOICE	
Fundamental frequency Fo	Mean and standard deviation, hystogram, expressive variations
Intonation	Contour forms, raising and falling segment distribution
Formants	Central frequencies and bandwidths, distributions, transitions
Voice quality	Features - jitter, shimmer, NHR, VTI, SPI, creaky voice, etc.
MANNER OF SPEAKING	
Speech rhythm	Segmental durations and intensities
Sentence intonation	Sentence focus, declination, verbal expressions
Speaking tempo	Syllable and articulation rate, pauses features (numbers, positions, durations)
Respiration	Rate, duration and spectral structure
Speech pathology	Articulation and speech deviations, dental bridge
SPEECH AND LANGUAGE	
Dialect	Type and degree of deviation from standard pronounciation, regional representation
Sociolect	Identification of jargons, description of phonetic, lexical and grammatical pecularities
Accent	Regional accent, foreign accent, deviation from sound system of a reference language
Verbal habits	Typical phrases, degree of eloquence

The next is acoustic analysis of suspected and questioned speech signals. This analysis supports auditory-perceptual findings and quantifies them with objective measurements of many acoustic features. For example, observation like „men's voice with a quite low pitch" can be described as person with fundamental frequency of voice of around 90Hz, or „monotonous voice" as person that has standard deviation of foundamental frequency of approximately 10Hz, or „fast tempo of speech" as person that utters approximately 7 syllables per second, or „clear resonant voice" as person that has vowels with very clear spectrum characteristics and higher formants with relatively increased energy compared to lower formants, etc. This analysis uses techniques and modern software tools in acoustic phonetics.

Finally, forensic opinion about identity/nonidentity of speaker is determined on the basis of milieu of forensic markers and expressed in terms of probability scale, Table 2 [14, 19]. This scale is adopted in most European countries.

Table 2. Probability scale.

Identity/non-identity
Very strong probability (close to certainty)
Strong probability
Moderately strong probability
Moderate probability
Limited probability
Can not be assessed (no-decision)

The main problems that affect FSR are caused by the forensic environment and acoustical impairments, for instance: telephone channel distortions, heavy background noises, poor recordings quality, insufficient speech materials, non-cooperative speakers, imitations, and differences in speaker's verbal expression. These problems are characteristic for questioned voices, but similar ones exist for suspected voice [16]. Many of these problems cause variations in voice and speech.

Listener can very good recognize the variations in speech expression using his perceptual system. This means that speech signal, as acoustic signal, contains all acoustic features which auditory system detects and its perceptual mechanism interprets in an appropriate manner. Theoretical and experimental investigations have not found yet satisfactory model for auditory and perceptual system, so automatic recognition and interpretation of speech variability is still in the shadow of men's capabilities. This tells us how complex the variabilities are, how complicated is human perceptual system, and finally how human as an expert is unavoidable in forensic speaker recognition.

Typically, variations in verbal expression can be recognized as variations in voice and variations in speech. Their general classification is shown in Table 3 [17].

Intra-speaker variations caused by context at phonetic or linguistic level are always present in speech expression. It should not be omitted variations caused by emotions, because there are rare situations when speaker has utterance without emotions (sometimes in the case of illness or mourning). Other variations comes to emphasis depending on the conditions in conversation (speech in a motion, in noisy environment, in quiet room, in threat, in iritation).

Inter-speaker variations are based on inherent characteristis of speaker. However, inherent characteristics of one speaker are not constant and they are liable to change, for example: hoarseness with aging, some emerging chronic respiratory diseases, surgery on the vocal cords or the use of dental prostheses, long-term changes in lifestyle which are reflected in the adoption of the dialect of the new environment, and so on.

Table 3. Classification of variations in voice and speech.

Intra-speaker variations	Voice quality variations	modal, tense, relaxed, panting, hoarse, whispery...
	Speech style variations	careful, clear, articulate, causal, spontaneous, formal, intimate, read, dictated ...
	Phonetic and linguistic variations	contextual variations at the level of phonemes, words and sentences...
	Variations caused by communicative context	open conversation, interview, professional speech, lecture, dialogue human-computer...
	Tempo and speech rythm variations	normal, slow, fast, very fast tempo, rhythm structure...
	Variations caused by stress	emotional factors, cognitive load, the influence of alcohol, drugs, medications ...
	Vatiations caused by ambient situation	communication in noisy environment, Lombard reflex, communication conditions, speaking in motion ...
Inter-speaker variations	Variations that reflect: - physical dimensions of vocal tract - speaker gender and age - health condition - dialect and education...	

Automatic FSR

Modern development of speech technologies, especially in the field of automatic speech and speaker recognition, enabled significant use in *forensic automatic speaker recognition* (FASR) [18]. The aim of these systems is minimization of subjective estimation and evaluation od speech material (samples). This is realized with interpretation of speech as physical phenomena at speech signal level but not at linguistic level. Using the appropriate mathematical algorithms, certain features are extracted from the speech signal that are brought into correlation with the identity of the speaker and then with statistical method suspected and questioned samples are compared.

Two moments are very important: (1) FASR systems can give valid comparision only under optimal conditions of their use (good SNR (signal to noise ratio), speech material of sufficient duration, speakers of the same psycho-emotional state, etc.) and (2) these systems are very vulnerable to recording conditions and characteristics of the telecommunication channel (ambiental noise and speech signal distortions). On the other side, given the fact that forensic expertise is unique to each couple of speech samples (suspected-questioned recordings), the question is how could FASR system incorporate artificial intelligence that would allows complete replacement of a forensic expert. There is a general consensus that it in the near future, this replacement still cannot be expected.

At present FASR systems are used in a limited number of forensic laboratories: in France (IRCGN), Switzerland (IDIAP), Spain (Guardia Civil), and the USA (FBI). There are also semi-automatic systems that are used in combination with auditory phonetic analysis by forensic experts. This type of approach is used in Italy (RCIS) and Russia (NWFSC) [13]. The methods that excludes FASR has been used by most labs or individuals in the Bundeskriminalamt (BKA) and elsewhere in Germany, UK, Sweden, Finland, the Netherlands, Austria [20], and Serbia (Laboratory for forensic acoustics and phonetics, LAAC) [14].

Arguments for auditory-instrumental approach

Following examples show advantage of auditory-instrumental approach compared to automatic approach in FSR. More exactly, this arguments show forensic situations where FASR cannot be used, because it may give false results.

Argument 1

First example is related to the software Speech Interactive System (SIS), designed by Speech Technologies Centre (Saint Petersburg) [21], and its application for the same person in different environments. SIS offers almost fully automated pitch analysis, 16 parameters of pitch are used (Table 4), and provide a decision whether they belong to the same speaker or not. The main task of an expert is to find two adequate samples of suspected and questioned recordings, as they should be emotionally and intonationally comparable, without the noises that could interfere with pitch extraction, etc. The recordings must have at least 30 seconds of voiced speech data (excluding pauses and voiceless consonants) in each recording in order to obtain enough statistics. False acceptance (FA) and false rejection (FR) probabilities are computed for each parameter, and FA and FR values for the weighted relative deviation of pitch features are computed finally. At the end, the overall decision, based on FA and FR values, is made. The decision is always categorical but not probabilistic. If FR exceeds FA the answer is positive (i.e. "the voices belong to the same speaker"), if not it is negative.

Table 4 shows the results in comparison of two signals, Signal I - suspected voice and Signal II – questioned voice, as example of SIS performance in a real forensic case.

Table 4. An example of comparison of pitch statistics.

Parameter	**Signal** I	**Signal** II	**FA**%	**FR**%
Average value, Hz:	130.3	123.0	23.3	40.6
Maximum, Hz:	183.9	182.7	2.1	96.5
Minimum, Hz:	93.8	76.2	68.8	3.9
Maximum - 3%, Hz:	163.3	156.8	13.8	72.4
Minimum + 1%, Hz:	97.4	89.5	32.9	23.0
Median, Hz:	131.7	123.8	23.8	40.0
Percent of area with rising pitch, %:	47.5	45.8	23.9	71.5
Pitch logarithm variation:	0.0028	0.0036	27.2	48.2
Pitch logarithm asymmetry:	-0.17	-0.16	1.7	97.7
Pitch logarithm excess:	2.83	2.67	13.8	83.5
Average velocity of pitch change, %/sec:	-15	-29	51.3	42.6
Pitch logarithm variation derivative:	2.47	1.43	89.7	1.8
Pitch logarithm variation derivative asymmetry:	-0.26	-0.93	84.4	10.4

Pitch logarithm excess derivative:	15.74	20.18	66.0	14.6
Average velocity of pitch rise, %/sec:	612	353	77.6	6.1
Average velocity of pitch fall, %/sec:	662	499	52.5	24.8
Weighted relative deviation of pitch features			55.0	2.4

FA – false acceptance, probability of false acceptance, i.e. probability of error, if we conclude the speaker in two phonograms is the same, the less FA we have, the higher probability of one and the same speaker in two phonograms is.
FR – false rejection, probability of false rejection, i.e. probability of error, if we conclude the speakers in two phonograms are different, the less FR we have, the higher probability of different speakers in two phonograms is.

General decision based on the results of fundamental frequency statistics analysis – *the different speakers in the analyzed phonograms*.

The next test is carried out with SIS: the same person was speaking in two different situations which are used as suspected and questioned voice. Six subjects participated in test and the same text was pronounced in Serbian or in English or Hungarian. The subject S2 was bilingual person in Serbian and Hungarian and with good knowledge of English, but subject S1 was not native English. The results of features from Table 4 were summarized and shown in Table 5.

SIS made a mistakes in decision in all cases except in Case 1 where subject S1 was correctly recognized. Subject S1 used Serbian articulation base as well as intonation in pronunciation of English („Serbian English“). This example, as the following one, shows limiting abilities of FASR in domain of pitch analysis.

Table 5. SIS decisions for the same subject as suspected and questioned.

Case	Subject	Suspected - Questioned	FA	FR	Decision
1	S1	Serbian - English	3.4	56.3	Same speaker
2	S2	Serbian - Hungarian	72.1	0.4	Different speakers
3	S2	Hungarian - English	66.3	0.6	Different speakers
4	S3	Serbian - Serbian imitation	55.0	2.4	Different speakers
5	S4	Serbian - Serbian distorded	90.1	0.2	Different speakers
6	S5	Serbian - Serbian excited	61.5	0.8	Different speakers
7	S6	Serbian - Serbian illhumored	42.8	3.4	Different speakers

Argument 2

The next example illustrates statistical distributions of fundamental frequencies F0 of suspected and questioned voices that belong to the same person (a real case). Suspected voice was declarative, recorded in the morning in police interview, while the person has not been in stressed condition (that was not his first time in police). The questioned voice was expressive and recorded in the evening communication. Both recordings were in duration over 30 seconds. Histogram of suspected voice is symmetric with dynamics of F0 from 75Hz to 175Hz, which idicates calm voice. On the other side, histogram of questioned voice is considerably wider and asymmetric, and spreads to higher frequencies, it has larger dynamics of F0 that goes from 85Hz up to 250Hz. Average frequencies of these two histograms differ in about 10Hz, while standard deviation is almost twice bigger in questioned voice. Final observation is the difference in lowest F0 of suspected voice that is 75Hz and of questioned voice that is 85Hz.

All cited features indicate the different voices. However, the expert knowledge about declarative and expressive voices could explaine all differences and accept conclusion that both voices belong to the same person. Especially the differences in lowest F0 are supported with investigation in [22]. The question is: *Does the FASR own such expert knowledge (artificial intelligence) to process this and similar cases, taking in mind that each case is unique*?

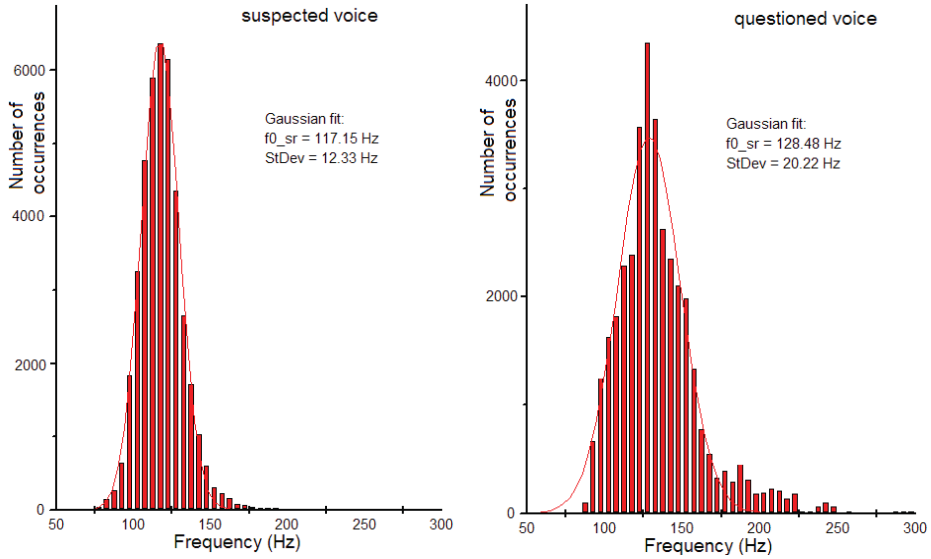

Figure 1. Histograms of suspected and questioned voices (the same person in real case).

Argument 3

In speaker identification and speaker profiling one of the most powerful features used to identify a person is regional accent and dialect. It is well known the case of Paul Prinzivalli [4] where suspected Prinzivalli was acquited only on accent difference in his and offender's voice. This example shows that only one but very strong forensic marker is enough for good and right forensic decision. On the other hand this example indicates very important role of forensic linguistics in forensic expertise.

In the auditory-instrumental FSR the forensic experts applied different strategies in identifying a speaker's regional accent and dialect: aural-perceptual analysis, acoustic analysis, consultation of audio databases and consultation of the literature on dialects. As pointed in [23] there is no correlations between the performance (i.e. error rate) of the forensic experts and the time spent, the number of methods applied, the kind of methods applied or the perceived degree of difficulty. These facts indicate that performance in accent and dialect identification predominantly depends on the individual knowledge and skills of the forensic expert.

Automatic accent and dialect recognition is one of the main topics in last two decades in modern researches, mainly for the purposes of improving performances of automatic speech recognition systems [24]. Many of the techniques developed for language identification are directly applied to the accent and dialect identification. Literature review in [25] shows recognition accuracy od maximum 85%, which is insufficient for FSR needs. This argument confirms in addition that forensic expert has significant advantage in relation to automatic approaches.

CONCLUSIONS

The foregoing discussion wouldn't be complete if we didn't highlight the fact that sometimes instrumental approach can outperform auditory approach [26]. Let us mention two examples: (i) vowels of two speakers can have the same phonetic quality but their spectrograms are not identical, and (ii) with speech signal processing we can obtain set of mathematical features from which we can make speaker discrimination. Especially this second example shows that speaker recognition can be done in completely new (parametric) dimensions that are beyond the reach of an expert. This fact shows the necessity of expert and instrumental symbiosis in FSR.

In last decade, application of automatic speaker recognition in forensics was often analysed, but the final conclusion has always been: *a clear need-for-caution,* including statements such as, "at the present time, there is no scientific process that enables one to uniquely characterize a person's voice or to identify with absolute certainty an individual from his or her voice" [27]. Presented arguments in this paper are in favor to this point of view, where under forensic conditions human experts still seem to be superior to automatic speaker recognition approaches. But, it must be mentioned that an expert besides his talent, education, training and experience, must be ready for constant improvement, because it is known that every new case study is unique and represents not only forensic but also scientific challenge.

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REFERENCES

1. S.T. Jovičić (1999). *Speech communication: physiology, psychoacoustic and perception*. Nauka, Belgrade. (In Serbian)
2. S.T. Jovičić, Z. Kašić, M. Đorđević (2006). Paralinguistic and extralinguistic information in speech technologies. Proc. of Conf. *ETRAN*, Belgrade, 443-449. (In Serbian)
3. S.T. Jovičić (2001). Forensic aspects in speaker recognition. *Nauka Tehnika Bezbednost*, 1, 41-60. (In Serbian)
4. P. Rose (2002). *Forensic speaker identification*. Taylor & Francis, London.
5. S. Furui (1992). Acoustic and speech engineering (onkyo, onsei kougaku). Kindai Kagakusha Publishing Company, Tokyo.
6. National Research Council (1979). On the theory and practice of voice identification. National Academy of Science, Washington, 3–13.
7. Steinberg JC (1934) Application of sound measuring instruments to the study of phonetic problems. J Acoust Soc Am, 6, 16–24.
8. R. Potter (1945). Visible patterns of speech. Science, 102, 463–470.
9. C.H.G. Grey, G.A. Kopp (1944). Voiceprint identification. Bell Telephone Laboratory Annual Report, New York, 1–14.
10. L. Kersta (1962). Voiceprint identification. Nature, 196, 1253–1257.
11. VIAAS (Voice Identification and Acoustic Analysis Subcommittee) of the International Association for Identification (1992). Voice comparison standard. *Journal of Forensic Identification*, 5, 373-396.
12. R.H. Bolt, F.S. Cooper, E.E. David, P.B. Denes, J.M. Pickett, K.N. Stevens (1973). Speaker identification by spektrograms: some further observations. *J. Acoust. Soc. Am.,* 54, 531-534.
13. S. Gfroerer (2003). Auditory-instrumental forensic speaker recognition. *EUROSPEECH 2003*, Geneva, 705-708.

14. S.T. Jovičić (2009). Forensic speaker recognition: between theory and practice. *Proc. of First conference with international participation: Law and forensics in criminal law*, Belgrade: Academy of Criminalistic and Police Studies, 324-332.
15. Z. Kašić, J. Đorđević (2009). About linguistic expertise in crime solving. *Proc. of First conference with international participation: Law and forensics in criminal law*, Belgrade: Academy of Criminalistic and Police Studies, 333-340.
16. S.T. Jovičić, Z. Kašić (2011). Quality of undisputed voice recordings: forensic aspects. *International Scientific Conference „Archibald Reiss Days"*, Academy of Criminalistic and Police Studies, Belgrade.
17. S.T. Jovičić, Z. Kašić (2009). Intra-speaker speech variations: forensic implications. *Int. Congress of Applied Linguistics*, Faculty of Philosophy, Novi Sad, Serbia. (In Serbian)
18. A. Drygajlo (2012). Automatic speaker recognition for forensic case assessment and interpretation. In A. Neustien, H.A. Patil (eds.): *Forensic speaker recognition: Law enforcement and counter-terrorism*. Springer, New York.
19. Association of Forensic Sciences Providers (2009). Standards for the formulation of evaluative forensic science expert opinion. *Science and Justice*, 49, 161-164.
20. M. Jessen (2008). Forensic phonetics. *Language and Linguistics Compass,* 2/4, 671–711.
21. SIS II forensic sound software; http://www.speechpro.com/
22. M. Heđever, E. Farago, S. Huskić (2007). Voice problems in professional voice users, Acta Med. Sal., 36(1), 1-9. (In Croatian)
23. O. Köster, R. Kehrein, K. Masthoff, Y. H. Boubaker (2012). The tell-tale accent: identification of regionally marked speech in German telephone conversations by forensic phoneticians. *Journal of Speech, Language and the Law*, 51-71.
24. F. Biadsy (2011). *Automatic Dialect and Accent Recognition and its Application to Speech Recognition.* PhD Thesis, Columbia University.
25. H. Kamper, T. Niesler (2012). A literature review of language, dialect and accent identification. Technical Report SU-EE-1201, Stellenbosch University, South Africa
26. J. Baldwin, P. French (1990). *Forensic phonetics.* Printer: London/New York.
27. J.P. Campbell, W.Shen, W.M. Campbell, R. Schwartz, J.-F. Bonastre, D. Matrouf (2009). Forensic Speaker Recognition: A need for caution, IEEE Signal Processing Magazine, March, 95-103.

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IMPLICIT AND EXPLICIT SPEECH ACTS IN FORENSIC LINGUISTICS

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Abstract: There has been a long tradition of speech act research, of those acts that are performed by linguistic or other communicative means such as non-verbal behaviour. In some cases it is relatively easy to state the "rules" for the performance of speech acts, when there are explicit linguistic signals, clear social factors, etc., whereas for many other cases the variability of those signals and conditions presents a serious problem so that a disagreement may arise as to what particular speech act has been performed. We analyze here the relationship between linguistic signals that can determine a speech act up to a degree and the types of extralinguistic factors (social, psychological, and cultural) that are usually taken up in forensic linguistics literature. The focus will be on the speech act of threat as the paradigmatic case representing the overlapping of linguistic and extralinguistic components and factors in determining its realization.

