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TOPIC I

**CRIMINALISTIC AND CRIMINAL JUSTICE
ASPECTS IN SOLVING AND PROVING
OF CRIMINAL OFFENCES**





THE EUROPEAN UNION'S MODEL ON INTEGRATED BORDER MANAGEMENT TO COMBAT TRANSNATIONAL ORGANIZED CRIME

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Abstract: In the 21st century, along with the process of globalisation, a constantly evolving security environment creates new dimensions of threats and challenges to security and stability of a trans-national nature. This seeks for comprehensive, multidimensional, collective and well-coordinated responses. The European Union and its specialised agencies, Organisation for Security and Co-operation in Europe, United Nations, Interpol as well as other international organisations are able to really contribute in developing cooperative and coordinated responses to these threats by relying on its broad membership and profound expertise and experience. During the past 25 years, huge processes of changes and renewals of law enforcement management standards took place in relation to strategic security management, *inter alia*, after the fall of the *Iron Curtain*, and the immense challenges in nation-building in Eastern and South-Eastern Europe. The abolition of border controls within the Union's *Schengen* area and simultaneous introduction of necessary compensatory measures were additional challenges.

Keywords: Integrated Border Management Model, transnational organised crime, European Union, border control, *acquis communautaire*.

INTRODUCTION

According to the position of the European Union, a modern, cost-benefit-oriented and effective law enforcement management system should ensure both open borders as well as maximum of security at the same time with simultaneous enhanced inter-agency and international cooperation. Thus, the Union's endeavour is to safeguarding internal security to all member states through preventing transnational threats, combating irregular migration and any forms of cross-border crime for ensuring smooth border crossings for legitimate travellers and their belongings, goods and services. That is why

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the Union's strategy on common security and defence policy has been developed to ensure effective border control and surveillance and cost-efficient management of the external borders of the European Union. The Union's policy is and will continue to be developed on the basis of the three main areas in place: common legislation, close operational/tactical cooperation and financial solidarity. In addition, Integrated Border Management has been confirmed as a priority area for strengthening the cooperation with third countries in the European Commission's strategic security management approach, where non-EU countries are encouraged as partners to upgrade their border security, surveillance and border management systems.

As a logical consequence, potential transnational threats must be clearly identified and cross-border organised crime combated consistently without compromise. In this context, cross-cooperation and information exchange are very important elements of the Union's Integrated Border Management concept, which facilitates the coordination and cooperation between all relevant authorities and organisations in the fields of modern police management and border control in achieving the jointly defined objectives and standards in terms of open but at the same time secure borders. This applies within the respective law enforcement agencies (intra-agency cooperation), as well as between other involved governmental departments and agencies of a country (inter-agency cooperation) and also across borders in a bilateral and multi-lateral context (international cooperation).

The process to develop a new awareness of the dimensions of these major challenges is to clarify which standards and processes the European Union together with the international community needs to develop in order to combat the complexity of these potential threats and cross-border crime effectively.

The essay will provide an insight to which the European Union is competent in the reform and modernisation of state law enforcement agencies for ensuring effective border control, border surveillance and border management in line with the EU *acquis communautaire* and standards.

TRANSNATIONAL ORGANISED CRIME (TOC)

Organised forms of crime are to be found in nearly all countries around the world, and from the criminals' point of view are extremely lucrative industries with an estimated turnover of about one trillion US dollars annually. According to the economic reports from 2012, the southern Italian syndicates alone generated sales of approximately 140 billion Euros and that despite the negative effects of economic and financial crises (Wirtschaft, 2012). The organised crime (OC) groups and individual criminals operating in the EU are highly diverse. They range from large "traditional" OC groups to smaller groups and loose networks supported by individual criminals, who are hired and collaborate on an *ad hoc* basis. Approximately more than 5,000 OC groups operating on an international level are currently under investigation in the EU (Europol, 2017). This figure does not necessarily reflect an overall increase in TOC activities in the EU compared to 2013, when Europol reported on the activities of 3,600 internationally operating OC groups in the EU. This increase is primarily a reflection of a much improved intelligence picture. The increase also points to the emergence of smaller criminal networks, especially in criminal markets that are highly dependent on the internet as part of their *modi operandi* or business model. Overall, the number of TOC groups operating internationally highlights the substantial scope and potential impact of serious and organised crime on the EU.

The progressing globalisation of economic and financial systems, rapid developments in communications and cyberspace (Springer Gabler Verlag, 2016), as well as the dynamic political and economic integration processes in Europe, accompanied by a multitude of crises and the greatest wave of irreg-



ular migration since the Second World War, will inevitably affect the interior and exterior security situation. No other profession has such a good international network of organised structures in the area of cross-border criminality. In addition to the global systems of economy and finance, another field has developed, namely organised forms of crime. These organisms sometimes have more economic power than a state that has to abide by such structures reluctantly, which is at least a natural defensive attitude of the normal population. The countries of origin of organised forms of crime are usually characterised by a weak political system and very often coupled with an inadequately developed and functioning legal system in which the rule of law is only partially implemented or not at all.