Keywords: implicit, explicit, speech act, linguistic signals, extralinguistic context, threat

INTRODUCTION

In linguistic pragmatics one of the main topics – speech acts, has received considerable interest, since on the one hand, they seem to capture a crucial communicative meaning of utterances, i.e. the "real", intended meaning that it has for the interlocutors, and on the other hand, the degree of directness and explicitness of these speech acts seem to be a challenging issue for linguistics and other disciplines that depend on understanding the communication and language. Our paper aims at giving an overview of the gradience relations between those speech acts that involve explicit linguistic signals or forms and implicit, indirect forms that can be found in literature.

SPEECH ACTS

The British philosopher John Austin, in contrast to the positivist philosophy of language, showed that it was wrong to treat language as simply a means to describe a certain "state of affairs" in the world, and that many utterances cannot be reduced to propositions or sentences whose semantics can be explained by truth and falsity. Thus, if we say: '*I bet you sixpence it will rain tomorrow.'* it does not make sense to talk about whether that utterance is true or false, it is the act of "betting" that is being performed by its very uttering. Or when the speaker says, "[before the registrar or altar]: 'I do'", he/she is not reporting on a marriage: he/she is indulging in it.[1] As opposed to the effort of positivists to translate often ambiguous or indeterminate, according to them, sentences of ordinary language into more "logical" sentences, Austin claimed that such view of the ordinary language is much oversimplified. On the contrary, there is more to language than that. Most importantly many sentences can be used to perform an action, not only of stating that something is or is not, but to "thank, demand, warn, promise, threat", etc.

Some of these speech acts are explicit. Such verbs as *bet, proclaim, thank,* etc. are called performative. There are linguistic conditions that should be met in order that they realize the

1 Austin, J. 1962, How to do things with words, Oxford University Press, pp. 5-6.

action – they must have a first person subject, present tense indicative form, could be modified by adverb *hereby*. So, a sentence *He bets you a sixpence that it will rain tomorrow* is not a performative, it is a description of what "he" is doing. Also, certain social conditions must apply. For example, the performative utterance *I proclaim you man and wife* must be uttered by the relevant authority. Further social and situational factors, place, time and other circumstances, together with the appropriateness of the speaker (and other participants in the communication) constitute "felicity conditions" for a performative utterance to be successfully performed. In some cases, though rare, such as marriage, it may be legally determined, as to who, when, where and the exact wording that the act should be performed with.

Every utterance has the *locutionary force*, that is, its linguistic form and content**.** What the speaker intends to communicate to the addressee is the *illocution (illocutionary force)*. How the addressee interprets or reacts to what the speaker says is the *perlocutionary act* or *force*. In principle, if communication is successful, the illocution and the perlocution should correspond, so that if, for example an act of "promise" has been performed by the speaker, the listener would understand that it is a promise, and would be entitled to expect some positive future situation.

Speech acts, being about what we can perform with language, have been classified along different dimensions and for a variety of reasons into various categories. Austin himself, as already mentioned, introduced categories such as locution, illocution, perlocution. The most interesting turned out to be illocution since it deals with intentions, whereas perlocutions or perlocutionary force, dealing with the effect a speech act has on the addressee was considered as the most difficult to explain, due to the subjectiveness and a number of situational, psychological, social factors that it implies. One of Austin's main distinction was between explicit performatives (like *I promise I'll come*) and implicit performatives (like *I'll come,* which is also a promise). Most of the classifications were originally concerned with single utterances equaling single sentences.

Some speech acts though cannot be expressed, or very often are not expressed by a single utterance, i.e. consisting of a single, grammatically simple sentence, and the linguists have termed them as *speech act sets*. Complaint is an example of a speech act set – i.e., one speech act consists of several speech acts. As shown by Murphy and Neu,[2] who analyzed how students may make complaints about their low grades to their professor, the overall speech act of complaint has several components. They are: an "explanation of purpose" (*May I talk about my paper*), "complaint" (*I am upset with my grade*) or "criticism" (*You did not recognize my point*), "justification" (*I put a lot of effort*), "candidate solution: request" (*Could you reconsider my grade*).

Since in this example of "complaint" we see that a speech act is already extending beyond a sentence and now involves a short text/discourse, it should be pointed out that a similar distinction is made through the idea of *macro* and *micro speech acts*. Thus a narrative can have the role to "involve, persuade and perhaps move an audience through language and gesture, 'doing' rather than telling alone",[3] which means that a narrative can have several macro acts. Or, one can hear a long story of mishaps of the speaker on the way to the meeting where he came late, all as "justification" for being late, in other words the whole story can be an indirect "apology". The act of "persuading" can also spread over a conversation or discussion for a number of turns until one of the interlocutors concedes. It is reasonable to suppose that majority of complex speech acts could also be broken down into smaller, component speech acts so as to preserve pragmatic coherence of the whole text/discourse.

EXPLICIT AND IMPLICIT PERFORMATIVES

One important type of classification, a broad one, between explicit and implicit speech acts, or direct and indirect speech acts has been much analyzed in linguistic pragmatics. There are not many speech acts that show a matching one-to-one correspondence between its form, i.e. the form of the sentence/utterance and the intended speech act. The ones that seem to meet such a correspondence may be only the very formal ones, often legally regulated, (*I proclaim you man and wife*, *I baptize you*, *I name the ship*, etc.). It is perhaps this specific formalization that makes

2 Murphy, B. and Neu, J., "My grade is too low: The speech act of complaint", in: pp.191-216.
3 The Sage Dictionary of Social Research Methods, 188.

them canonical speech acts, but not common. We rarely say to someone: *I forbid you to smoke here*, which is the direct, explicit speech act (- we used first person present indicative of the performative verb), rather we say something like: *Here we don't smoke*, or *Sorry, I am allergic to the cigarette smoke,* or even we point to the "No smoking" sign on the wall and say nothing. These are all indirect speech acts.

Typically examples in literature show the gradience of explicitness/implicitness by examples such as: *I command (demand) you to pass the salt*, which, though explicit, is socially almost unacceptable, and can be made less and less rude or impolite just by using the imperative: *Pass the salt* and even more implicit by questioning the addressee's capability to perform the action of passing the salt: *Could you pass the salt?* The interesting point about these less direct forms is that very often they are the usual forms, preferred by the speakers rather than the explicit one. The evidence that it is the preferred form and typical one comes from the "funny" situation when the reaction of the addressee is not that of "passing of the salt" but a simple answer "*Yes*" after which he/she 'does nothing'. Such indirect forms are considered more polite, more acceptable in many cases of social interaction. The illocutionary force (or illocutionary speech acts) received much attention especially in the case of more indirect speech acts.

The other side of the coin is presented by cases which show that one and same utterance (sentence) can have different, and sometimes numerous illocutions. Thus, almost any ordinary sentence, like: *It is five o'clock.* can be a "statement" if it is intended to inform, or expression of "request" that the conversation participants leave the premises, "apology" if said with a suitable face expression and tone of voice in a situation in which the speaker forgot that his addressee must leave and made the speaker listen to a long talk, and the list of situations can go almost as much as the author is tireless in inventing them.

THREAT AS A SPEECH ACT

The variability of linguistic forms and illocutions of speech acts can be illustrated by the speech act of threat. Due to the fact that it is rarely expressed explicitly, in the sense some canonical speech acts (betting, naming, getting married, etc.), issues have been raised as to whether it is an illocutionary or perlocutionary act, how to distinguish between them and similar speech acts such as promises, warnings, etc.

Since the goal of the threat is to "intimidate" the addressee, it is sometimes mentioned that it is a perlocutionary act, that is, like "persuade", "convince", etc. in that it is more oriented towards the effect. There are other verbs such as *amuse* for example that basically denote that some kind of emotion or belief of the addressee is produced. Thus, we can say *I tried to amuse them but did not succeed*, in case no obvious effect can be observed, but it is not quite common to hear *I tried to promise them but did not succeed*. In other words, whether it was a true act of amusement or promise depends on addressee in the former case and the speaker in the latter. Also, I may threaten someone, but since that person might not feel threatened my threat might not produce an obvious effect. It is even easier to recall that some people might find a joke funny and laugh, while there are those that would not laugh at all, for personal, cultural and who knows what other reasons. Since the effect of any utterance may depend on a whole lot of factors, social, psychological, cultural, perlocutions seem to be difficult to take into account. And it still remains as a fact that we can recognize that a threat or a joke or intimidation was meant, and say so, even though we do not feel touched by it. It seems that perlocution, even it is admittedly a part of certain speech acts, and of threat is abandoned in favour of the illocution.

The second point is that as a speech act threatening is often seen as very similar to some other speech acts: promises, warnings. We shall first overview the conditions for a threat to be a successful act, and then see how it interacts with other speech acts.

For a threat as a speech act to be successful/felicitous, the speaker must, according to Fraser,[4] express or satisfy the following conditions:

C1. The speaker's intention to personally commit an act (or be responsible for bringing about the commission of the act);

4 Bruce Fraser, Threatening revisited, *Forensic Linguistics* 5 (2) 1998, 160-173.

C2. The speaker's belief that this act will result in an unfavourable state of the world for the addressee.

C3. The speaker's intention to intimidate the addressee through the addressee's awareness of the intention in C1.

There are also three more conditions which, according to Fraser, are not necessary for a threat to be successful, but if met, make that speech act felicitous. They are a) the power and/or capability of the threatener to bring about the new state of affairs, b) result specified in the condition of a conditional threat be capable of satisfaction by the addressee, c) associated only with a conditional threat, is that the speaker wants the condition met.[5]

Some of the aspects of these conditions have been further developed and specified in the literature. Thus, Harmon[6] takes up conditions proposed by Fraser and adds details. Preparatory condition includes "satisfaction" of the speaker from something detrimental to the victim" and also "has the capability to accomplish that detriment". Whereas the physical ability is determinable: "physical ability, aptitude (gender, race, socio-economic group, substance abuse, lives alone and without support, medical condition, access to weapons, etc)" the emotion of satisfaction is not. Sincerity conditions refer to the seriousness of the speaker's intention: he should be taken as serious. How serious is his intention seems to be measurable by the "speaker's past in general, acts vis-à-vis the intended victim, view of the speaker by others, especially a threatened class, response to treatment, impulsivity, history of hospitalization, commitment, jail, victim of abuse in the past". Then the essential condition is formulated in terms of the verbal and nonverbal behaviour: "word choice, implying physical harm, self-harm, etc., specificity of the victim, intonation, demeanour, gestures, how detailed plan to commit the act has become, a sincere recantation…"

Finally, the author adds that fourth, "propositional content condition: conditional locution, and the condition was not immediately surmountable, whether there are geographic or other impediments to the completion of the action (distance, other continent, circumstances, the speaker is in jail)". The important comment following these detailed conditions is that this paradigm is "amenable to growth". As we can see, the author, dealing here with the case of threats by mental hospital patients, is adding as much information as possible about psychological and social histories relevant for determining the speech act of threat. In particular he claims that it is most important (from the aspect of legal obligation to inform the threatened person of the situation) not what the effect of the threat is, but whether it has been uttered or not.

LINGUISTIC FORMS

Based on literature and analysis of some further examples, threat, like many other speech acts seems to take a variety of linguistic forms. We will first quote Harmon's examples, which, according to this author, can be threats:[7] *He is going to die*, *I worry that I'm going to kill him*, *Why should someone like him get to live*, *He's dead.* These could be joined in the group of threats Salgueiro[8] calls "elementary threat" usually consisting of one sentence (without conditions). This latter author gives further examples: *You'll pay for this!, I'll kill you! You'd better watch out!*. These are typical examples, and what they often share are lexemes with the semantic component of 'death', 'kill', or denial of 'life', whereas from the syntactic and pragmatic point of view they are varied – assertions, questions, exclamatives.

Also syntactically conditional sentences as threats have received much attention in the literature. As the conditional, "if" sentences do not denote a realized situation, but a possible, future situation, it seems these sentences are particularly appropriate for use in threats (and promises). Though conditionals are not necessarily promises and threats, it seems that they all share a sort of prediction that is implicated in these two speech acts. For example, conditional sentences: *If*

5 Ibid, p.164.

6 Harmon, A.G. (2007) "Back From Wonderland: A Linguistic Approach to Duties Arising from Threats of Physical Violence," *Capital University Law Review*, Fall 2008.pp 27-95.

7 Ibid. p.44

8 Salgueiro, A.B., 2010, Promises, threats, and the foundations of speech act theory, *Pragmatics,* 20:2, 213-228.

it rains tomorrow, I will stay at home. *If it's sunny tomorrow, I'll go out*, share with promises and threats the meaning of prediction: *If you lend we your bike, then I will help you with your homework. If you don't lend me your bike, I will not help you with your homework*. Apart from the fact that conditionals lend themselves to logical analysis, and are therefore interesting for semantic analyses, Salgueiro also claims that even elementary threats are tacitly conditional and therefore basic to threats in general. Actually, the only arguments for claiming this tacitness is that 1) the most typically cited example is that of a bank-robber: "*If you don't give me the money, I'll shoot you*", and also because it is about conditions which "everyone takes for granted" in cases when they are not explicitly mentioned.[9] The second differentiation among conditional forms we find is between promises and threats that are commissive conditional promises/threats and directive (request/demand) conditional promises and threats. The examples are: *If I win the lottery, I'll buy you a car; If I become the boss, I'll ruin you*, where conditions depend not on the speaker or addressee, but on someone else, and the conditions that contain request or demands that the addressee is to satisfy: *If you give up smoking, I'll buy you a car. If you give up studying I won't give you money any more.* Here the fulfilment of the condition depends on the speaker.

Yet another author, Donaghy, implies that conditionality is at the foundation of speech acts of promises, threats, warning, and advice. We will quote his examples because they illustrate otherwise often used linguistic negation to show the interconnectedness of speech acts, threats, promises and warnings:[10] *If you finish your homework, I will give you more castor oil to drink* (promise), *If you don't finish your homework, I will give you more castor oil to drink* (threat). *If you study for the exam then you will pass* (advice). *If you don't study for your exam, you will not pass* (warning). In all these cases we have another tacit imperative sentence: *So finish your homework, Study for the exam*. The author actually wants to show by his examples the idea that a sentence in the imperative mood – actions to be performed, always has a context - premises with practical arguments that are justification for that action. Speech acts such as advice, warning, promises and threats are determined by the structure of these premises, according to him.

It seems that there is a general agreement that all conditional threats are associated with a complementary conditional promise: *If you finish your homework, I'll buy you a chocolate. – If you don't finish your homework, I won't buy you a chocolate.*

The similarity is that in all of them some situation, relevant for the speaker and/or addressee, is envisaged. All conditional threats are associated with a complementary conditional promise. In case of promise, the future situation is positive for the addressee, whereas in threat and warning the situation is considered by the speaker to be negative, bad, and detrimental for the addressee. In case of promises and threats the speaker is responsible for bringing about of that future situation, in warnings reference is made to some situation that is beyond the control of both the speaker and the addressee. Only the speech act of promise can be used as an explicit speech act with the performative first person present tense verb: *I promise I'll buy you a car*. Warning can be made explicit with the performative: *I warn you that it will rain*, but threat is unacceptable: *I threat that I will kill you* – this sounds very odd to native speakers. Even though explicit performative cannot be used, sometimes in a dialog a parenthetic: *This is a threat,* or a question can be posed: *Are you threatening?* The closeness of these three speech acts can also be illustrated by the fact that one of the performative words can be used for another speech act. For example: *I promise I'll kill you if you go on like that*. Or *I warn you that you will have your legs broken*. Also, examples like: *I'll take away your car*! can be followed by the addressee's: *Is that a threat*? And the speaker's: *No, it's a promise*!, which point to the fact that both threat and promise constitute a pair, i.e. there is inter-changeability of the two – behaving like antonyms, the difference being about the degree of commitment to the future action – in promises it is expected to be fulfilled, and the addressee can complain if it is not fulfilled, and in threats the addressee is generally not expected to complain if the negative, detrimental situation is not realized. And that is why in this last example the word "promise" is presenting actually a worse threat than otherwise. This deontic part of meaning of these speech acts is the consequence of the desirability of action for the addressee, and yet a question might be posed as to whether the speaker who makes a threat would remain credible if he did not "oblige" with the detrimental future action – hence the expressions like *vain threats*, but also *vain promises*.

9 Ibid, p. 217.

10 Donaghy Kevin, Recognizing advice, warning, promises and threats, Coling, 1990,

In this follow-up of threats and promises we generally have imagined situations, whereas in real situations such speech acts are followed by the reaction (perlocution) of the addressees. Most often probably in denial of the speaker who threatened: *I didn't mean it.* Or *That is not what I said*, and *It was only a metaphor* and a narrative description of the fear of the threatened. Such reactions have been less taken into consideration and deserve some more attention in further research. This brings us to the last point in our paper, how the data concerning linguistic means for performing threats and other speech acts are collected and researched.

When researching speech acts such as threat or any other kind of speech acts we can first of all rely on the data offered by reference dictionaries and grammars. The information we can gather from them is important since their entries provide insight into the multiple meaning and usual contexts in which a word can appear. Thus, a *serious threat* can mean: a threat "bad enough to worry you" or "not joking", or both, which are two of the possible meanings of the word *serious* in a dictionary.[11] However, since such linguistic literature is always to a certain extent outdated, conservative, it does not cover all the possible linguistic contexts in which a phrase can be found as in real life, so additional data should be looked upon.

The empirical data based on real cases, described by forensic linguists, lawyers, mental health physicians, etc. are probably the best source of information for investigating speech acts such as threats. It is through this type of data that we can gather that the threatener often includes mention of the "mitigating circumstance" for themselves, typically: *I have no choice but*, *I have tried everything else*, *It was something I could not help*, etc., which present an effort to weaken his responsibility in making the threat as a socially undesirable act. This type of data again does not cover all the cases of speech acts and therefore a growing databases can only contribute to further research.

Naturally occurring data of general language and how some speech acts are produced can be obtained though video or audio taping of real life situations. The problem with such data is that 1) most of the existing data are records of spontaneous informal conversations between friends and acquaintances, or formal public discussions, and in both types of discourse, there are few instances of certain speech acts. We can find it reasonable that compliments, promises, invitations, agreeing or disagreeing, etc. are more often found in such data than let's say threats, or apologies. 2) It is well known that speakers, if aware of the video or audio taping, will adjust their behaviour and therefore would not produce, even if in certain aspects they would relax into spontaneity, those aspect of language that they are consider socially undesirable. Video or audio recording is ethically harder to do without the knowledge of the speakers. The ones that could be publicly available, such as "threats" between politicians and other public figures are again not expected to be easily found (insults, criticism are more common).

The second important source of data on speech acts, again not all of them would be instantiated, is the analysis of examining publicly available threats by different types of threateners. Some are private threateners, such as the patients in mental institutions who usually threat family members and friends, or those that are involved in public affairs: people dissatisfied with politicians or business partners.

As another type of linguistic analyses we can also mention research that use language speakers' judgments. The method includes elicitation of speakers' production, performance and reception of speech acts through role-playing and written completion tasks. It is usually done with the informants such as university students, who are given a description of a situation, of participants, goal, etc., and their oral or written production of a speech act is recorded and analyzed. It is also possible to have judgments of already produced speech act along a set of criteria, including determining which act has been performed or how effective it was, etc. The limitations of such data are non-spontaneity of the interaction since role-playing is always about imagined situations, possibly the fact that certain variables have not been included in the description of the imagined situation, and certainly the fact that students as informants generally represent only a small part of population, and in case of other social groups may not be representative at all.

11 Macmillan English Dictionary. Oxford: Macmillan, 2007.

CONCLUSION

The speech act of threat, though one of those that cannot be used with explicit performative or with many explicit linguistic signals, seems to have a number of linguistic forms that coupled with detailed description of relevant contextual and situational factors renders itself to clear linguistic analysis as a speech act. Further investigations into the interconnectedness of linguistic and extralinguistic factors would probably more clearly determine as many as possible components of such speech acts, and explain why the speakers of a language, even when they are expressed indirectly, implicitly understand that they have been performed.

REFERENCES

1. Austin, J. 1962, *How to do things with words*, Oxford: Oxford University Press.
2. Donaghy K., 1990, Recognizing advice, warning, promises and threats, Proceedings of *COLING 1990* Conference of Computational Linguistics), Helsinki. 336-338
3. Fraser, B. Threatening revisited, *Forensic Linguistics* 5(2) 1998, 160-173.
4. Harmon, A.G., 2007, "Back From Wonderland: A Linguistic Approach to Duties Arising from Threats of Physical Violence," *Capital University Law Review*, Fall 2008.
5. Macmillan English Dictionary, 2007. Oxford: Macmillan
6. Murphy, B. and Neu, J., ,. 1995, "My grade is too low: The speech act of complaint", in: / Susan M. Gass and Joyce Neu (eds.) *Speech acts across cultures; challenges to communication in a second language,* Berlin: Walter de Gruyter & Co.pp.191-216.
7. Salgueiro, A.B., 2010, Promises, threats, and the foundations of speech act theory, *Pragmatics,* 20:2, 213-228.
8. *The Sage Dictionary of Social Research Methods*, 2006. London: Sage Publications Ltd.

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REVIEW OF THE RESEARCH ON AUTHORSHIP COMPARISON IN CHINA

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Abstract:Authorship comparison has been greatly developed, since National Police University of China began to study and use it in the 1980s. There are many experts who have devoted themselves to study authorship comparison and a lot of books and papers have been published. Now with the significant increase in prints, copies, and E-files, authorship comparison becomes more and more important. We believe that the research status of authorship comparison in China is that the terms remain to be unified, for the conditions of the questioned text and the known text we have known more and more clearly, the methods continue to be innovative, and the written speech characteristics are increasingly diversified. We also believe that the future directions of the research on authorship comparison will be to quantify the characteristics.
Keyword:Authorship comparison, Research status, Quantitative characteristic

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INTRODUCTION

Nowadays, with the development of electric network and office automation, there has been an obvious increase in the number of prints, copies, and E-files involved in crimes, in which no traces of handwriting can be found. As a result, more and more attention has been attached to authorship comparison. Consequently, academic research has been going further and further; research methods have continuously been updated, and a large number of research findings have been published and successfully put into practice. At the same time, it should be pointed out that authorship comparison is not very mature and many problems remain to be solved. The following is a careful analysis of the current research situation in terms of authorship comparison, conditions of the questioned text and the known text should have, authorship comparison methods, characteristics in written speech and so on. By making the analysis, I hope that more colleagues will pay attention to and learn about authorship comparison.

THE TERMS OF AUTHORSHIP COMPARISON REMAIN TO BE UNIFIED

Currently, there are a relatively small number of professionals involved in the work of authorship comparison and the terms of authorship comparison remain to be unified. The following are a few terms on authorship comparison.

Yuwen Jia first puts forward the concept of “the identification of personal speech style”, while Zhijia Wang’s concept is “the personal identification of the extralinguistic features”. In our opinion, the former is more accurate, for what we identify is “speech”, not “language”. “The extralinguistic features” are the reflection of the person of personal speech style.

Daren Qiu calls it “authorship identification”[1]. Xu Yang calls it “the judicial identification of individual language style”[2]. Junfa Yue calls it “written speech identification”[3]. Of the three

1 Yuwen Jia. *File Examination* [M]. Liaoning People’s Publishing Company, 1990:146.
2 Zhijia Wang. *Personal Identification of Remaining Parts of Extra linguistic in Written Speech* [J]. Academic Journal of Police College of Jiangsu, 2001(5):154.
3 Daren Qiu. *Investigation of Linguistics* [M]. The Chinese people’s public security university press, 1995:415.

concepts, we consider that "written speech identification" is more in line with the Chinese way of thinking, because it is the extension of the denominating methods–"test object + 'examination/identification'" – in the field of questioned document examination, such as "handwriting examination", "printed document examination", and so on, to maintain consistency with the other terms. It is unequivocal in defining whether the two written materials being identified are written by the same person. Therefore, it is more accurate and well-conceived than "authorship identification", in which it is thought the identification of the authorship is made directly through the written materials. Just like Dr. Olsson stated that "some linguists use authorship identification. My reason for disliking this term is that, again, if we have two possible authors as candidates, we are not really doing an identification exercise. To say that our writer is more likely to be x or more likely to be y is not the same as saying that our writer is x or y. We are not actually identifying x or y. We are proposing a greater likelihood of x than y, or the other way around. If we were absolutely certain that x was the writer, for example, then we could say we are identifying him or her, but it is a basic premise of any scientific method that results are not given as certainties, but as probabilities or classifications. It is very rare in authorship work that we can identify a writer. Also, note that identification here suggests being able to pick out one individual author from all other authors. This takes us back to the 'linguistic fingerprint' claim. This is another reason why I think the term authorship identification should not be used in forensic work."[4]

However, in order to better communicate with international counterparts, we should better choice one from authorship attribution, authorship comparison and authorship identification which are using by forensic linguist from all over the world. I suppose that the most appropriate term for authorship testing is authorship comparison. "Because forensic texts are typically short they represent only small samples of human behaviour. Even if we find that several short texts by one author exhibit similar features we cannot be sure that these features are not random. There is always the possibility that some quirk of individual variation is acting on the features we have found. Therefore I do not believe we can actually attribute short texts, because – out of all the possible population in the world – we cannot say for certain that x or y wrote a particular text. This would be the same as saying that humans possess an idiolect – a unique way of using the language. Some writers have referred to the 'linguistic fingerprint'. However, there is no evidence for that viewpoint. All we can say is that, given x and given y, x or y is the more likely candidate of the two. Therefore what we are doing is not attributing but comparing. "[5]

In addition, it is a common belief that "written speech" is equal to speech materials in the form of writing, prints or copies, which are based on the carrier of paper. Hong Wang's idea is that "written speech is the speech in the form of text, which include those handwritten, printed, copied, faxed, network transmission, stored in the storage medium and so on. The identification of written speech is supposed to include: establishing identity in those who have written the speech, establishing identity in the author of the speech materials of prints and copies, establishing identity in the author of the speech materials transmitted on network and stored in the storage medium and establishing identity in the speaker in the audio files."[6] These new research objects are the latest developments of "written speech" and "written speech identification".

Zhijia Wang calls it "establishing identity in the personal speech characteristics of electronically printed documents"[7]. Ying Yuan calls it "the identification of the author of the printed document". [8]These concepts underline the importance of authorship comparison in identifying printed and copied documents. Some other researchers inquire into the technique of "the identification of network speech" or "the identification of the writer of the online essay", which is the application of authorship comparison in identifying the E-text. These concepts lay special emphasis on some unique functions of authorship comparison，which tends to gain the atten-

4 Xu Yang. *On Judicial Identification of Individual Language Style* [J]. Law Journal of Shanghai Administrative Cadre Institute of Politics and Law, 2000(6):58.
5 Junfa Yue. *Discussion on the Written Speech Identification* [J]. Academic Journal of National Police University of China 2003(2):19.
6 John Olsson. *Forensic Linguistics: Second Edition* [M]. Continuum International Publishing Group, 2008: 45-46.
7 John Olsson. *Forensic Linguistics: Second Edition* [M]. Continuum International Publishing Group, 2008: 44-45.
8 Hong Wang. *A Practical Technical Manual on Speech profiling and Identification in Cases* [M]. The Chinese people's public security university press, 2012:11-12.

tion and recognition of technicians working in the front of criminal investigation. However, as concepts, they lack accuracy and comprehensiveness.

FOR THE CONDITIONS OF THE QUESTIONED TEXT AND THE KNOWN TEXT WE HAVE KNOWN MORE AND MORE CLEARLY

There are limits to the application of any technique. Authorship comparison is no exception. Zhijia Wang's and Junfa Yue's works help us gain a clear knowledge about the conditions of the questioned test and the known text.

As far as the condition of the speech materials for identification is concerned, Zhijia Wang mainly focuses on the length of the questioned text, introducing the research findings abroad. He points out: "a material prerequisite for the successful identification of the speech characteristics of a printed document is that the document must have a certain amount of words. Ukrainian forensic experts Pali suggests that there should be at least 500 words for the effective identification of a Russian document, which she stresses is of great importance in identifying the author of the document. It is yet not to be determined about how many characters are needed for the effective identification of a Chinese document. In order to express some ideas and reflect some personal speech characteristics, there should be at least 500 words. Generally speaking, the longer the document is, the more clear the speech characteristics are."[9]

Junfa Yue expounds in detail on the amount of the questioned text for identification, language level and language style. His viewpoint is that "there should be three prerequisites for the identification of a document.1.There must be a certain number of words in the questioned text. Generally speaking, there should be at least 500 words. The more words, the easier the identification becomes. Too few words, such as a slogan, a signature, two or three messages will make it impossible to make the identification.2.The questioned text is supposed to reflect the educational level of the writer. The higher the educational level is, the more skillful the usage of the language is, the more obvious the speech habits are, the easier the identification becomes. The educational level is relative. As long as some speech characteristics are detected, the identification will become possible.3. The style of the questioned text is suitable for identification. Generally speaking, it is easier to detect a person's speech characteristics and language style from the questioned text written in the oral style. Therefore, such questioned texts are more suitable for written speech identification. The same is true for the materials written in the style of a letter. However, the style is not a necessity for identification. So long as enough speech characteristics are shown, the questioned texts written in any style can be identified. As far as the number of the words needed for the identification is concerned, there are only some indistinct limits, while some distinct limits have not been testified by local experiments."[10]

As for the condition of the known text, Zhijia Wang mentions the amount of the known text, when the known text is written, the expression style and the subject. His point of view is that the comparability of the known text of the suspect lies in meeting the following basic prerequisites. "1.The amount of the known text should be as large as possible.2.There should not be too long an interval between when the known text is formed and when the questioned text come into being. The shorter the interval is, the easier the identification is. It is the best if the two texts are written at the same period of time.3.The expressing method of the known text should be the same as that of the questioned text, and the subjects of the two should be the same or similar. For example, they are all narrative or argument."[11] Junfa Yue puts forward some requirements on the style, subject and amount of the known text and on when it comes into being. He considers the following as the prerequisites of the known text. "1.The styles should be the same. In order to make the two more comparable, it is preferable to choose the known text whose style is the same

9 Zhijia Wang, Xiangchen Wang, Hong Lin. *Establishment of Identity of Individual Speech Characteristics in Electrically Printed Files* [J]. Academic Journal of Police College of Jiangsu, 2002(4):177.

10 Ying Yuan. *Speech Analysis and Identification in Criminal Cases* [M]. The Chinese people's public security university press, 2005:324.

11 Zhijia Wang, Xiangchen Wang, Hong Lin. *Establishment of Identity of Individual Speech Characteristics in Electrically Printed Files* [J]. Academic Journal of Police College of Jiangsu, 2002(4): 177-178.

as or similar to that of the questioned text to be identified.2.The subjects of the two should be similar. In the speech materials of the same subject, there are many things in common in terms of language elements and expressing styles.3.The interval of when the two materials come into being should be as short as possible. The shorter the interval, the fewer changes there are, the more comparable it is.4.There is supposed to be sufficient known texts. The more known texts there are, the more evident the speech characteristics become. The more obvious the speech habits are, the more suitable it is for the comparison."[12]

The analysis of the two researchers above helps us have a clear understanding about the application limits of authorship comparison, but these limits to the questioned text and the known text are based on the qualitative judgment made according to identifying experience. There has been no special statistical study on speech materials in Chinese. The research findings abroad are yet to be testified locally.

Besides, it is my opinion that the originality of the questioned text should be taken into consideration. It should be considered whether the questioned text has been copied, pasted or collectively written by different individuals. The original questioned text is suitable for identification, while the questioned text that in not original is unsuitable. If we have to test the questioned text that is not original, we must make a careful selection. Based on such questioned text, we can only draw a tendentious conclusion instead of a clear and definite one.

Currently, it is difficult to confirm the originality of the questioned text. There is also difficulty in obtaining the known text that is comparable enough. These difficulties are the bottleneck for the development of authorship comparison, which remain to be settled.

THE METHODS OF AUTHORSHIP COMPARISON CONTINUE TO BE INNOVATIVE

Authorship comparison continues the method of comparison test adopted by speech profiling. With further study, people put forward the methods of mathematical statistics, psychological analysis and so on. Among which the method of comparison test based on linguistic elements and linguistic means is a common method and has various types of characteristics. This method is more practical and plays a critical role in analyzing specific case. While other methods, which are mentioned by people and seem to have sufficient theoretical basis, are lack of large-scale experimental validation and there is no operability. However, the method of transition from qualitative analysis to quantitative test, and combining qualitative methods with quantitative ones, is the inevitable trend of future development. Its practices can yet be regarded as a kind of beneficial attempt.

Jun Deng put forward analytic methods of language style and mathematical statistics. "Language style analysis is performance method of analytical style. Basic linguistic terms and complex linguistic terms are first analyzed, and then the sentences, finally paragraphs. His analysis is unfolded layer by layer, from the small units of language to the big units of language, the specific to the abstract, the microcosmic to the macroscopic. By frequency and amount, analytical methods of mathematical statistics perform statistical analysis of various linguistic means used by language materials, either by means of manpower or computer." [13]

Fangyan Feng suggests that "speech characteristics can be analyzed by methods of statistical linguistics, methods of psychological characteristics, analytical methods of social language and deduction methods of verbal logic, etc."[14]

These opinions apply the objects and methods of research in linguistic fields to the authorship comparison, filled with theoretical basis. However, they didn't offer specific operation methods.

12 Junfa Yue. *Discussion on the Written Speech Identification* [J]. Academic Journal of National Police University of China 2003(2):20.

13 Zhijia Wang, Xiangchen Wang, Hong Lin. *Establishment of Identity of Individual Speech Characteristics in Electrically Printed Files* [J]. Academic Journal of Police College of Jiangsu, 2002(4):178.

14 Junfa Yue. *Discussion on the Written Speech Identification* [J]. Academic Journal of National Police University of China 2003(2):20-21.

Yue Junfa concludes that "the general methods of authorship comparison include comparative method, comprehensive method, overall exclusive method, survey method, mathematical statistical method and dynamic analysis method."[15]

Dr. Olsson summarized the method of authorship comparison as:[16]

- Check Known and Questioned texts (K and Q, K and U, etc) for compatibility and comparability.
- Examine texts for points of similarity and difference. Do not be one sided, include counter examples.
- Ascertain the linguistic layers or level/s of these points of similarity and difference
- Look for relationships between the different layers
- Using a corpus, test the extent to which these features exist in the general population
- Determine their relative significance in terms of an order of importance table
- Quantify the differences, using a statistical approach
- Apply a scale of judgment reflecting the likelihood or unlikelihood of authorship

The first four steps are similar with the comparative method we now use, while there are obvious differences on the last four steps between them. We perform the last steps mainly depending on the experience of forensic linguist, instead of using a corpus, an order of importance table, and a statistical approach. Therefore, one of the major problems that our forensic linguists now confront is how to realize the automation, scientization and modernization of authorship comparison, according to the theory and method of statistical linguistics, combined with the practical situation of Chinese.

THE WRITTEN SPEECH CHARACTERISTICS ARE INCREASINGLY DIVERSIFIED

The base and key of authorship comparison lie in whether the speech characteristics can be recognized correctly and accurately. The following are what has been known about speech characteristics.

Ying Yuan considers "speech characteristics as speech habits which are sure to be reflected in one's communication. Different individuals have different natural and social qualities and the differences in speech characteristics are mainly shown in one's speech style, structure, and the usage of rhetoric and punctuations and so on. In addition, she also gives a brief introduction about the features of the traces left by the printer."[17]

Junfa Yue deems "speech characteristics are shown in many ways. It is possible to regard every speech element or expression means as a speech characteristic. The key is whether there is a regular pattern that arises repeatedly in the individual's usage of speech elements and expression methods. In his book, taking over ten actual cases of successful authorship identification as examples, Junfa Yue sets forth eight speech characteristics of the written speech: script characteristics, pronunciation characteristics, expression characteristics, grammar characteristics, structure characteristics, punctuation characteristics, rhetoric characteristics, and the characteristics in the arrangement of words."[18]

In brief, researchers have been making efforts to find out the characteristics of the written speech. They can be put into two categories according to the form and content. In terms of form, the characteristics of the written speech mainly include handwriting characteristics (materials written by hand), trace characteristics left by the printer (printed materials), script characteristics, pronunciation characteristics, punctuation characteristics, and the characteristics in the arrangement of words. In terms of content, the characteristics of the written speech mainly

15 Jun Deng, *Discussion on Language Style Recognition and Its Application in Investigation* [J], Detection,1997(1):65.
16 Fangyan Feng, *Discussion on the Speech Written Identification in New Era* [J]. Guangdong Public Security Technology.2005(3):27-28.
17 Junfa Yue. *Speech Profiling and Identification* [M]. The Chinese people's public security university press 2007:29-31.
18 John Olsson. *Forensic Linguistics: Second Edition* [M]. Continuum International Publishing Group, 2008:43.

include expression characteristics, grammar characteristics, structure characteristics, rhetoric characteristics and speech content characteristics. These characteristics are mainly judged and recognized by manual work, so the expert's knowledge and experience play a decisive role in the identification.

With the introduction of mathematical statistics methods, the authorship comparison is being carried out according to character frequency characteristics, word frequency characteristics and punctuation frequency characteristics. Junhai Li (1986) is a pioneer in the path. He makes judgment about an individual's speech habits by performing a research into the distribution frequency of punctuations in the makeup of the individual's letters. In 2006, Junfa Yue did a lot of work on data statistics while directing two undergraduates to finish their thesis---*Statistics on the Usage Frequency of the Word of Contradiction(Fluctuation) and Punctuation; Statistics on the Usage Frequency of Words and an Analysis on Zedong Mao's Works of On Contradiction and On Practice.*

The mathematical statistics method is the road to the future for the application of the technique of authorship comparison and it is also an inevitable course to realize the quantification of the characteristics of the written speech.

CONCLUSION

Authorship comparison is an application technique based on linguistics, science of criminal investigation, psychology, logistics, statistics, computer science and many other branches of learning. The past 30 years since the 1980s has witnessed a great development in science, technology and culture in China. There has been unprecedented progress in the basic theoretical disciplines above. As far as authorship comparison is concerned, there have also been significant developments in the fields of identification principles, technique approaches and so on. The quantification of the characteristics of the written speech will lead the authorship comparison to the future. It is certain that seeing its increasing effectiveness in criminal investigation and social services, a growing number of researchers will focus their eyes on the development of the authorship identification and devote themselves to the related research.

REFERENCES

1. Daren Qiu. *Investigation of Linguistics* [M]. The Chinese people's public security university press, 1995.
2. Fangyan Feng, *Discussion on the Speech Written Identification in New Era* [J]. Guangdong Public Security Technology.2005(3):26-28.
3. Hong Wang. *A Practical Technical Manual on Speech profiling and Identification in Cases* [M]. The Chinese people's public security university press, 2012.
4. John Olsson. *Forensic Linguistics: Second Edition* [M]. Continuum International Publishing Group, 2008.
5. Jun Deng, *Discussion on Language Style Recognition and Its Application in Investigation* [J], Detection, 1997(1):64-66.
6. Junfa Yue. *Discussion on the Written Speech Identification* [J]. Academic Journal of National Police University of China 2003(2):19-22.
7. Junfa Yue. *Speech Profiling and Identification* [M]. The Chinese people's public security university press 2007.
8. Junhai Li. *Judgment an Individual's Speech Habits Based on Distribution Frequency of Punctuations* [J]. Academic Journal of National Police University of China, 1986 (1):25-28.
9. Xu Yang. *On Judicial Identification of Individual Language Style* [J]. Law Journal of Shanghai Administrative Cadre Institute of Politics and Law, 2000(6):58-61.

10. Ying Yuan. *Speech Analysis and Identification in Criminal Cases* [M]. The Chinese people's public security university press, 2005.
11. Yuwen Jia. *File Examination* [M]. Liaoning People's Publishing Company, 1990.
12. Zhijia Wang. *Personal Identification of Remaining Parts of Extra linguistic in Written Speech* [J]. Academic Journal of Police College of Jiangsu, 2001(5):153-157.
13. Zhijia Wang, Xiangchen Wang, Hong Lin. *Establishment of Identity of Individual Speech Characteristics in Electrically Printed Files* [J]. Academic Journal of Police College of Jiangsu, 2002(4):177-181.

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ON COMMUNICATIVE COMPETENCE IN PROFESSIONAL COMMUNICATION OF LAW ENFORCEMENT OFFICERS

О формировании коммуникативной компетентности в профессиональном общении сотрудников ОВД

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Abstract: The article draws attention to special features of communication in the professional intercourse of law enforcement officers, analyses different aspects and components of the communicative competence. The author formulates his determination of the communicative competence of a law enforcement officer. The article raises a problem of unified standards in creating official documents, the future of computer-based programs of editing. In conclusion the author advises on methods and practical steps of improving the communicative competence in police training at various levels: from initial training to higher educational institutions and practical bodies of the Ministry of Internal Affairs of Russia.
Keywords: communication, competence, language, professional ethics, educational standards

Профессиональное общение сотрудников ОВД имеет свою специфику, вызванную особенностями профессиональной деятельности в сфере обеспечения правопорядка и законности.

Как представители государственных органов, сотрудники ОВД вынуждены в своей деятельности подчиняться требованиям законов, а многие аспекты поведения сотрудников ОВД в профессиональной сфере регламентированы требованиями различных документов (кодексов, уставов, наставлений, приказов, инструкций и т.д.), что ведет к формализации общения, порой достаточно строгой (например, при допросе).

Другой характерной особенностью профессионального общения сотрудника ОВД является множественность субъектов, категорий граждан, с которыми сотруднику полиции приходится вступать в контакт, решая профессиональные задачи (лица, ранее осужденные за совершение преступлений, несовершеннолетние, потерпевшие, сотрудники государственных органов и т. п.).

Исследователи также отмечают специфичность поводов для вступления в общение. В большинстве случаев поводом для вступления в общение является совершенное либо готовящееся преступление, правонарушение, асоциальное поведение. Это обстоятельство ограничивает круг участников общения (пострадавшие, свидетели, правонарушители), определяет содержание общения, его цели.

В случаях, когда правонарушение служит поводом для вступления в общение, цели его участников не совпадают, что обусловливает конфликтный характер общения.

Учитывая данное обстоятельство, сотрудникам ОВД следует выбирать оптимальный вариант собственного поведения в каждой конкретной ситуации и находить индивидуальный подход в общении с гражданами, исключающий возможность унижения человеческого достоинства.

Общение представляет собой сложный и многоплановый процесс установления и развития контактов между людьми, основанный на социально-психологических, этических, языковых закономерностях его функционирования.

Коммуникация - специфическая форма взаимодействия людей в процессе их познавательно-трудовой деятельности (Лингвистический энциклопедический словарь).

Большинство исследователей разграничивают понятия «общение» и «коммуникация»: в понятии «общение» акцент делается на процесс обмена информацией, а в понятии «коммуникация» - на передаче информации. Однако при переводе русского слова «общение» на английский язык передать это различие невозможно, поскольку кроме слова “communication” других вариантов не существует.

В данной статье рассматривается *коммуникативная сторона профессионального общения*, реализуемая в процессе вербальной коммуникации и используемая для передачи информации.

Европейский кодекс полицейской этики, другие международные документы среди профессиональных качеств сотрудника полиции указывают на его коммуникативные способности. В ст. 11. Кодекса профессиональной этики сотрудника органов внутренних дел Российской Федерации отмечается: «Культура речи является важным показателем профессионализма сотрудника милиции и проявляется в его умении грамотно, доходчиво и точно передавать мысли». Далее в этой же статье Кодекса раскрывается содержание понятия «культура речи» и называются коммуникативные качества, которых необходимо придерживаться сотруднику ОВД. Речь сотрудника должна быть ясной, грамотной, содержательной, логичной, доказательной и уместной.

Кроме того, как отмечается в Кодексе профессиональной этики, сотруднику ОВД необходимо соблюдать и отстаивать чистоту русского языка. В его речи неприемлемо употребление неуместных слов и речевых оборотов, в том числе иностранного происхождения, вульгаризмов, примитивизмов, слов-«паразитов». Сотрудник ОВД не должен использовать жаргонизмы и другие элементы криминальной субкультуры в общении с коллегами и гражданами.

В исследованиях отмечалось, что восприятие населением профессиональных действий сотрудников ОВД во многом зависит от профессионализма его речевого поведения.

Культура речи сотрудников органов внутренних дел, ее четкость, ясность, понимаемость, сдержанность, установка на взаимопонимание, умение вести конструктивный диалог, давать рациональные оценки поступкам, а не людям, конструктивно разрешать конфликтные ситуации, снимать излишнюю эмоциональную напряженность и т. п. являются определяющими факторами, которые формируют профессиональный имидж сотрудников правоохранительных органов[1].

От степени владения нормами и богатствами языка зависит, насколько точно, грамотно и понятно сотрудник правоохранительных органов может выразить свою мысль, объяснить то или иное положение закона, оказать должное влияние на слушателей. Нарушение сотрудником ОВД языковых норм (например, употребление просторечных, диалектных, жаргонных форм и др.) может вызвать отрицательную реакцию: неуважение, неуверенность в его знаниях.

Таким образом, **профессиональное общение сотрудников ОВД представляет собой процесс взаимодействия людей (сотрудников и граждан), обусловленный решением профессиональных задач.**

Цели профессионального общения определяются характером и ситуациями профессиональной деятельности, их достижение свидетельствует об уровне коммуникативной компетентности специалиста, о качестве выполнения им своих служебных функций. Коммуникативная компетентность выступает как одна из наиболее важных профессионально значимых характеристик, а развитие этой компетентности - как первоочередная задача высшего образования.

В образовательных учреждениях высшего профессионального образования МВД России изучаются дисциплины гуманитарного цикла, направленные на формирование коммуникативной компетенции сотрудника ОВД, такие как «Русский язык в деловой документации», «Русский язык и культура речи». В базовую (обязательную) части данного цикла включена и дисциплина «Иностранный язык», формирующая коммуникативные компетенции профессионального общения на одном из иностранных языков.

Под **коммуникативной компетентностью** понимается совокупность теоретических знаний, практических умений и навыков, обеспечивающих эффективное осуществление

1 См.: Воспитательная работа с личным составом в системе Министерства внутренних дел Российской Федерации: Учебник / Под общ. ред. В.Я. Кикотя. — М.: ЦОКР МВД РФ, 2009.

коммуникативного процесса, ориентированность в различных ситуациях общения [2].

Сам термин «коммуникативная компетентность» или «коммуникативная компетенция» заимствован российской наукой из американских речевых технологий и теорий коммуникации, отражающих американский образ жизни и поведения и диктующих успешность, убедительность речевого акта – прежде всего в области деловых отношений.

Переориентация на западные стандарты высшего образования еще окончательно не завершена, поэтому в российских вузах остается в качестве чисто российского феномена предмет «Культура речи», традиционно ориентированный на овладение языковыми нормами.

Исследователи выделяют три аспекта культуры речи: нормативный, коммуникативный и этический. Первый, важнейший аспект - нормативный. Языковая норма - это центральное понятие культуры речи. Культура речи, прежде всего, предполагает соблюдение норм литературного языка, которые воспринимаются его носителями, говорящими или пишущими, в качестве «идеала», образца. Норма является главным регулятором речевого поведения людей. Однако это необходимый, но недостаточный регулятор, потому что одного соблюдения предписаний нормы не хватает для того, чтобы устная или письменная речь оказалась вполне хорошей, т. е. удовлетворяла все потребности коммуникации. Можно привести большое количество самых разнообразных по содержанию текстов, безупречных с точки зрения литературных норм, но не достигающих цели. Обеспечивается это тем, что норма регулирует в большей мере чисто структурную, знаковую, языковую сторону речи, не затрагивая важнейших отношений речи к действительности, обществу, сознанию, поведению людей. Поэтому вторым важным качеством культуры речи является коммуникативная целесообразность - это умение находить, в языковой системе для выражения конкретного содержания в каждой реальной ситуации речевого общения адекватную языковую форму. Выбор необходимых для данной цели и в данной ситуации языковых средств - основа коммуникативного аспекта речи.

С коммуникативной целесообразностью тесно связан и третий - этический аспект культуры речи. Коммуникативная целесообразность как критерий культуры речи касается как формы выражения мысли, так и ее содержания. Этический аспект куль туры речи предписывает знание и применение правил языкового поведения в конкретных ситуациях таким образом, чтобы не унизить достоинства участников общения. Этические нормы общения предусматривают соблюдение речевого этикета. Речевой этикет представляет собой систему средств и способов выражения отношения общающихся друг к другу. Речевой этикет включает речевые формулы приветствия, просьбы, вопросы, благодарности, поздравления, обращения на «ты» и «вы», выбор полного или сокращенного имени, формулы обращения и т. д. Этический компонент культуры речи накладывает строгий запрет на сквернословие в процессе общения и другие формы, оскорбляющие достоинство участников общения или окружающих людей.

Во всех федеральных государственных образовательных стандартах высшего профессионального образования (ФГОС ВПО) в число общекультурных компетенций включены коммуникативные компетенции, под которыми понимается «способность осуществлять письменную и устную коммуникацию на русском языке, логически верно, аргументированно и ясно строить устную и письменную речь, публично представлять результаты исследований, вести полемику и дискуссии» и «способность к деловому общению, профессиональной коммуникации на одном из иностранных языков ».

Необходимо учитывать, что существуют и другие представления о составляющих коммуникативной компетенции как совокупности требований к определенному уроню профессиональной подготовки. В широком понимании в нее включают такие компоненты, как владение коммуникативными тактиками и стратегиями, умение анализировать внешние сигналы (телодвижения, мимика, интонации), владение ораторским искусством, актерские способности, умение организовывать и вести переговоры, иные деловые встречи и т. д.

2 Шашкин Н. Г.. Формирование коммуникативной компетентности у будущих сотрудников органов внутренних дел в системе высшего образования : Дис. ... канд. пед. наук. - Чебоксары, 2005.

В соответствии с Приказом МВД России от 3 июля 2012 г. № 663 «Об утверждении Порядка организации подготовки кадров для замещения должностей в органах внутренних дел Российской Федерации», сотрудники, принятые на службу в органы внутренних дел, проходят первоначальную подготовку, предусматривающую приобретение ими основных профессиональных знаний и навыков, необходимых региональных центрах профессиональной подготовки в течение полугода по учебным программам, разработанным Департаментом государственной службы и кадров МВД России. В рамках данных учебных программ сотрудники слушают лекции и участвуют в практических занятиях по культуре речи с преподавателями высших учебных заведений МВД России, имеющими опыт для выполнения служебных обязанностей. Данная подготовка проводится в профессионального общения.

Сотрудники ОВД, получающие высшее профессиональное образование, имеют гораздо больше возможностей для совершенствования своих коммуникативных компетенций: в ходе практических занятий по культуре речи, во время индивидуальных консультаций с преподавателями, при подготовке научных докладов, при участии в дискуссиях на заседаниях научных кружков и научных конференций.

В число основных направлений по формированию коммуникативных компетенций, стоящих перед преподавателями высших учебных заведений МВД России, входят:

- наиболее трудные для усвоения нормы орфоэпии, орфографии, пунктуации, грамматики;
- языковые особенности функциональных стилей, в первую очередь официально-делового;
- составление текстов различных видов деловых бумаг, процессуальных документов в соответствии с языковыми и стилистическими нормами, правилами речевого этикета;
- формирование навыков лингвистического анализа, редактирования, правки служебных и профессиональных документов.

Владение коммуникативными компетенциями означает способность учитывать функциональную дифференциацию языка и прагматические условия общения. В языке существуют такие разновидности, как устная и письменная речь, а также функциональные стили, напр. официально-деловой, научный, публицистический. Так, официально-деловой стиль требует знания и употребления готовых речевых формул, штампов (нельзя произвольно писать заявления, протоколы и т. п.), но их использование в разговорной или публицистической речи свидетельствует о плохом владении стилистическими нормами. Приведем лишь несколько примеров неудачного выбора речевых средств из журнала «Профессионал», издаваемого Министерством внутренних дел: «факты не могут быть проверены *на предмет соответствия* их действительности», «публикации вызвали *живой интерес* граждан к подобного рода информации», «необходимо помнить и об *оборотной стороне медали* – привлечении *к соответствующей ответственности* наших сотрудников».

Довольно часто мы становимся свидетелями телевизионных выступлений, интервью, информационных репортажей, в которых речь сотрудников ОВД похожа на цитаты из процессуальных документов.

Умение свободно, в соответствии с задачами общения, переходить с одной функциональной разновидности языка на другую - важный показатель коммуникативной компетенции.

Достижение целей коммуникативного акта в значительной степени зависит от внеязыковых, экстралингвистических факторов, таких как ситуация общения (официальная или неофициальная), социальное положение, возраст коммуникантов, степень изученности темы и т.п. Например, лекция по актуальным проблемам права в неподготовленной аудитории вряд ли будет адекватно воспринята и понята без дополнительных объяснений и комментариев.

С другой стороны, бедность словаря, однообразие грамматических и синтаксических конструкций говорящего не позволят достичь эффективного решения коммуникативных задач.

Развивать свой словарный запас, используя лучшие образцы литературного языка, публичных судебных выступлений известных юристов – не только привилегия, но и необходимая составляющая профессионального мастерства специалиста ОВД, проходящего обучение в вузе.

В связи с четкой регламентацией требований к уровню освоения дисциплин, изучаемых в учебных заведениях высшего профессионального образования, возникает вопрос: можно ли в рамках отведенных для данной дисциплины часов научиться эффективной коммуникации? Этот практический вопрос важен не только для профессиональных ораторов, лекторов, но и всех педагогов, государственных служащих, в том числе сотрудников ОВД.

Как известно, существует несколько уровней коммуникативной компетенции или культуры речи: правильность речи и речевое мастерство. Владение нормами литературного языка во всех его функциональных разновидностях позволяет говорить о достижении первого уровня культуры речи.

Правильность речи, понимаемая как соблюдение языковых норм, достигается изучением правил отбора и использования языковых средств.

Речевое мастерство – это уже не только следование нормам литературного языка, но и умение выбрать из существующих вариантов наиболее точный в смысловом отношении, стилистически уместный и выразительный.

Речевое мастерство, владение «искусством слова» требует дополнительных, гораздо более масштабных и фундаментальных усилий, причем не только преподавателей, но и самих обучаемых.

Задачи образовательных программ для будущих специалистов ОВД направлены в первую очередь на повышение их языковой и речевой компетентности при проведении межличностного общения официального, полуофициального и неофициального характера, а также при составлении разного рода текстов деловой и процессуальной документации.

В процессе обучения в учебном заведении будущие специалисты правоохранительных органов могут ознакомиться как с примерами нормативного и образцового использования языковых средств, так и с «отрицательным материалом» - примерами речевых ошибок. Работа с текстами, редактирование деловых и процессуальных документов – важная часть коммуникативной компетентности, позволяющая предупредить ошибки в устной и письменной речи.

Задача преподавателя – привлечь внимание обучаемых к наиболее распространенным случаям нарушения языковых норм, проанализировать причины их появления, указать на способы их устранения.

В последнее время появились исследования, посвященные лексикографическому описанию типичных ошибок сотрудников ОВД[3]. Их авторы предпринимают попытку стимулировать борьбу за правильность и чистоту словоупотребления сотрудников ОВД на примере отобранных слов и выражений, где наиболее часто встречаются ошибки в речи даже достаточно грамотных людей.

Речь сотрудников ОВД, так же как и речь представителей других профессий, отражает состояние речевой культуры современного общества, поэтому большинство зафиксированных исследователями ошибок и их причины являются типичными для подавляющей части носителей данного языка. В устной и письменной речи традиционно отмечаются, в первую очередь, ошибки словоупотребления (непонимание значения слова, нарушение лексической сочетаемости, употребление паронимов, лексическая избыточность и др.), а также орфоэпические, грамматические и синтаксические ошибки.

Важная составляющая часть коммуникативной компетенции – это так называемые коммуникативно-релевантные знания, без которых невозможна адекватная речевая деятельность, включающие знание ситуаций общения, вариантов речевых дискурсов и стратегий, социокультурных аспектов речевого поведения.

Одним из важных условий коммуникативной компетенции сотрудника ОВД является

3 См., например: Носкова Л.Г. Типичные ошибки в речи сотрудников органов внутренних дел. Словарь. – М.: ДГСК МВД России, 2011.

получение знаний не только об языковых явлениях, но и об экстралингвистических факторах, релевантных для общения в данной национально-культурной среде.

Благодаря накопленному человечеством культурному опыту и взаимодействию культур в речевой практике существуют и активно используются универсальные модели речевого поведения, не зависящие от национально-культурной принадлежности коммуниканта.

Однако существуют препятствия в речевом общении, объективно обусловленные принадлежностью коммуникантов к различным возрастным, расовым, этническим, социальным, религиозным и т. п. группам. Им приходится преодолевать социокультурные барьеры коммуникации. Как отмечается в исследованиях по данной теме, при общении представителей разных культур каждый из них действует в соответствии со своими культурными нормами, поэтому они могут столкнуться с серьезными коммуникативными проблемами, связанными с несовпадением, а порой и конфликтом норм, ценностей, стереотипов сознания и поведения. Это несовпадение порождает *культурные барьеры* коммуникации[4].

Приведем, на наш взгляд, наиболее типичный пример «межкультурной интерференции» в процессе общения на неродном языке.

Ситуации вступления в общение. Представители государств с жесткой иерархической структурой реализуют в речи свое социальное или служебное положение (начальник – подчиненный), демонстрируя уважение или наоборот, доминирующую роль в разговоре. Так, слушатели из государств среднеазиатского региона приветствуют начальника каждый раз при встрече, независимо от того, виделись ли они с ним раньше или нет. Зная эту особенность, мы – преподаватели, т. е. начальники – также здороваемся с иностранными слушателями из уважения к социокультурным особенностям их речевого поведения. Со временем данная привычка обычно исчезает, уступая место общепринятым правилам вступления в общение, но она сохраняется в ситуациях монокультурной коммуникации.

Переход системы российского образования на «компетентностную» модель обучения предполагает создание условий для формирования и развития как профессиональных, так и общекультурных компетенций. Федеральные государственные стандарты образования третьего поколения содержат требования к конечному уровню подготовки специалиста, среди которых – овладение общекультурными компетенциями.

Так, выпускник образовательного учреждения высшего профессионального образования по специальности 030901 «Правовое обеспечение национальной безопасности» должен обладать способностями «уважительно и бережно относиться к историческому наследию и культурным традициям, толерантно воспринимать социально-культурные различия», «к толерантному поведению, к социальному и профессиональному взаимодействию с учетом этнокультурных и конфессиональных различий… », «… самосовершенствоваться, адаптироваться к меняющимся условиям профессиональной деятельности и изменяющимся социокультурным условиям, приобретать новые знания и умения, повышать свой интеллектуальный и культурный уровень… »[5].

При этом обращается внимание на то, что одним из обязательных требований к программе обучения в конкретном образовательном учреждении является создание условий для развития общекультурных компетенций, формирование социокультурной среды.

Во всех Федеральных государственных образовательных стандартах высшего профессионального образования в число общекультурных компетенций включены коммуникативные компетенции, в частности, по уже упоминавшейся специальности: это «способность осуществлять письменную и устную коммуникацию на русском языке, логически верно, аргументировано и ясно строить устную и письменную речь, публично представлять результаты исследований, вести полемику и дискуссии » и «способность к деловому общению, профессиональной коммуникации на одном из иностранных языков».

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4 См.: Тер-Минасова С.Г. Язык и межкультурная коммуникация. – М., 2000. – С. 27-28.

5 Федеральный государственный образовательный стандарт высшего профессионального образования по направлению подготовки (специальности) 030901 Правовое обеспечение национальной безопасности (квалификация (степень) «специалист»). – М., 2011.

Таким образом, в тексте ФГОС компетенция социокультурная и компетенция коммуникативная тесно взаимосвязаны и направлены на достижение общей цели – подготовку высококвалифицированного, адаптированного к современным условиям специалиста.

С учетом выполняемых сотрудниками ОВД профессиональных задач, круга коммуникативных ситуаций их профессионального общения может быть сформулировано определение коммуникативной компетентности сотрудника ОВД: **это обусловленное задачами профессиональной деятельности мотивированное использование речевых средств, соответствующее нормам речевого общения в официально-деловой сфере и требованиям законодательства в области правоохранительной деятельности.**

Последнее условие – соответствие письменной или устной речи сотрудника полиции требованиям законов, относящееся как к содержанию, так и форме речевого акта, налагает на его автора особую ответственность. Любой документ, составленный и подписанный сотрудником полиции, имеет юридическую силу, хранится в соответствующем деле или архиве и доступен для контроля вышестоящими органами.

Широкое использование компьютерных технологий в профессиональной деятельности обусловливает необходимость формирования и развития у сотрудников ОВД навыков деловой письменной речи, правил составления деловой документации. От качества составления документов, их объективности, грамотности во многом зависит исход принимаемых решений.

Сотрудник ОВД, как государственный служащий, несет ответственность за качество подготовленных им документов, за их эффективность как инструментов управления и решения вопросов в профессиональной сфере.

Он должен владеть навыками организации необходимого лексико-юридического материала, чтобы не только правильно оформить документ, но и сделать его понятным, точным, грамотным.

В последнее время много говорится о необходимости унификации документов, включая единообразие их языка[6]. В качестве аргументов в пользу данного решения называются повышение оперативности документооборота, снижение количества языковых ошибок, отсутствие необходимости редактирования документа и ряд других. Этому объективно способствуют и сами особенности деловой документации – широкое употребление устойчивых, стандартных языковых оборотов, используемых в неизменном виде. Их наличие в деловой речи – следствие регламентации служебных отношений, их повторяемости, тематической ограниченности.

Однако, как правильно отмечают специалисты в области лингвистики, одних стандартов и образцов для составления качественного документа явно недостаточно. Трудно найти специалиста, одинаково хорошо владеющего всеми разновидностями официально-делового стиля, его подстилями: законодательным (для написания законопроектов, нормативных актов); административно-канцелярским (для написания рапортов, справок, приказов); дипломатическим – для переписки с представителями других государств, органами власти субъектов Российской Федерации).

Далеко не все сотрудники ОВД умеют работать с программными продуктами, с помощью которых оформляется документ, базами данных, такими как PayDox, MS Access и др.

Многие не знают о существовании специальных словарей и справочников, которые нужно использовать при написании текстов, например, орфоэпический словарь, словарь управления, словарь иностранных слов и т. д.

Неизбежный переход к системе электронного документооборота ставит перед нами актуальные проблемы: как избежать, помимо чисто юридических и технических аспектов обработки большого количества документов, ошибок при их подготовке с помощью компьютерных программ? Кто будет и будет ли вообще осуществлять редактирование документов? Ведь, как известно, лингвистическую экспертизу проходят только нормативные правовые акты на уровне не ниже регионального органа законодательной власти.

6 См.: Язык документа – индикатор эффективности современного управления/ «Экономика и управление» - Уфа, 2013. - № 2. С. 27 - 37.

Каждому сотруднику ОВД следует помнить, что степень владения навыками составления документов и знание языковых норм определяют возможность его профессиональной компетентности. Стимулировать повышение уровня коммуникативной компетентности можно путем написания тестов, диктантов. Так, в Волгоградской академии МВД России в 2013 году все сотрудники прошли языковое тестирование по материалам, разработанным преподавателями кафедры русского языка.

Профессора, доктора наук и другие преподаватели высшей квалификации Волгоградской академии МВД России, ведущие научные исследования, проводят мастер-классы, языковые тренинги по наиболее сложным аспектам профессионального общения сотрудников ОВД - как с курсантами и слушателями академии, так и с сотрудниками полиции территориальных органов внутренних дел. Наконец, регулярно организуется проведение семинарских занятий с участием практических работников по темам учебных программ, формирующим коммуникативную компетентность сотрудников ОВД.

Таким образом, профессию сотрудника ОВД можно назвать «коммуникативной» профессией: это профессия, успех которой в значительной мере зависит от его коммуникативной компетентности.

ЛИТЕРАТУРА

1. Кодекс профессиональной этики сотрудника органов внутренних дел Российской Федерации/Приложение к Приказу МВД России от 24.12.2008 № 1138.
2. Правовое обеспечение национальной безопасности. Федеральный государственный образовательный стандарт высшего профессионального образования (квалификация специалист). – М.: Минобрнауки, 2011.
3. Введенская Л. А., Павлова Л.Г., Кашаева Е. Ю. Культура речи государственного служащего. – М.: Феникс, 2011.
4. http://russkiyyazik.ru/

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VOICE EVIDENCE EVALUATION OF TELEPHONE NUMBERS IN THE FRAMEWORK OF LIKELIHOOD RATIO

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Abstract: Forensic speaker recognition based on likelihood ratio has become state of the art method in forensic voice comparison domain. Its key kernel is to estimate the within-speaker variability and between-speaker variability. In this paper, we first labeled the telephone number of zero in mobile phone database and extracted Mel-Frequency Cepstrum Coefficients features of the whole utterance of zero. Then we compared the distribution of the extracted features, as well as the within-speaker variability and between-speaker variability. At last, the extracted features were trained into Gaussian mixture model to represent the speaker characteristic, and their discriminant performance of the extracted features were tested in likelihood ratio framework. The voice evidence strength of voice samples were quantified in the form of likelihood ratio value.

Keywords: forensic speaker recognition; likelihood ratio; evidence strength; telephone number; GMM; MFCC

INTRODUCTION

Forensic speaker recognition is the process of discriminating if a specific individual (suspected speaker) is the producer of a questioned voice recording[1]. In forensic automatic speaker recognition (FASR), the processing chain of FASR, starts from features extraction, passes through features modeling and comparison between features and statistic models, and ends at the stage of interpretation of scores got from recognition systems. The likelihood ratio (LR) framework based on Bayes' Theorem has been applied in both automatic speaker recognition[1-3] and acoustic-phonetic speaker recognition[4-6]. The voice evidence expressed in the framework of LR, not only consists of the quantified degree of similarity between speaker-dependent features extracted from the questioned voice and speaker-dependent features extracted from recorded speech of a suspect, represented by his or her model, but also consists of the quantified degree typicality that the speaker-dependent features' probability of occurrence in the potential background population[7]. Forensic automatic speaker recognition systems can be text-dependent or text-independent. By using acoustic features extracted from a given speaker's utterance, a speaker statistic model is trained. In text-dependent systems, suited for cooperative users, the model is based on utterance-specific. However, in reality, the comparison between the questioned recording and a suspect's recording is usually based on text-independent method, so which aspect of voice that really works in comparison is not clear. It's hard to interpret transparently in the court that which factor of the questioned voice is compared against which factor of a suspect's voice. Therefore, in this paper, we investigated the text-dependent forensic automatic recognition method. We selected out whole duration of the numbers (0) from the telephone number series, and then extracted speaker-dependent features on the selected numbers, at last, the features extracted from the questioned recording were compared against the statistic models trained on the same number. In this way, the comparative targets are on the same linguistic content. An forensic automatic speaker recognition method based on Gaussian Mixture Modelling (GMM) was used in a likelihood ratio framework.

LIKELIHOOD RATIO FRAMEWORK

The ongoing paradigm shift[8, 9] in the evaluation and interpretation of evidence in the forensic sciences add new requirements that evidence must be evaluated and presented in a logically correct way and that the reliability of the results must be demonstrable. In forensic automatic speaker recognition (FASR), the goal is to identify whether an unknown voice of a questioned recording (trace) came from a suspected speaker. The framework of likelihood ratio based on Beyes theorem is the current state-of-the-art interpretation approach of forensic evidence[6, 7, 10]. In the LR framework, forensic scientists are not forced to make "yes" or "no" decisions, which is posterior odd and should be decided by the courts[11]. Forensic scientists provide the strength of voice evidence which supports either prosecution hypothesis (H0) or defence hypothesis (H1), which can be combined with prior background information (prior odds, province of the court) to give posterior odds (province of the court) for judicial outcomes. It is a updating process of information. The Beyes theorem is shown in Eq. (1).

H_0 – the two voice recording were spoken by the same speaker.
H_1 – the two voice recordings were spoken by two different speakers.

$$\underbrace{\frac{p(H_0|E)}{p(H_1|E)}}_{\text{posterior odds}} = \underbrace{\frac{p(E|H_0)}{p(E|H_1)}}_{\text{likelihood ratio}} \times \underbrace{\frac{p(H_0)}{P(H_1)}}_{\text{prior odds}} \qquad (1)$$

The Bayes theorem allows for the evaluation of the strength of evidence in the form of LR, which can provide quantitative degree of support for one hypothesis against the other. The numerator of LR is used to estimate the probability of observing the evidence assuming H0 hypothesis is true, its denominator is used to estimate the probability of observing the same evidence assuming H1 hypothesis is true. The relative strength of evidence in support of the hypothesis is reflected in the magnitude of LR value. The deviation of LR value from the unity (=1) provides a quantification on the strength of the voice evidences. The more the LR deviates from unity, the greater the support for either prosecution hypothesis (i.e. when LR > 1) or defence hypothesis (i.e. when LR < 1). The closer the LR value approaches the unity, the less useful the evidence becomes, because it means that the present evidence provides almost equally strength of support for both hypotheses, H0 and H1.

The more similar between the questioned recording and suspect's recording(s), the more likely they were spoken by the same speaker. However, the result must be balanced by the typicality of the selected features in the relevant background population. Hence, LR value is the outcome of interaction result between both factors of similarity and typicality. In the LR framework, both similarity and typicality are necessary to evaluate the strength of evidence[12]. Bayes' theorem is the process of the consideration of the odds. In fact, the theorem permits the revision of a measure of uncertainty about the truth when new information is provided. The important feature of Bayesian inference is that it permits one to move from prior probability to posterior probabilities on the basis of data or subjective assessments. In forensic science, identity of a source is hard to be known with certainty, and therefore must be inferred. The inference of identity can be seen as an individualization process, from an initial large population to a restricted class, or, ultimately, to unity. According to the inference of identity in forensic speaker recognition, common speaker verification and speaker identification (in closed- and open-set) techniques have been shown inadequate for evaluating the evidence in forensic domain. These techniques implicitly use subjective thresholds, forcing the forensic expert to make yes or no conclusions, which should be devolved upon the court. Bayesian inference eliminates the shortcoming of common speaker recognition and can provides quantified strength of evidence. It has a transparent inference process, and it is scientific and logic right framework for the evaluation of forensic evidence. It has been a research focus in the evaluation of forensic evidence[13, 14].

CALCULATION OF LIKELIHOOD RATIOS: GMM APPROACH

By using acoustic features extracted from a given speaker's recordings, a speaker model is trained. Classical speaker models can be deterministic or statistical, also known as nonparametric and parametric models, respectively. In statistical models, each speaker is modeled as a probabilistic model with an unknown but fixed probability density function. The training process is to estimate the parameters of the probability density function from the given features. Comparison is done by evaluating the likelihood of the test recording with respect to the model. The hidden Markov model (HMM) and the Gaussian mixture model (GMM) are the most popular statistical models for text-dependent and text-independent recognition, respectively[15]. In forensic automatic speaker recognition, the suspect's recording is usually selected out to train a statistical model. An important step in the implementation of the above likelihood ratio calculation is selection of the actual likelihood function. The choice of this function is largely dependent on the features being used. For text-independent speaker recognition, where there is no prior information of what the speaker will say, the most successful likelihood function has been Gaussian mixture models. Few research has focused on the text-dependent FASR, so we tested the feasibility whether GMM can still provide reliable results in text-dependent forensic automatic speaker recognition. Gaussian mixture model was used in this paper to model the within-speaker variability of a suspect and between-speaker variability. The likelihood values were estimated from the comparison between features of questioned recording and the suspect's statistic model. A Gaussian mixture model is a weighted sum of M component Gaussian densities[16]. For a D-dimensional feature vector, the mixture density used for the likelihood function is defined as:

$$p(x \mid \lambda) = \sum_{i=1}^{M} \omega_i p_i(x) \qquad (2)$$

$$p_i(x) = \frac{1}{(2\pi)^{D/2} \mid \Sigma_i \mid^{1/2}} \exp\{-\frac{1}{2}(x-\mu_i)^T \mid \Sigma_i \mid^{-1} (x-\mu_i)\} \quad (3)$$

The complete Gaussian mixture model is parameterized by the mean vectors, covariance matrices and mixture weights from all component densities. The mixture density is a weighted linear combination of M unimodal Gaussian densities, $p_i(x)$, each parameterized by a mean $D \times 1$ vector μ_i and a $D \times D$ covariance matrix, Σ_i. ω_i are the mixture weights, and satisfy $\sum_{i=1}^{M} \omega_i = 1$. The parameters of GMM are denoted as $\lambda = \{\omega_i, \mu_i, \Sigma_i\}$, where $i = 1, \ldots, \mathrm{M}$. According to the opinion of Reynolds, Douglas A[1], although the component Gaussian are acting together to model the overall probability density function, full covariance matrices are not necessary even if the features are not statistically independent. Diagonal covariance basis Gaussians is capable of modeling the correlations between feature vector. First, the effect of applying a set of M full covariance matrix Gaussians can be equally obtained via using a larger set of diagonal covariance Gaussians. Second, diagonal-matrix GMMs are more computationally efficient than full covariance GMMs for training. Third, empirically, Reynolds, Douglas A etc. have observed that diagonal matrix GMMs outperform full matrix GMMs. Given a set of training feature vectors, maximum likelihood model parameters are estimated using the iterative expectation–maximization (EM) algorithm[17] . The GMM can be regarded as a hybrid between a parametric and nonparametric density model. Like a parametric model, the GMM has structure and parameters that control the behavior of the probability density, but without constraints that the data must be of a specific distribution type. Meanwhile, like a nonparametric model, the GMM has many degrees of freedom to allow arbitrary density modeling, without excessive computation and storage demands.

1 Reynolds, Douglas A. "Gaussian Mixture Models." 2009.

The principle for evaluation of the strength of evidence consists in the estimation and the comparison of the likelihood ratios. The forensic voice evidence does not consist in speech per self, but in the degree of similarity between speaker dependent features extracted from the questioned voice and same features extracted from the suspect voice, represented by his/her GMM model. Between-speaker variability was also trained using GMM with the features extracted from background population database. The background population database must be recorded in the same transmission channel. In this paper, we didn't constrain the mobile brand. The recording were recorded by different phone brands, such as Apple\Nokia\Huawei, etc. The likelihoods are explicitly represented by probability density models. The strength of the voice evidence is the result of the interpretation of the evidence, expressed in terms of the likelihood ratio given two alternative hypotheses. Mathematically, H_0 is represented by a model denoted λ_{hyp}, which characterizes the hypothesis H_0 in the feature space. For a Gaussian distribution, λ_{hyp} denotes the mean vector and the covariance matrix parameters. The alternative hypothesis, H_1, is similarly represented by the model denoted $\lambda_{\overline{hyp}}$. Likelihood ratio is then expressed by Eq. (4).

$$p(X \mid \lambda_{hyp}) / p(X \mid \lambda_{\overline{hyp}}). \qquad (4)$$

EXPERIMENTS RESULTS AND ANALYSIS

The database includes 20 male speakers' recordings of Mandarin. Each speaker was recorded on two sessions, and the first session was about one week earlier than the second session. The contents of recordings are the telephone numbers including from zero to nine. These recordings were made via the common mobile phone channels in China, which include GSM/WCDMA/CDMA2000. They were digitized and saved as 16 bit PCM sound files at a sampling frequency of 11.025 kHz.

Features commonly used in automatic speaker recognition are from the various speech production and perception models. The speech signal continuously changes with the movements of articulatory, and therefore, the signal must be divided into short frames. Short-term spectral features are computed from short frames of about 20–30 ms in duration. Within this interval, the speech signal is assumed to remain stationary. These acoustic feature vectors are usually descriptors of the short-term spectral envelope. Thus some form of spectral envelope based various features is used in many speaker recognition systems even if they are dependent on external recording conditions, e.g., RelAtive SpecTrAl Perceptual Linear Prediction (RASTA-PLP) coefficients or Mel-Frequency Cepstral Coefficients (MFCCs). 16th-order Mel frequency cepstral coefficients (MFCCs) were extracted as multiple dimensions features of voice in this research, which is a representation of an approximation of the short-term spectrum. The mel-scale cepstrum is the discrete cosine transform of the log spectral energies of the speech segment. The spectral energies are calculated over logarithmically spaced filters with increasing bandwidths (mel-filters). A detailed description of the feature extraction steps can be found in [18]. For band-limited telephone speech, cepstral analysis is performed only over the melfilters in the telephone passband (300–3400 Hz). All cepstral coefficients except its zeroth value (the DC level of the log-spectral energies) were not retained in the processing. These features were extracted using Praat software[19], in which window length was set as 0.015 second, and time step was set as 0.001 second. Time step was set as only 1 milliseconds in order to get more frame to train the statistic models. In the training of each speaker's model, three tokens from session 1 and three tokens from session 2 were selected out to train the present speaker's GMM. Universal background model (UBM) was trained using all the other speakers' recordings when the same speaker's recordings were compared. UBM was trained using other 18 speakers' recordings except those being compared when two different speakers' recordings were compared.

In the training of GMM, 64 mixtures were used for the suspect features to represent within-speaker variation, and 64 mixtures were also used in the training of UBM to represent between-speaker variation. Expectation-Maximization (EM) algorithm and diagonal-matrix were used

in the training of GMM. For the simplicity, table 1 only lists the feature variability of telephone number, zero. In table 1, the columns are the means and standard deviations of 16 dimensions features of MFCC, and '1' represent the first dimension, '2' represents the second dimension, and so on. The first row is the mean value of the speaker named "AQF", and the second row is the mean value of UBM. The third row is the standard deviation of the speaker named "AQF", and the fourth row is the standard deviation of UBM. From the Table 1, we can conclude that the mean values show a downward trend with the increasing of dimension numbers. AQF_Std represents within-speaker variability and UBM_Std represents between-speaker variability. The standard deviations of UBM is bigger than the standard deviations of AQF except those with gray shading. We can conclude that between-speaker variability is bigger than within-speaker variability in most of MFCC features. This is the base that MFCC can be used to discriminate speakers. In the gray shadings, the between-speaker variability is a little smaller than the within-speaker variability and they are very close, which won't provide big wrong support for conclusions.

Table 1 the mean and standard deviation of within-speaker variability and between-speaker variability

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
AQF_Mean	79.8	10.6	-21.5	-80.7	-26.9	3.3	-4.2	2.1	9.6	0.8	7.5	12.0	3.7	8.5	3.9	6.7
UBM_Mean	81	16.2	-11.2	-72.6	-16.1	-15.3	-2.2	0.8	-3.7	-3.8	-2.3	1.9	2.6	2.3	1.8	0.2
AQF_Std	31.8	26.2	13.9	20.2	20.8	14	17.4	17.8	15.2	10.9	10.8	7.7	10.5	6.7	6.3	5.5
UBM_Std	43.9	40.7	29.4	31.2	24.2	19.8	17.1	15.3	13.2	11.9	10.2	9.3	8.6	7.5	7.4	6.6

Fig. 1 and Fig. 3 show the histograms of the 1st dimension of MFCC extracted from AQF and background population database. The feature in Fig.1 has the smaller standard deviation than the same feature in Fig.2, although Fig.1 has two peaks. This maybe be interpreted because zero in Mandarin has consonant part and vowel part. We selected the whole utterance of zero, not just vowel part. So, one peak represent the characteristic of consonant and the other peak represent the characteristic of vowel. This manipulation decrease the difficulty of labeling the consonant part or vowel part correctly. Fig. 2 and Fig. 4 show the histograms of the second dimension of MFCC extracted from AQF and background population database. The two peaks in Fig.2 is not as obvious as in Fig.1, which indicates that the affection of consonant decreases on the second dimension of MFCC.

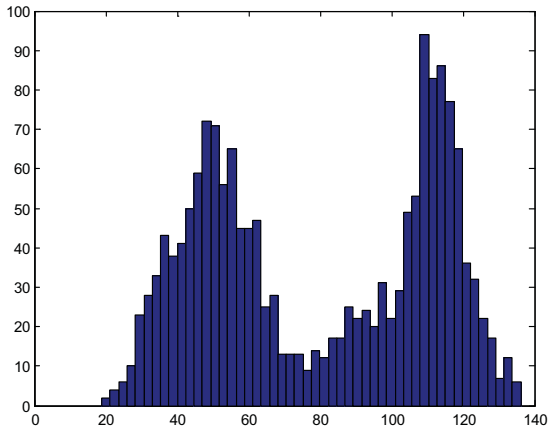

Figure 1 the histogram of the 1st dimension of MFCC extracted from AQF

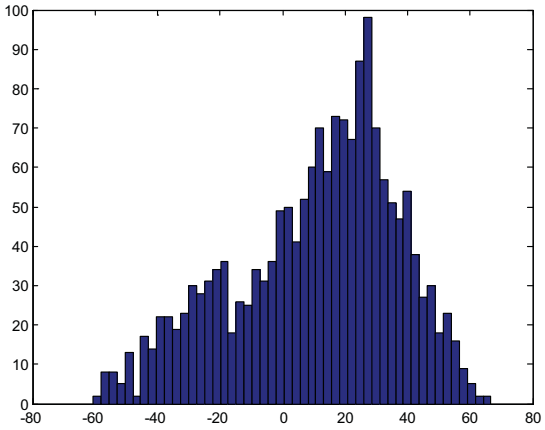

Figure 2 the histogram of the second dimension of MFCC extracted from AQF

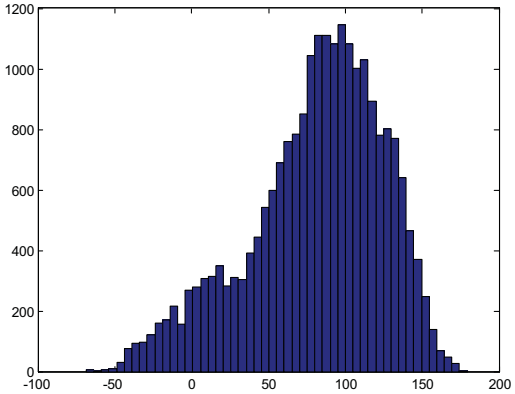

Figure 3 the histogram of the 1st dimension of MFCC extracted from background database

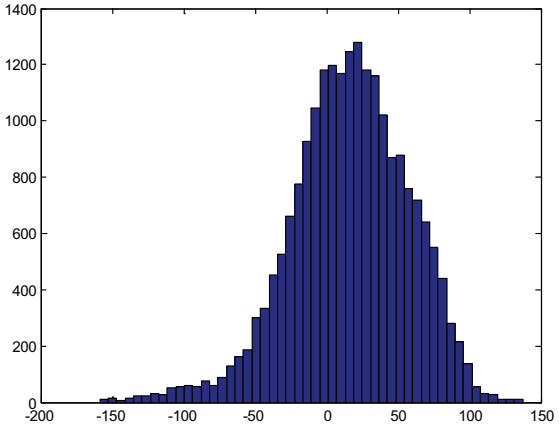

Figure 4 the histogram of the second dimension of MFCC extracted from background database

For the same speaker comparison, we used AQF's recordings. Three tokens from session 1 and three tokens from session 2 were selected out to train AQF's GMM. Four tokens except those used to train his GMM were selected to calculate the LR values. The LR values of the four tokens are 2547.6, 10.8, 1080, 30361. The results indicate that they all support the conclusion the two recordings were spoken by the same speaker, although they had different evidence strength. The mean LR value of the four tokens is 8499, which indicates that this evidence is 8499 times more support H_0 hypothesis (the two recordings were spoken by the same speaker) than supporting H_1 hypothesis (the two recordings were spoken by different speaker).

For the different speaker comparison, we used AQF's recording and another speaker's recording whose name is CJ. We modeled CJ's ten zero utterances into a GMM, and compared the AQF's ten zero utterances' features against CJ's GMM. The LR values of the ten different speaker comparisons are listed in Table 2. These results indicate that all the results support the different speaker hypothesis and the strength of the evidence is very strong. The probability of supporting H_1 hypothesis more than supporting H_0 hypothesis is the reciprocal of LR value. Then, as evidence strength, the smallest value is 1/0.042=23.8, and the biggest value is 1/8.7e-28= 1.1e+27. Figure 5 is the histogram of LR values in the different speaker comparison. The results show that all the value of likelihood ratio are far from unity, which means that they can provide fairly big strength of the present evidence.

Table 2 the LR values of different speaker comparison

LR	1.9e-09	3.7e-05	0.011	7.6e-07	0.042	9.4e-18	1.7e-13	1.5e-07	2.4e-11	8.7e-28
1/LR	5.3e+08	2.7e+04	90.9	1.3e+06	23.8	1.1e+17	5.9e+12	6.7e+06	4.2e+10	1.1e+27

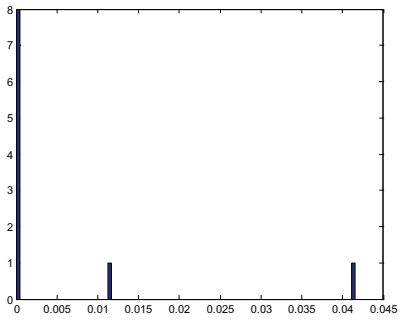

Figure 5 the histogram of LR values in the different speaker comparison

CONCLUSION

In this paper, we researched the discriminant performance of forensic automatic speaker recognition system in the framework likelihood ratio when telephone numbers were provided. The utterances of the number including consonant part and vowel part were used to extract MFCC features. Results indicate that this manipulation has fairly good discrimination performance and the GMM can work well in the text-dependent recognition system. Only one token of a number can provide fairly big evidence strength. In the future, we will combine the LR values of zero with other numbers, which can be assumed those numbers are independent with zero, this would result in potentially even more powerful evidence strength.

REFERENCES

1. Drygajlo, A., *Automatic Speaker Recognition for Forensic Case Assessment and Interpretation*, in *Forensic Speaker Recognition*2012, Springer. p. 21-39.
2. Campbell, W.M., et al. *Understanding scores in forensic speaker recognition*. in *IEEE Odyssey 2006: Workshop on Speaker and Language Recognition, June 28, 2006 - June 30, 2006*. 2006. San Juan, Puerto rico: Inst. of Elec. and Elec. Eng. Computer Society.
3. Botti, F., A. Alexander, and A. Drygajlo, *On compensation of mismatched recording conditions in the Bayesian approach for forensic automatic speaker recognition.* Forensic science international, 2004. **146**: p. S101-S106.
4. Morrison, G.S., *Measuring the validity and reliability of forensic likelihood-ratio systems.* Science & Justice, 2011. **51**(3): p. 91-98.
5. Kinoshita, Y., S. Ishihara, and P. Rose, *Exploring the discriminatory potential of F0 distribution parameters in traditional forensic speaker recognition.* International Journal of Speech Language and the Law, 2009. **16**(1): p. 91-111.
6. Wang, H. and J. Yang. *The comparison of "Idiot's Bayes" and multivariate kernel-density in forensic speaker identification using Chinese vowel /a*. in *2010 3rd International Congress on Image and Signal Processing, CISP 2010, October 16, 2010 - October 18, 2010*. 2010. Yantai, China: IEEE Computer Society.
7. Morrison, G.S., *A comparison of procedures for the calculation of forensic likelihood ratios from acoustic-phonetic data Multivariate kernel density (MVKD) versus Gaussian mixture model-universal background model (GMM-UBM).* Speech Communication, 2011. **53**(2): p. 242-256.
8. Saks, M.J. and J.J. Koehler, *The coming paradigm shift in forensic identification science.* Science, 2005. **309**(5736): p. 892-895.
9. Gonzalez-Rodriguez, J. and D. Ramos, *Forensic automatic speaker classification in the "coming paradigm shift"*. Speaker Classification I. Fundamentals, Features, and Methods.2007.
10. Rose, P. *Forensic voice comparison with secular shibboleths - A hybrid fused GMM-multivariate likelihood ratio-based approach using alveolo-palatal fricative cepstral spectra*. in *36th IEEE International Conference on Acoustics, Speech, and Signal Processing, ICASSP 2011, May 22, 2011 - May 27, 2011*. 2011. Prague, Czech republic: Institute of Electrical and Electronics Engineers Inc.
11. Huapeng Wang, C.Z., Jun Yang, Ming Wu., *EXPERIMENTAL STUDY ON A FORENSIC SEMI-AUTOMATIC SPEAKER VERIFICATION USING VOWEL CEPSTRAL WITH LIMITED QUESTIONED DATA*, in *2013 INTERNATIONAL SCIENTIFIC CONFERENCE "ARCHIBALD REISS DAYS*2013. p. 151-158.
12. Rose, P. and G.S. Morrison, *A response to the UK Position Statement on forensic speaker comparison.* International Journal of Speech Language and the Law, 2009. **16**(1): p. 139-163.
13. Ramos, D., J. Franco-Pedroso, and J. Gonzalez-Rodriguez, *Calibration and Weight of the Evidence by Human Listeners. The Atvs-Uam Submission to Nist Human-Aided Speaker Recognition 2010.* 2011 Ieee International Conference on Acoustics, Speech, and Signal Processing, 2011: p. 5908-5911.
14. Gonzalez-Rodriguez, J., et al., *Emulating DNA: Rigorous quantification of evidential weight in transparent and testable forensic speaker recognition.* Ieee Transactions on Audio Speech and Language Processing, 2007. **15**(7): p. 2104-2115.
15. Reynolds, D.A. *An overview of automatic speaker recognition technology*. 2003. IEEE.
16. Reynolds, D.A., *Gaussian Mixture Models*, 2009.
17. Dempster, A.P., N.M. Laird, and D.B. Rubin, *Maximum likelihood from incomplete data via the EM algorithm.* Journal of the Royal Statistical Society. Series B (Methodological), 1977: p. 1-38.

18. Reynolds, D.A. and R.C. Rose, *Robust text-independent speaker identification using Gaussian mixture speaker models.* Speech and Audio Processing, IEEE Transactions on, 1995. **3**(1): p. 72-83.
19. Boersma, P. and D. Weenink, *Praat: doing phonetics by computer.* Computer program available at< http://www. praat. org, 2008.

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DESIGNING ENGLISH GRAMMAR EXERCISES ON THE TOPIC OF CRIME SCENE INVESTIGATION FOR LAW ENFORCEMENT STUDENTS

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Abstract: Learning English as a foreign language requires simultaneous development of students' lexical and grammar skills, through their participation in various classroom activities and exercises. These two aspects are also of great importance for ESP (English for specific purposes) students who learn English vocabulary and grammar in the specific area for which they are being educated. For this reason, ESP teachers and course designers face a great challenge in their attempts to design adequate instruction materials based on combining lexical and grammar contents which will attract and keep students' interest. ESP students are generally more interested in acquiring lexical knowledge, and their attitudes to learning grammar contents are rather negative, which is particularly true for those students who have been exposed to traditional teachings methods. In this paper the authors focus on designing grammar exercises on the topic of crime scene investigation for law enforcement students. Their aim is to present the issue of crime scene investigation as a resourceful topic which can stimulate the creativity of ESP teachers in the process of designing instruction materials which will make the acquisition of English grammar an enjoyable experience for law enforcement students.

Keywords: crime scene investigation, English for specific purposes, grammar, law enforcement

INTRODUCTION

Good knowledge of English is one of the prerequisites for successfully performing law-enforcement activities. This is particularly true for existing and prospective law-enforcement officers working in specific areas where the need for lexically shaping new concepts is directly dependent on the English lexical solutions based on its lingua franca status, or the position requires greater communication and interaction at international level which undoubtedly requires more than satisfactory English language skills. Crime scene investigation (CSI) can surely be considered as one of the "domains" where good proficiency of English plays a very important role in the successful accomplishment of the tasks of experts working in this field. The continuous development of new technologies necessarily implies the introduction of new terminology which is mainly shaped in English as the leading world language, and their successful translation in other languages depends, to a great extent, on the proper understanding of the concepts they cover, which consequently requires excellent knowledge of English vocabulary. This is the reason why English lessons addressing the issue of CSI abound in new vocabulary, mainly of technical nature, which helps students express their thoughts with greatest semantic precision and accuracy.

However, the study of English in the "CSI" classroom cannot be limited solely to the acquisition of lexical knowledge. In order to be able to properly communicate the message formulated in their brains to their interlocutors, students need to know the structure of the language and organize their thoughts into meaningful sentences, so as to avoid cases of possible misunderstandings. Prospective CSI experts will be involved in various types of tasks which require mastery of English writing skills including advanced knowledge of English grammar. The possession of good grammar skills is particularly important for written interaction, where the absence of direct, immediate contact between the interlocutors enhances the risk of failure in effective communication. Typically, they are involved in crime scene examination and evidence analysis, which is followed by a detailed and accurate documentation, formulation and presentation of their findings, written in a clear language. They also participate in court proceedings as expert

witnesses where language skills play a very important role. They prepare investigative reports and carry out written correspondence with relevant authorities and perform various other tasks which require advanced linguistic knowledge.

Taking into consideration the wide variety of situations where English proficiency is a must, we consider it of crucial importance that English language courses at tertiary level for law enforcement students must be grounded on adequate combination of lexical and grammar contents. In the sections that follow, we will demonstrate some of the possible options for successfully integrating both aspects of English language acquisition, which are aimed at making learning English grammar an enjoyable experience for the target students.

ESP COURSE DESIGN AND THE INTEGRATION OF GRAMMAR CONTENTS

Drawing on the arguments from the introductory section, it becomes clear that the issue of the integration of grammar in CSI English course materials should be addressed with greatest attention by teachers and course designers. Our experience as teachers and syllabus designers shows a high level of reluctance among students when it comes to learning grammar. According to them, the engagement in grammar instruction and practice is a boring and monotonous activity which does not provide any opportunity for them to express their creativity. Such negative attitude mainly results from their previous exposure to traditional teaching methods which focused on deductive language acquisition where students are passive recipients of grammar knowledge through mechanical repetition, imitation and reproduction.

In order to meet students' expectations for enjoyable learning environment teachers and ESP course designers should shift from traditional teaching habits and adopt modern teaching approaches which center on the students as active participants in the learning process. One of the options for achieving this goal is through the adoption of communicative language teaching, which focuses on inductive acquisition of foreign language skills and fosters students' communicative skills through their constant interaction both with the teachers and the other students. The aim of communicative language teaching is to develop what Hymes call "communicative competence" of the students (Savignon, 2002:1), mainly through communicative exercises carried out in the form of role-plays, group work, interviews, games and other student-centered interactive activities. According to proponents of this approach language is best acquired when it is contextualized, i.e. when certain linguistic and lexical contents is learned in a specific, given context which complies with the students' proficiency level and practical needs. Contextualization is of particular importance for ESP students, since the language they acquire is related to a specific field and students should be exposed to the language as it is used by native speakers in contexts relevant to the given field. Thus, for example, law enforcement students dealing with the topic of CSI should be presented with language used in authentic CSI setting by CSI professionals. This will surely raise their interest and motivation, because it provides a kind of a link between theory and practice, abstraction and reality, and they start viewing the learning process as a useful experience which will bring benefits in their future careers.

As far as ESP course design is concerned, communicative language teaching proves most effective through the so called content-based instruction. As its name suggests, the ultimate goal of this type of instruction is to enable students to communicate effectively while communication is achieved through content from a specific area. In content-based instruction specific contents related to a given field/profession is used as an instrument for acquiring linguistic knowledge, and vice versa – specialized knowledge is acquired through proper use of linguistic forms. Within the context of CSI, this practically means that teachers will use selected units related only to the topic of CSI which is centered on technical vocabulary from that field, and the whole text will incorporate in itself a wide variety of linguistic forms and patterns. This teaching technique helps students acquire linguistic knowledge in an inductive manner, thus avoiding prescriptive grammar teaching and making grammar acquisition an interesting experience for them.

However, the selection of contents which will be used as topics for classroom use is not an easy task to achieve, and it mainly depends on the creativity of the teacher/course designer and his/her familiarity with the subject taught. It is primarily based on students' need analysis which refers to "procedures used to collect information about learners' needs" (Richards, 2001:51), as the first step in materials development process. The aim of need analysis is to help ESP teachers and course designers select and adapt the instruction materials to the practical needs of the students. The process of selection and adaptation is what actually distinguishes ESP teachers from general English teachers who have completely different roles in the teaching process. It requires great experience, skills and assistance by experts and specialists in the area in question, in order to develop didactic materials which will attract students' interest and motivation for learning the language.

GRAMMAR EXERCISES IN THE ESP CLASSROOM ON THE TOPIC OF CRIME SCENE INVESTIGATION

In this section we will provide some practical solutions for incorporating grammar contents in didactic materials for learning English on the topic of crime scene investigation. For the purpose of this paper we selected a number of web sites dealing with different aspects of crime scene investigation and with certain modifications we adapted the original contents to the needs of our target students. We transformed the original texts into communicative and interactive classroom activities focusing on different grammatical unit, based on the principle tenets of communicative language teaching.

*Sample exercise 1 (**Modal verbs**)*

The first three exercises focus on the issue of evidence collection, as an important aspect of crime scene investigation. Taking into account the various types of evidence which can be collected from the crime scene, we considered it most appropriate to use different types of evidence for introducing different grammar structures.

In the first exercise, our focus is on blood and seminal stains. The activity presented in the exercise is set in an adequate context. Namely, a group of criminology students is attending a training course in evidence collection and the exercise is practically a conversation between the students and the training expert, discussing the handling of blood and seminal stains. In this exercise students practise the correct use of *can, may, should* and *mustn't*. The activity is carried out in the form of a group work. Students are divides in two groups and one group is given the questions while the other group has the answers of the training expert. The "question" group is given the questions in correct order, while the answers in the "answer" group are jumbled. Before they do the exercise orally, students from both group should fill in the gaps with the appropriate modal verb based on the previous instruction they have received during the class. Then a student from the "question" group asks the first question, and a student from the second group with the help of the other members of the group has the task to find the appropriate answer and read it aloud. The activity finishes when the last question is answered by the "expert".

This exercise is very useful for practising students' receptive reading skills and productive listening skills. The group work enables them greater interaction with the members of the group and enhances their problem-solving skills.

The following is the excerpt from the student-expert conversation:[1]

*Expert: When collecting evidence, please remember that all pieces of evidence _____ (Key: **should**) be collected individually and placed in separate containers. You _____ (Key: **mustn't**) mix several different pieces of evidence in the same container.*

*Student 1: But let's say there are two different blood or seminal stains on the same garment. _____ (Key: **Can**) we put them in the same container?*

*Expert: Most certainly not! The two stains _____ (Key: **may**) come from two different persons. In fact, if you come across a stained garment, you _____ (Key: **can**) send the whole article to the laboratory, you don't have to scrape the stain.*

1 The text for the conversation used in this execise is taken and adopted from: http://www.crime-scene-investigator.net/collect.html assessed on 15.01.2014 (The text from the web source was initially adapted from the California Commission on Peace Officer Standards and Training's workbook for the "Forensic Technology for Law Enforcement" Telecourse presented on May 13, 1993)

Student 2: And how do we do that?

*Expert: Pieces of clothing and other smaller objects that contain blood or seminal stains _____ (Key: **should**) be wrapped in paper or placed inside a paper bag or paper box. You _____ (Key: **mustn't**) use plastic containers.*

*Student 3: _____ (Key: **Should, Can**) we label the container somehow?*

*Expert: Yes, that's crucial! We discussed labeling of evidence earlier in the class. The same labeling rules _____ (Key: **should**) apply to containers where you place the evidence.*

*Student 2: But what if the object is too big and _____ (Key: **can**) not be sent to the laboratory?*

*Expert: In such cases, you _____ (Key: **should**) scrape the stain onto a clean piece of paper, which _____ (Key: **should**) be folded and placed inside an envelope. You _____ (Key: **mustn't**) scrape the stain directly inside the envelope.*

Student 3: Yes, but if the stain has not dried yet?

*Expert: True, we _____ (Key: **can**) not scrape anything that's wet, _____ (Key: **can**) we? You _____ (Key: **should**) then allow the blood or seminal stain to dry completely before you package it and send it to the laboratory...*

Sample exercise 2 (First and Second Conditional)

This exercise is practically a continuation of the dialogue with the training expert. Students role-play a discussion on handling hair and fibres as evidence in crime scene investigation. During the role-play students should decide on the appropriate type of conditional clause they should use in their conversation chunks, thus practising their receptive skills (reading) and productive skills (speaking).

The following is an excerpt from their conversation:[2]

***Expert:** Hair is always a very important, sometimes even the vital piece of evidence when investigating a case. If you _____ (Key: **discover**) hair on the crime scene, you will easily identify the perpetrator's race, sex or age.*

***Student 3:** Does it have to be head hairs? If we _____ (Key: **find**) chest hair, for example, would it be possible to identify those features?*

***Expert:** Of course! It will really make no difference if the hair _____ (Key: **originates**) from one's head, chest, arm, leg, or any other part of the body for that matter.*

***Student 1:** Is just one hair enough?*

***Expert:** Well, if the hair _____ (Key: **is**) well preserved, then even a single hair will suffice for the laboratory to make the necessary examinations. But ideally, if you _____ (Key: **recovered**) greater amount of hair, the laboratory would have more material to work with.*

***Student 2:** How should we collect the hair from the crime scene? Can we pick it up with fingers?*

***Expert:** If you _____ (Key: **follow**) the necessary procedures that were discussed earlier, then you are allowed to use fingers. However, if you _____ (Key: **carried**) the necessary equipment with you, it would be wiser to use tweezers.*

Once you have collected the hair, place it in paper bindles or coin envelopes which should then be folded and sealed in larger envelopes. Don't forget to label the outer sealed envelope.

***Student 1:** What would be the procedure if the hair _____ (Key: **was**) not loose?*

*Expert: If you _____ (Key: **came**) across a hair that is attached or stuck in something, like in dried blood or a crack of glass, it would be best not to remove it...*

Sample exercise 3 (Present Perfect, Past Simple & Past Continuous)

This activity is carried out in the form of pair work, and is part of a listening comprehension exercise. Students are given several paragraphs which provide a brief overview of the early history of fingerprinting. Based on the information given in the exercise, the pairs should try to

2 The sentences and paragraphs used in this exercise are taken and adapted from http://www.crime-scene-investigator.net/collect.html retrieved on 15.01.2014 (The text from the web source was initially adapted from the California Commission on Peace Officer Standards and Training's workbook for the "Forensic Technology for Law Enforcement" Telecourse presented on May 13, 1993)

rearrange the paragraphs chronologically and use the proper tense in the gaps. After they finish with the task, they listen to a presentation of the history of fingerprinting delivered by a native speaker acting the role of a British fingerprints expert, then check the answers with their partners. This is a very good opportunity for them to practice their receptive listening skills and to see how present perfect, past simple and past continuous are contextually and authentically used by e native speaker of English.

These are excerpts from the exercise:[3]

*Already in 1902 English lawyers _____ (**Key: presented**) fingerprints as evidence in court trials.*

***

*Fingerprints were first _____ (**Key: utilized**) as a method for identifying criminals in the 19th century in India by the Englishman Sir William Herschel. He _____ (**Key: was working**) as the Chief Magistrate of the Hooghly district in Jungipoor. His work consisted of recording the fingerprints of all his residents when they _____ (**Key: were signing**) business documents with the intention to reduce fraud. He _____ (**Key: launched**) this practice in 1858.*

***

*People _____ (**Key: have used**) one or another form of fingerprinting for centuries. However, ancient people _____ (**Key: didn't take**) fingerprints to investigate crimes, rather to record business transactions. The Babylonians _____ (**Key: pressed**) their fingertips into clay and the Chinese _____ (**Key: made**) ink-on-paper finger impressions…*

***

*The New York state prison _____ (**Key: adopted**) the use of fingerprints in 1903.*

***

*Sir Francis Galton _____ (practice) eugenics, a popular 19th century "science" that _____ (**Key: was seeking**) to improve the human genetics by selective reproduction. As part of his work, he _____ (**Key: collected**) measurements of various traits of people around the world, and _____ (**Key: gathered**), among other data, some 8,000 different samples of fingerprints. After careful study, he _____ (**Key: published**) his book "Fingerprints" in 1892, where he _____ (**Key: introduced**) a classification system based on patterns of arches, loops and whorls...*

Sample exercise 4 (Word building- nouns)

Lexical derivation of different parts of speech are another aspect which must be included in the ESP syllabus. Our experience with law enforcement students shows that students have problems identifying different parts of speech in English which is reflected in the way they express their thoughts verbally. In order to overcome these shortcomings we try to incorporate word building exercises in as many lessons as possible. By doing this, students are able to enrich their vocabulary on the one hand, and to learn the affixation rules and the meaning conveyed by various affixes – both prefixes and suffixes.

For the purpose of this exercise we used the same information on the chronology of the use of fingerprints. The original text was adapted so as to help students practice derivation of nouns through suffixation. Students are given a list of suffixes that they should match to the corresponding verbs so as to derive the appropriate noun forms. Students work in pairs and after the matching activity, they fill in the gaps in the text with the appropriate noun.

This is the list of some of the verbs and the suffixes:

3 The paragraphs are taken and adapted from the article "How Fingerprinting Works" by Stephanie Watson, available at: http://science.howstuffworks.com/fingerprinting3.htm retrieved on 15.01.2014

murder – er
adopt – ion
identify –tion abbreviate - ion

The excerpts from the text are presented below:[4]

*1883 – In the novel "Life on the Mississippi" Mark Twain wrote about a **murderer** who was identified by means of fingerprint **identification**.*

***

*1905 – After the **adoption** of the use of fingerprints by the U.S. Military, police agencies in the U.S.A. followed suite.*

***

*1980 – First computer data base of fingerprints was developed, which had the **abbreviation** AFIS (Automated Fingerprint Identification System)…*

Sample exercise 5 (Grammar point in focus: Present Simple, Present Passive & Infinitive)

The last exercise addresses the issue of forensic science and its two branches - forensic entomology and forensic dentistry. The exercise can be expanded to include other forensic branches, but due to the limitations of our paper we decided to select only two of them and to illustrate how they can be used for teaching different grammar points. For the purposes of this paper we adapted two texts elaborating on the two forensic branches respectively. The texts are divided into several paragraphs and the jumbled paragraphs are given to the students who are divided in two groups – each group dealing with one forensic branch. The students have the task to work with the other members in the group and identify the paragraphs referring to "their" forensic branch. The paragraphs that contain verbs in bold in present passive come from the text on 'Forensic Entomology', while the rest of the paragraphs with verbs in the infinitive come from the text on 'Forensic Dentistry i.e. Odontology'. After they finish, representatives from each group read the rearranged paragraphs and the exercise finishes with a discussion on the use of the different grammar forms in the texts in question.

This activity is useful for the students since it provides detailed information on the characteristics of these two branches of forensics as acontent relevant to crime scene investigation, through the specific grammar structures. It also gives them opportunity to develop their reading and speaking skills and to increase the interaction with the other students.

The following are the rearranged paragraphs for each forensic branch:

Forensic Entomology[5]

*1.Forensic _____ (Key: **entomologists**) **are** commonly **called** upon to determine the postmortem interval as part of homicide investigations. This **is determined** based on the age of the insects present in the corpse. This estimation **is** usually **called** the "Time Since Colonization". The postmortem interval is estimated by the Forensic Pathologist, Medical Examiner, or Coroner, and their estimation may **be** substantially **assisted** by the calculation of the "time since colonization".*

*2.A wide range of techniques **are used** by forensic _____, including species succession, larval weight and length, and accumulated degree hour technique. It can be very precise if the necessary data **is gathered**. A forensic _____ (Key: **entomologist**) can also make inferences as to whether the corpse **has been moved**. It **has been established** that particular insects prefer particular habitats: an outdoor or indoor environment, or shade or sunlit conditions of the outdoor environment. Thus, for instance, if a corpse **is recovered** indoors with*

4 The sentences and paragraphs used in this exercise are taken and adapted from: http://www.crimescene-forensics.com/History_of_Fingerprints.html retrieved on 15.01.2014

5 The sentences and paragraphs used in the text on forensic entomology are taken and adapted from: http://www.forensicentomology.com/info.htm retrieved on 15.01.2014

larvae of flies which are typical for sunny outdoor locations, that would be a sign that someone had moved and attempted to conceal the body.

3.On the other hand, freezing or wrapping of the body may ***be indicated*** *by an altered species succession of insects on the body. If the insects* ***were prevented*** *from laying their eggs in their normal time frame, this will alter the sequence of species and their typical colonization time. This alteration* ***will be detected*** *by the forensic _____ (Key:* ***forensic entomologist****). If there were no insects at all, that would suggest that the body* ***was*** *probably* ***frozen*** *or sealed in a tightly closed container…*

Forensic Dentistry[6]

1. _____ (Key: ***forensic dentistry****) is a branch of forensic science that applies dental science* ***to identify*** *unknown human remains and bite marks, using both physical and biological dental evidence.*

2.There is a range of medicolegal problems that forensic _____ (Key: ***forensic odontologists****) have* ***to deal*** *with. Their primary task is* ***to recognize*** *human remains of natural disasters, terrorist activities, and missing and unknown persons. Sometimes they are asked* ***to participate*** *in autopsy examinations. The postmortem dental examination of human remains serve* ***to chart*** *dental and cranial features,* ***to make*** *radiographic (x-ray) documentation of these features, and* ***to apply*** *these findings in criminal investigations.*

3.Dental identification is of great significance in the process of identification of victims of catastrophic events where one expects ***to come across*** *massive numbers of casualties such as terrorist attacks, fires, earthquakes, or airplane crashes …*

CONCLUSION

The sample classroom activities presented in the paper lead us to the conclusion that grammar contents can successfully be integrated in ESP instruction materials dealing with the issue of crime scene investigation. The process of selection and adaptation of relevant contents related to this issue is undoubtedly a complex and time-consuming experience for ESP teachers and course designers, but a successful interweaving of relevant specialized content and adequate grammar structures corresponding to students' proficiency level, can finally lead to communicative exercises which foster students receptive and productive skills and raise their interest in learning English grammar with greater motivation and enthusiasm.

REFERENCES

1. Savignon, Sandra J. Communicative Language Teaching: Linguistic Theory and Classroom Practice pp. 1-27 in Savignon, Sandra J. (ed.) 2002. Interpreting Communicative Language Teaching: contexts and concerns in teacher education. New Haven&London:Yale University Press
2. Richards, Jack C. 2001. Curriculum Development in Language Teaching. Cambridge:Cambridge University Press
3. http://www.crime-scene-investigator.net/collect.html
4. http://science.howstuffworks.com/fingerprinting3.htm
5. http://www.crimescene-forensics.com/History_of_Fingerprints.html
6. http://www.forensicentomology.com/info.htm
7. http://forensicdentistryresourcecenter.com/forensic_dentistry.htm

6 The sentences and paragraphs used in the text on forensic dentistry are taken and adapted from: http://forensicdentistryresourcecenter.com/forensic_dentistry.htm retrieved on 15.01.2014

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COMPARATIVE ANALYSIS OF THE DISCOURSE BETWEEN EMERGENCY CALL-CENTRE DOCTOR AND “CHRONIC” PATIENT

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Abstract : In this paper, through a case study we analyze conversations in the institutional framework of Belgrade Emergency Medical Service Call-Centre between a young caller[1] and doctors on duty. Telephone emergency call operators and patients are subject to the rules of the institutional interaction which include the asymmetric distribution of roles and the turn-taking order. Emergency Medical Service physicians who answer the phone have a dominant role, because they control the length of the conversation, as well as its course. This paper examines the relation of the physicians to the patient and what can be observed on the structural organization of the interaction, the structure of turn-taking, choice of vocabulary and intonation.

Keywords: discourse analysis, institutional communication, asymmetry, prosody, intonation, turn, dominant speaker, sequence.

CORPUS AND THEORETICAL FRAMEWORK

For the analysis of spoken interaction in this study we used six audio recordings[2] of phone calls made by a young patient to the Emergency Medical Service Call-Centre[3] on several occasions in 2013, with total duration of 25 minutes and 16 seconds. The calls are usually made during the early morning hours, and there are total of 34 such calls. When the call is received, the emergency room doctor on duty gets certain information on the screen which provides an insight into who the doctor is talking to. The data are the phone number from which the call is made, address, and since we’re talking about a patient who has many times called the EMSC, a Abstract of all the recent calls made to the call-centre, as well as his age and a brief insight into the disease. With the help of that data, regardless of who the doctor on duty is at the time of the patient’s call, the doctors have in front of them some sort of a medical card, or a “picture” of the patient.

In the jargon of EMSC the patients who often call the service are called *chronic patients*. Some patients make about a hundred to two hundred calls from the same number, so the fact that a physician’s monitor displays the sum of the previous number of calls somewhat helps them find a way to deal with such a patient.

The patient who is the subject of our analysis is a visually impaired person who in recent years has had problems with blood pressure. He often calls the EMSC to seek advice because he is concerned for his health. Doctors are aware that he often usurps the telephone line that is dedicated to the most urgent cases, but have kind of an obligation to “calm down” his fears[4]. On several occasions they want to transfer the patient to the “line for advice” because his concerns and the scope of communication are beyond this institution[5].

Discourse analysis is a type of linguistic analysis that emphasizes the structure of the natural flow of the spoken language in which coherent linguistic sequences are produced. Discourse analysis typically emphasizes the need to “see language as a dynamic, social, interactive phenomenon” where “meaning is conveyed not by single sentences, but by more complex ex-

1 in the transcripts the caller says he is 30 years old
2 audio recordings and transcripts are in the authors’ possession
3 henceforth: EMSC
4 Piette, 2005: 13
5 Heritage, 1997: 225

changes, in which the participants' beliefs and expectations, the knowledge they share about each other and about the world and the situation in which they interact, play a crucial part."[6]

INSTITUTIONAL FRAMEWORK IN CONVERSATION

The analysis of transcripts reveals that the patient understands the sociolinguistic environment which he is located in - generally he respects the asymmetrical division of roles between the attending physician and himself. The patient first presents his problem and then listens to advice. The advice and the voice of the doctor through the choice of intonation and lexicon can confirm the doctor's attention, understanding and caring, and it acts soothingly to the young patient, and can also show a commanding, decisive attitude that the patient obediently listens to[7].

After opening the formal exchange greetings, the patient takes the turn to communicate the reason for his call because doctors at the call-center, due to the efficiency of the verbal exchange during the calls expect a concrete, clear, and as a short and overview of their problems as possible[8].

e.g. 1
t4[9][10] - 1 P: Dobro jutro.
t4 - 2 dr O: Dobro jutro.
t4 - 3 P: Izvinite, ovaj, ja sam əə, ovaj imam pritisak.

e.g.2
t6 - 1 P: Dobar dan
t6 - 2 dr O: Dobar dan
t6 - 3 P: Izvinite, teo sam samo jedno pitanje kratko. Ovaj... imam, dosta nestabilnost.

While the patient is explaining the reason for his call to the EMSC, he communicatively dominates the conversation as the speaker, the doctors listen to him and, with minimal responses, are encouraging him to describe the condition he is in[11].

e.g. 3
t3 - 4 P: Ovaj, pijo sam, od pritisak ujutru, ovaj əə, samo minut. Pijo sam ovaj, kako se vika... O:, izvinite, molim vas. Vivace plus, pet dvaes pet, to ujutro i uveče sam popijo negde oko sedam sati sam popijo Vivace, Vivace od dva i po miligrama ovaj.
t3 - 5 dr O: əh
t3 - 6 P: E, sad, ja sam tražio Klometol, znaš pošto mi je mučnina
t3 - 7 dr O: əh
t3 - 8 P: Pošto su mi prepisali treći lek, a ona mi je, moja supruga nije znala, i ona mislila ta j kutija ista kao, dođe kao, ovaj, kako se zove Klometol, i dala mi je Ka-fo-pril. Ka-fo-pril
t3 - 9 dr O: Katopil
t3 - 10 P: Da
t3 - 11 dr O: Od koliko miligrama?
t3 - 12 P: əə. Od dvadeset pet
t3 - 13 dr O: Aha. Dobro.

6 Crystal, 1995: 116
7 Douglas-Cowie, 1998: 353
8 Savić, 1998: 9
9 t + (Number) indicates the number of transcript, "P" the patient's turn, "Dr. O" emergency call-centre doctor's turn
10 For the transcription of spoken material in this paper we use the following characters: *əə* - indecision; *əh* - signal that the listener is following the speaker; *mh* - confirmation; ... pause in speech;: Extension of vowels, (()) part of the text is omitted; ↓ decreased intonation; () slurred part of the recording; the words that are underlined are pointed out for analysis
11 Slade, 2008: 301

Markers of support, as minimal responses, which doctors give a kind of green light with to the young patient to continue to speak, apart from *əh*, there are also one-word statements as: *aha, dobro* (*Yeah*, *right*). In the opening part of the conversation, where the communicative issue opens with the help of minimal and short additional questions, the doctor allows the patient to, in the role of patient - narrator, dominate communicatively and thus help the physician obtain the necessary information. At this point the narrative of the patient is delivered. At the same time, the doctor takes his formal dominant role of the doctor - adviser in the institutional framework of EMSC.

e.g. 4
t6 – 31 P: Da, dosta nistarnos` i oni su mi dali, prepisali mi, moj opšte prakse ovaj doktor već tri četri godine pijem ovaj Lorazepan ujutru i uveče, al ne mi pomaže ništa
t6 – 32 dr O: əh
t6 – 33 P: od tri miligrama
t6 – 34 dr O: əh
t6 – 35 P: ne mi pomaže ništa isto imam visok pritisak, ali zato imam aparat i ovaj merim
t6 – 36 dr O: əh
t6 – 37 P: Ali ja ne mogu sam. Ja sam se pokrećao sam,
t6 – 38 dr O: əh
t6 – 39 P: A sada ne mogu, znači, (( )) od tih lekovi ima sedam samo lek.
t6 – 40 dr O: əh
t6 – 41 P: E sada je otišla na odmor (( ))

Minimum response may, as in the previous example, be only an *"əh"* or, as in the following example, the word *"dobro"* (good):

e.g. 5
t5 – 16 P: E, i ovaj, imam nistarnosti u očima, šetaju mi oči dosta
t5 – 17 dr O: Dobro
t5 – 18 P: Najprostije da vam kažem. Onda pijem ovaj od pritisak, Vi-Va-Ce Plus od 2 i po ili Vi-Va-Ce, isto od 2 i po, samo običan ovaj ujutru i uveče
t5 – 19 dr O: Dobro
t5 – 20 P: I ovaj, pijem Lorazepan i ujutru i uveče po dva, po jedan pijem
t5 – 21 dr O: Dobro
t5 – 22 P: Čak štoviše, ajde rekoh još danas, evo dva dana po polovinu sam isto pio

Asymmetry in the institutional framework[12] of the examples from our corpus can be seen in the following exchange of doctor – patient:

e.g. 6
t5 – 31 P: (( )) Završio sam te lekovi, izvinite što vas maltretiram, završio sam te lekove
t5 – 32 dr O: Morate malo brže, ovo je Hitna pomoć, znate
t5 – 33 P: Da, da
t5 – 34 dr O: Daću vam telefon za savete, pa da pitate kog hoćete
t5 – 35 P: Pa nemam, reci mi samo, oću samo jedno obaveššćenje
t5 – 36 dr O: Kažite

In the previous example from the transcript no.5 (**t5**) we see that the EMSC doctor uses asymmetric division of roles within the institutional framework[13] of telephone communication with patients, firstly (**t5 - 32**) to indicate to the patient that he is addressing the wrong service, then to let him know he needs to release the emergency line as soon as possible, by offering him an

12 ten Have, 2007: 15
13 Heritage, 1998: 5

alternative solution (**t5 - 34**), and in the end, because he has an obligation to at least help the caller by offering him advice, allows the caller to extend the turn (**t5 - 36**).

The patient – emergency service physician conversation is subject to the rules of formal communication[14] where the symmetrical use of pronouns *"Vi"* (You)[15] shows the detachment of speakers which is characteristic of the nature of formal communication, which calls to the EMSC are. The superiority of the physician and his role of dominant speaker is reflected in his ability to explicitly warn the patient who, in his excitement forgets to use the correct form of courtesy[16], to return to formal speech:

e.g. 7

t6 – 46 dr O: Pa ako se to zakazuje, vi to morate da zakažete i da idete regularnim putem
t6 – 47 P: A ko da izdrži do toliko vremena po nedelju dana, dve
t6 – 48 dr O: A::
t6 – 49 P: Ko da izdrži, ajde reci mi
t6 – 50 dr O: gospodine, da vam kažem nešto, vi ste bili, nemojte da mi se obraćate sa ti, vi ste bili kod specijaliste za uho (( ))

In the institutional speech, as a specialized communication system, the turn-taking[17] of speakers is strictly regulated and the speaker with the dominant role is the one who has control over the sequences[18]. From the transcripts we are analyzing, even though because of the quantity of the spoken utterances it seems that the patient, i.e. the caller is the one dominating the conversation, it is obvious that in the patient – EMSC doctor conversation the interaction power is institutionally asymmetrically[19] distributed in favor of the doctors, and that they dominate the topic of conversation and duration of the exchange.

CONVERSATION OPENING

In the conversation opening, the turn-taking exchange[20] in the analyzed material is not dense. It also has a limited number of resources used jointly by interlocutors. The phone calls conversation involves the caller and the receiver, or, in the case we are analyzing the patient and the EMSC physician, where receiver speaks first. In every phone call the patient's conversation opening turn is marked by the standard greetings of formal[21] communication. In addition, he observes the rules and norms of the call – response sequence, which in the case of telephone conversations are set by the strict juxtaposition of adjacency pairs, given that the response is conditionally relevant and expected[22]. Depending on the time of day his "opening" is *dobro jutro, dobar dan, dobro veče*. EMSC doctor's response is also formal: *hitna pomoć, izvolite; moli:m, dobro jutro; izvolite, dobar dan* (Emergency, how may I help you, hello, good morning...).

e.g. 8

t1 – 1 dr O: Hitna pomoć, izvolite.
t1 – 2 P: Alo, dobro veče
t1 – 3 dr O: Dobro veče

14 Heritage, 1997: 235
15 Serbian has the T-V distinction, i.e. a contrast between second-person pronouns that are specialized for varying levels of politeness, and uses the second-person plural pronoun (*Vi*) for any formal use
16 Hood, 2008: 399
17 Stević, 1997: 34
18 Radović, 2013: 3
19 Heritage, 1997: 237
20 Savić, 1998: 5
21 Hood, 2008: 397
22 Stević, 1997: 91

e.g. 9

t4 – 1	P: Dobro jutro.
t4 – 2	dr O: Dobro jutro.

In several cases, within the doctor's response there is a decreased intonation[23]: *dobro veče*↓, *recite*↓.

e.g. 10

t3 – 1	dr O: Hitna pomoć, izvolite. ↓
t3 – 2	P: Doobro veče.
t3 – 3	dr O: Dobro veče. ↓

Since the EMSC physicians already have information about the patient that is calling[24], in the conversation during the opening, i.e. answering the phone, with some of the doctors-operators there is a noticeable decrease in intonation[25]. The existence of this prosody element in the discourse signals, on the one hand, the indignation of the doctor because of the repeated call from the "chronic" patient, which ex officio should not be rejected, it is also a signal to the patient that he is exaggerating, what he is also aware of, so that most of the calls that we analyzed, he diffidently, topicalizates by apologizing. Due to the fact that the EMSC line was established to assist the truly urgent cases, and the fact that the patient whose calls we analyzed in this paper, it certainly is not, the physicians use their dominant speaker role to control the change in topic, turn-taking and length of the conversation[26].

In two cases, the patient does not comply with the call – response sequence:

e.g. 11

t5 – 1	dr O: Izvolite
t5 – 2	P: Dobro veče.
t5 – 3	dr O: Izvolite

e.g. 12

t2 – 1	dr O: Moli:m
t2 – 2	P: Dobro veče, gospođo.
t2 – 3	dr O: Recite. ↓

The deviation from the call – response sequence and the adjacency pairs, can be explained by the fact that the doctors' screen, at the moment of the call, shows the data that provide an insight into who they are talking to, and before answering the call the doctor knows who the caller is. Consequently, this way of interaction can be viewed through an infrastructure in which the information provided to the doctor can serve as a marker, that is pre-sequence which acts as an introduction to conversational action that follows. Also, given that the doctors know who they are talking to, this deviation in examples 8 and 9 can be interpreted as an asymmetrical immediate identification.

23 Douglas-Cowie, 1998: 352
24 Savić, 1998: 8
25 ten Have, 2007: 22
26 Heritage, 1998: 7

TOPICALIZATION AND STRUCTURE OF PATIENT - DOCTOR CONVERSATION

When the function of opening the conversation is ended and played-out the first following turn is used as stepping stone to initialize the subject of the conversation, i.e. topicalization. The patient has the role of a caller who needs emergency medical attention, and it is on him to introduce the topic of conversation so as to explain the reason of the call.

e.g. 13
t3 – 4 P: Ovaj, pijo sam, od pritisak ujutru, ovaj əə, samo minut. Pijo sam ovaj, kako se vika (pauza). O:, izvinite, molim vas. Vivace plus, pet dvaes pet, to ujutro i uveče sam popijo negde oko sedam sati sam popijo Vivace, Vivace od dva i po miligrama ovaj.

t6 - 3 P: Izvinite, teo sam samo jedno pitanje kratko. Ovaj... imam, dosta nestabilnost.

t2 – 4 P: Ovaj, hh, izvinite, ovako, ovaj, ə:, varira mi pritisak.

Within the structure of the doctor - "chronic" patient conversation such turn is highly predictable. Given that the "chronic" patient is aware that he usurps the line for emergency calls and that he will probably cause some resentment from the doctor on duty, the subject of the conversation often starts with an apology which, even though extends the duration of the call, is actually pre-sequence where the availability of the doctor patient addresses to is checked:

e.g. 14
t2 – 4 Ovaj, hh, izvinite, ovako, ovaj...

t4 – 3 Izvinite, ovaj, ja sam ə:...

t5 – 4 Ja se puno izvinjavam...

t6 – 3 Izvinite, teo sam samo jedno pitanje kratko.

The blood-pressure is his central problem, and it is almost always that word he begins topicalization with. In addition to the words *izvinite* (excuse me) and *pritisak* (pressure), the utterance of the patient is pervaded with fillers, false starts, abandoned and repaired utterances.

e.g. 15
t2 – 18 P: A i cela, evo već, prvi dan, əə, znači, prvo me boleo vrat i onda cela lobanja me pekla, znaš kako me pekla, kao vrućina velika

t5 – 12 P: Znači, u glavi mi se, ovaj, vrti. Nemam stabilnost, znači. Nemam stabilnost i zakasnio sam već evo nedelju dana, ja sam slepo lice. Gospođo, bio sam

t3 – 8 P: Pošto su mi prepisali treći lek, a ona mi je, moja supruga nije znala, i ona mislila ta j kutija ista kao, dođe kao, ovaj, kako se zove Klometol, i dala mi je Ka-fo-pril. Ka-fo-pril

The conversation is almost always structured in such a way that the patient begins topicalization with the details of what medication he took of the prescribed therapy and when, what subjective discomfort he feels, what his blood pressure level and heart rate are, while the doctors´ turns in the sequence at the beginning are monorhematic utterances, in a form of minimal response, such as: *dobro, mə, da:, aha* or short additional questions that interrupt[27] the main course of story, and run turn to the side sequence (t4-17-31)

27 Heritage, 1997: 226

e.g. 16

t4 – 17 P: Ujutru i uveče. Evo sad sam osvanuo. Ja i supruga. Ja sam mislio da je to Klometol (( )) od dvaespet, miligrama.
t4 – 18 dr O: əh, i koliki vam je sada pritisak?
t4 – 19 P: Pa ovaj
t4 – 20 dr O: Je l imate vi mučninu sada?
t4 – 21 P: Pa je
t4 – 22 dr O: Je l prestala mučnina?
t4 – 23 P: Prestala mi mučnina
t4 – 24 dr O: Dobro
t4 – 25 P: Kad sam popijo njega, znaš
t4 – 26 dr O: ( )... Katopil
t4 – 27 P: Pa, popijo sam ga u jedan sat
t4 – 28 dr O: Dobro
t4 – 29 P: Evo celu noć, znači, ne sedim, (( )) to se zateklo i kafu sam popijo
t4 – 30 dr O: Pa koliki je pritisak?
t4 – 31 P: Pa, evo, sad sam zadnji put izmerio (( ))

or in cases where the physician does not understand what the patient said, as the misapprehension sequence, concerning blood pressure level or dosage of the drug, which demonstrate that the physician is in line with what the patient is saying, thus supporting him to continue to talk so as to create a complete picture of the "problem ."

e.g. 17

t2 – 12 P: Varira mi pritisak, ne znam šta da radim
t2 – 13 dr O: Ništa. Pa, ništa, znači. Je l ste prehlađeni nešto? Jeste bolesni?
t2 – 14 P: Pa nisam baš prehlađen. Nisam bolesan. Bolela me glava, osećam prvu noć, ovo je već treći noć... Osećam
t2 – 15 dr O: Ništa. Da se javite vašem lekaru, nije to ništa strašno sada. Znači, ukoliko, ovo je sad u redu.
t2 – 16 P: Aha
t2 – 17 dr O: Znači da, zovete, da sutra odete u Dom zdravlja, da prekontrolište, uradite laboratoriju, da prekontrolišete pritisak i kod njih i da s vremena na vreme merite pritisak.... Eto. To je to.

When a patient finishes talking about the issues for which he called, the doctor takes the role of dominant speaker. Since the pressure of the patient was not disturbingly low or high in any of the calls, all the doctors soothingly advise the patient, asking him what was he doing, whether he was anxious or mentally burdened and conclude that his condition is not something that would require anything more than advice. It is notable that the patient does not want to accept that his condition is not alarming and he always tries to re-emphasize the issue of his high blood-pressure[28]. At that point turns are densely interwoven, statements of both speakers become incomprehensible because they keep overlapping until the doctor uses his asymmetrically more powerful institutional role[29], and even increased vocal intensity so as to make it clear to the patient that his blood-pressure is not high and that he shouldn´t worry (*to nije visok pritisak, nije to ništa strašno sada[30], nemojte da brinete).*

Given that the story about the pressure got an epilogue and that conversation should be ended, the patient opens the subtopic[31] by talking about what he had additionally taken from his prescribed therapy. This is how conversation gets its new "mini-cycle" because the doctor

28 Douglas-Cowie, 1998: 355
29 Koprivica-Lelićanin, 2011: 189
30 see e.g. 17
31 ten Have, 2007: 22

is interested in what medicine patient took, about the dosage, and continues to talk about what effect and in what time the medicine will have.

e.g. 18

t3 – 22 P: A izvinte, a za koliko će on počne da deluje taj? Ovaj sad zadnji što sam pijo, ovaj sad što sam ti reko
t3 – 23 dr O: Pre koliko vremena ste vi to popili?
t3 – 24 P: Pa, e, samo što sam popijo, pre pet minuta
t3 – 25 dr O: A, pa dobro, tek za sat vremena
t3 – 26 P: Tek za sat vremena?
t3 – 27 dr O: Mmh. Četres pet minuta do sat vremena, tako.
t3 – 28 P: I šta sad da radim, da pijem to ili da mi ne padne
t3 – 29 dr O: Ne, nego ćete malo da sačekate, ne znam koliki vam je bio pritisak sad kad ste pili vaše lekove
t3 – 30 P: Pa nisam proverio, vidim da mi je dobro, reko ajde znam da moram da ga uzmem uveče i Vivace plus
t3 – 31 dr O: Kad ste to uzeli?
t3 – 32 P: U pola sedam, u sedam.
t3 – 33 dr O: A pa dobro, i onda niste merili pritisak uopšte posle toga

Even though the principle in conversation is to stick to the topic, it happens that the patient heavily abuses EMSC line. On two occasions, within three days, as the reason for his calls he states instability so as to, based on his visual impairment and pressure, trick the doctors for an immediate CT scan of the sinuses, a visit to otorhinolaryngologist and neurologist - because his general practitioner is on vacation.

e.g. 19

t5 – 53 P: Recite mi, da li bi mogla neka klinika da me prihvati da snimam te sinuse pošto moja doktorka ne radi, na odmoru je
t5 – 54 dr O: ( )
t5 – 55 P: Mesec i po dana
t5 – 56 dr O: Sutra Opšta praksa, molim vas, sutra kod vašeg lekara opšte prakse i on će vas uputiti gde treba
t5 – 57 P: Ali moj doktor ne radi, je l mogu negde večeras
t5 – 58 dr O: Pa bilo koji doktor, šta ima veze, mora da vas primi
t5 – 59 P: A sutra je subota, šta je, izgubio sam se nešto
t5 – 60 dr O: Bez obzira, u svakom domu zdravlja ima dežurni lekar
t5 – 61 P: əh
t5 – 62 dr O: U svakom domu zdravlja ima dežurni lekar. Na vašoj opštini koji je glavni Dom zdravlja. Prijatno:!
t5 – 63 P: Hvala ↓

As soon as the doctor gained insight into the situation, the doctor wants to switch patient, who wants only one more information[32], on the line for advice. While she waits for the question, by the way giving him an explanation for his fainting, she realizes that the conversation is pointless because she is not a person who can help him in this situation. The doctor uses her superior institutional role to stop him and clearly let him know that he should go to the Health Center because he is not a patient for urgent medical intervention. She ends the conversation with concrete response and greets the patient with the increased vocal intensity of the word *prijatno:* (goodbye) (t5 - 62). Pre-closing sequence of the patient and his terminal turn are unclear and apparently show his discontent with the outcome of conversation[33].

In the case of the other telephone line "heavy abuse", the conversation between the patient and the operator takes longer, and it is interwoven with the larger number of turns. The patient is "freer" to express his problems or to which health service he should go and the encouragement

32 see e.g. 6
33 Schegloff, 1973: 83

from the doctor to continue was confirmed with her short turns: *mə , da, aha, da:* until she makes it clear that there is a substitute for his general practitioner, and that he must make an appointment with the specialist the regular way[34]. Previously encouraged with his long turns, he briefly loses insight into his disproportionately smaller conversational power and even uses increased vocal intensity to ask the doctor how he could hold up to all this time for a week or two, until his general practitioner returns from the vacation (*a ko da izdrži do toliko vremena po nedelju dana, dve; ko da izdrži, ajde reci mi?)* The doctor then returns to the institutional superiority and, addressing him with *gospodine, ..., nemojte da mi se obraćate sa ti* (sir, ... do not address me with "you"[35]) repeats everything she has already said as a conclusion in a broader turn, and a commanding tone. At that point the patient surrenders: *Dobro, u redu, hvala vam, izvinite, molim vas, ovako* (well, okay, thank you, excuse me, please).

CONVERSATION CLOSING

As a rule, there is no one-sided conversation closing. However, if both speakers, in this case, the patient and the physician-operator, can not come to the joint conclusion that the subject of conversation is exhausted, when they finish the subtopic of prescription therapy, the doctor uses the institutional power role to finalize the conversation. In the closing sequence of the conversation there are two phases: pre-closing and the closing or terminal exchanges[36] that follow the offer – acceptance sequence, as transitional turns, and at the very end the greeting – greeting sequence as integral components. In the course of the closing interaction two types of pre-closing and terminal turns can be seen. If the call of the patient is in relation to the increased pressure and his fear that something will happen to him, it can be said that the conversation is slowly ended with turns in which the patient receives a general conclusion and advice in pre-closing.

e.g. 20

t1 – 47 dr O: Ništa, vi sad samo odmorite, vama više treba odmora nego bilo šta drugo jer vama pritisak nije sada visok , verujte, nije ta premor i slabost zbog umora, zbog pritiska, nego verovatno zbog premora.

or

t2 – 66 dr O: Ništa neće da vam se desi. Bez brige. Lepo lezite sad i spavaćete.

or

t3 – 45 dr O: Razumem ja to sve ali, kažem onda, za sat vremena ćete da izmerite pritisak da vidite da li je pao mnogo ako je pao uzmite slano nešto da jedete i da pijete slanu vodu, vegetu da razmutite, i tako. I da legnete, podignete noge na dva jastuka i podići će se pritisak. Nemojte praviti nagle pokrete i to je to.

or

t4 – 81 dr O: Dobro, ali znači kada j vas zaboli u glavi i sve to znači da vaš organizam ne ovaj se bori sa tim pritiskom, a kada nemate ovaj tegoba sve u redu. Znači ne lečimo aparat, nego vas. Znači kad vi nemate tegoba onda je sve u redu, znate. Jer vaš organizam je najbolji, kako s zove, ə alarm kad mu ne nije u redu. Doviđenja

In the case when the patient calls EMSC to be checked by a neurologists, an otorhinolaryngologist, or to get an emergency CT scan of sinuses, the pre-closing is connected with unmasking of the reasons for calling the EMSC which provokes doctors' negative attitude which can be observed in intonation, curt tips which break the willingness of the patient for further communication:

e.g. 21

t5 – 60 Bez obzira, u svakom domu zdravlja ima dežurni lekar.

34 see e.g. 17 and 19
35 see e.g. 7 and footnote 15
36 Stević, 1997: 99

Terminal exchange also varies. As in the pre-closing, the patient is more or less satisfied with the outcome of the conversation. When the doctor calms him because of the blood-pressure, the final turns are the standard adjacent pairs[37] that are, as in the opening sequence, integral parts of ritual actions of politeness:

e.g. 22
t1 – 48 P: Dobro, hvala vam ↓
t1 – 49 dr O: Prijatno
t1 – 50 P: Doviđenja
or
t2 – 67 P: Važi, hvala vam
t2 – 68 dr O: Prijatno
t2 – 69 P: Hvala
or
t3 – 50 P: Mh, važi, hvala
t3 – 51 dr O: Prijatno
or
t4 – 82 P: Hvala vam, hvala vam. Izvinite.

In a situation where the patient wanted to go beyond the jurisdiction of the EMSC, terminal exchange is marked with curt medical advice without the possibility of subsequent extension of the final exchange, and the terminal exchange of patient is marked with decreased intonation, loosely articulated words, words of apology:

e.g. 23
t5 – 62 dr O: U svakom domu zdravlja ima dežurni lekar. Na vašoj opštini koji je glavni Dom zdravlja. Prijatnoo!
t5 – 63 P: Hvala ↓ *(tužno i labavo artikulisano)*
or
t6 – 52dr O: E, onda ako vam je to on predložio, na osnovu toga predloga, ovaj specijaliste ORL, lekar koji menja vašeg lekara će vam dati sve te upute i vi će te da idete da zakažete, znate
t6 – 53 P: Dobro, u redu, hvala vam, izvinite, molim vas, ovako
t6 – 54 dr O: Prijatno

In some cases the pre-closing and terminal exchange of a doctor is merged in one, which does not allow the patient any opportunity to further extend the conversation[38] which shows that the physician-operators use their dominant role of interlocutor. In both cases, the doctor's turn consists of some kind of conclusion and advice from which the terminal utterance follows in the form of one word:

e.g. 24
t4 – 81dr O: Dobro, ali znači (...) Znači kad vi nemate tegoba onda je sve u redu, znate. Jer vaš organizam je najbolji, kako s zove, ə alarm kad mu ne nije u redu. Doviđenja.

t5 – 62 dr O: U svakom domu zdravlja ima dežurni lekar. Na vašoj opštini koji je glavni Dom zdravlja. Prijatno:!

37 Schegloff 1973: 74
38 Schegloff 1973: 73

CONCLUSION

In the discourse analysis of EMSC doctors and "*chronic*" patient, we realized that the doctors have the institutionally superior role to, if not in terms of quantity, then to qualitatively dominate the topic, despite the fact that the patient is the one who introduces the topic of conversation first, which was due to the fact that the patient is a caller.

Structurally, the conversation has its flow[39]: opening, topicalization and closing. In the subject of the conversation patient quantitatively dominates, which is aimed at gathering enough data for the physician to get insight[40] into the situation. We observe that doctors, even though in the institutional framework of a telephone conversation, do not always use their dominant interlocutor role with the patient, they allow the patient to extend turns, whether it is a side sequence, i.e. to introduce a new block of turns into the current context, or to insert new turn into the current sequence which he believes is sequentially relevant or it is, in fact, used to unmask the true intentions of a call. Such linguistic behaviour of the caller, the physician-operators tolerate by using lexical and prosodic means to achieve their goal - to help the patient and calm his anxiety. However, in cases where after assessing the health state of the patient the physician determines that the needs of the caller do not correspond to the competence of EMSC, or when it turns out that the patient is trying to abuse the EMSC in order to circumvent the standard procedure for specialist examinations that are not urgent, the physician-operator uses the institutional role of the dominant speaker and with structural markers, which signal the end of the sequence, bring the conversation to an end, and in cases when the patient tries to extend the turn, although he had received the advice, to close the conversation.

We note that conversations from our corpus come to an end in two ways. Either the patient receives a general conclusion about his health condition and advice in pre-closing in light exchange of turns, or it is a technical instruction done in a commanding tone which advises the patient to go to the Health Center. Although doctors' pre-closing turns can be prosodically and substantially different, the inverted narrative quantity is obviously in favour of the doctor in relation to the beginning of the conversation. This additionally confirmed the hypothesis of a dominant institutional function of the physician-operator. The patient was given the opportunity to thank the doctors and unconditionally accept the end of the conversation.

REFERENCES

1. Douglas - Cowie, E., Cowie, R., (1998) INTONATIONAL SETTINGS AS MARKERS OF DISCOURSE UNITS IN TELEPHONE CONVERSATIONS, Language and Speech, 41 (3-4), 351-374
2. Heritage, J. (1997) CONVERSATION ANALYSIS AND INSTITUTIONAL TALK: Analyzing Data, in David Silverman (ed.) Qualitative Research: Theory, Method and Practice. London : Sage : 221-245
3. Heritage, J., (1998), John Heritage, 'CONVERSATION ANALYSIS AND INSTITUTIONAL TALK: Analyzing DISTINCTIVE TURN-TAKING systems' in S. Cmejrková, J. Hoffmann O. Müller and J. Council (eds.) Dialoganalyse VI (Volume 2) (Proceedings of the 6th International Congress of IADA - International Association for Dialog Analysis), Tübingen : Niemeyer : 3-17
4. Hood, S., Forey, G., (2008) Interpersonal THE DYNAMICS OF CALL - CENTRE INTERACTIONS: CO - CONSTRUCTING THE RISE AND FALL OF EMOTION, Discourse & Communication, 2: 389

39 Heritage, 1997: 228
40 Slade, 2008: 300

5. Koprivica-Lelićanin, M., Šuvaković, A., (2011), JEZIČKE POJAVE U ASIMETRIČNOJ INSTITUCIJSKOJ INTERAKCIJI – SLUČAJ KOL CENTRA, Glasnik Etnografskog instituta SANU, XL (2), 189-197.
6. Crystal, D. (1995) The Cambridge Encyclopaedia of Language, Nolit, Belgrade
7. Piette, J. D., (2005), USING TELEPHONE SUPPORT TO MANAGE CHRONIC DISEASE, California Healthcare Foundation
8. Radović, N. (2013), TELEVIZIJSKI INTERVJU KAO POLUINSTITUCIONALNI DISKURS: ANALIZA PREUZIMANjA REČI U INTERVJUU U JUTARNjEM PROGRAMU, studijski istraživaki rad na doktorskim studijama na Filološkom fakultetu, Beograd (unpublished)
9. Savić, S. (1998), DISKURS TELEFONSKIH RAZGOVORA, Futura publikacije, Novi Sad
10. Schiffrin, D. (1994), Approaches to discourse, Blackwell, Oxford UK and Cambridge USA
11. Slade, D. et al., (2008), EMERGENCY COMMUNICATION: THE CHALLENGES FACING DISCURSIVE CLINICIANS AND EMERGENCY PATIENTS IN HOSPITAL EMERGENCY DEPARTMENTS, Discourse & Communication, 2: 271
12. Stević, S., (1997), ANALIZA KONVERZACIJE, Filološki fakultet Univerziteta u Beogradu, Beograd
13. Schegloff, E. A., Sachs, H. (1973), OPENINGS UP CLOSINGS, Semiotica, VIII, 4 (1973) 289-327
14. Have, P. (2007) Doing Conversation Analysis, Second Edition, Three Exemplary Studies (pp. 14 - 25), Sage

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