As a result, legal, social and society norms are pushed back and replaced by violence and the right of the strongest, coupled with an unrestrained pursuit of profit and power. Crime structures adapt almost without any problems to the economic and social framework conditions of the respective country. The combined absence of rule of law and non-enforcement of monopoly of power by a state, together with the ability of criminal groups to completely isolate themselves from society, provide the perfect breeding ground for infiltration into a society and thus guarantees the success of their criminal actions.² These developments initially have a local origin and can develop rapidly in the country and then in the cross-border context. For this reason, it can be unequivocally ascertained that organised forms of crime appear not only in the national context but are also operating predominantly across borders (Soine & Gehl, 2006). On the one hand, the steady increase in cross-border passenger and freight traffic allows only selective controls. On the other hand, the elimination of stationary border controls within the *Schengen* area promotes these developments and minimises the risk of discovery. Corresponding numbers of cases within the continually increasing cross-border passenger and goods transport system are documented in the *Eurostat* passenger transport statistics (Eurostat, 2016).

Much faster than most states with their law enforcement and investigative authorities, these criminal structures are able to take advantage of the speed at which the international market operates and all kinds of technical advances of state-of-the-art communication technologies. These criminal groups often form complex business-oriented alliances and linkages, strengthened by agreements that serve to influence the decision-making processes in politics, society and the economy in a transnational manner. Other significant characteristics of these criminal structures are their fundamental rejection of state monopolies, intimidation and scaremongering of dissenters, as well as a hierarchical system coupled with conditioned behaviour of the members, based on their own code of conduct with the possibility of sanctioning in cases of non-compliance. In its entirety, three recurring causes are observed: poverty, regulation³ and greed (Southwell, 2007).

“We want to be tough on crime, but equally tough on its causes” (*Ibid*), according to Blair, it would certainly be possible to find ways of relieving and developing positive changes in order to combat poverty and normative constraints. However, the endeavour to change the characteristic trait of greed is a whole different concept and one that is far more difficult to achieve.

2 Emperor, Günther (1996): *Kriminologie*. In order to record the organised crime, the Federal Criminal Police Office has developed a comprehensive system of indicators, which clearly highlights the description elements of the planning, preparation and implementation of the criminal acts as well as the exploitation of the prey. The following indicators point to the forms of organised crime: [...] a long-term consolidation of a plurality of persons as a profit-oriented solidarity of interests, with a high degree of exchangeability of their members and systematic foreclosure to the outside [...]. P. 410.

Schwind, Hans Dieter (2010): *Kriminologie – A practice-oriented introduction with practical examples*. [...] the total foreclosure to the outside (silence against law enforcement authorities) [...]. P. 624.

3 Note from the author: In this case, regulation should be understood as an instrument for overseeing and at the same time suppressing the society by means of normative constraints.



The detection and investigation, structural analysis and consequent combating of transnational OC groups present huge challenges for national law enforcement agencies and intelligence services, which ideally should cooperate closely. This phenomenon must be combated by all available means according to the rule of law, in order to continue to guarantee the free democratic constitution in Germany and the democracies of the other EU member states (Thurich, 2011).

IS ORGANISED CRIME THE SAME AS MAFIA?

Organised forms of crime are often equated with the expression *Mafia*; but this is inappropriate. The colloquially manifested concept of *Mafia* cannot be equated with organised crime and is not correct in this respect, since organised crime is, from a holistic viewpoint, a heterogeneous and not a monolithic structure (Soine & Gehl, 2006). Rather, the respective organised crime groups have resulted independently in different countries with their respective forms of governance, in different epochs, cultures and structures with different names and traditions (Southwell, 2007). However, no other coalition of an organised crime group is more famous than that of the Italian *Mafia*, although this term does not exist in a real sense (*Ibid*). Technically speaking, *Mafia* stands for the emergence of criminal groups in Sicily, which continue to commit serious crimes in organised forms and procedures. However, in order to understand the origins of the *Mafia*, one must know and understand the cultural, sociological and political developments of Sicily (*Ibid*). A possible historical explanation can be derived from the long-standing foreign domination by the dynasty of the Bourbons, according to which nationalist groups in the south of Italy wrote the saying: “*M.a.F.l.a. – Morte alla Francia, Italia anela!*” (“The death of France is longing for Italy”) (Bossert, 2006), or comparatively “*M.a.F.l.a. – Morte Ai Francesi, Invasori, Assassini!*” (“Death to the French, Invaders, Murderers!”) (Runciman, 1976). Further references are also found in the Sicilian dialectic. Here, *Mafia* is equated with boldness or boastfulness, but the word presumably derives from the Arabic word *mahyah*, which has roughly the same meaning (Schüler, 2008).

Mafia-like structures are viewed from the outside as strictly isolated and familial constructs and are bound both territorially and thematically. Southwell describes the myth *Mafia* as a consolidated part of Italian culture, such that the general viewer gets the impression that this is part of the national cultural heritage (Southwell, 2007). Organised forms of crime emerged independently of one another in terms of time and territory, and they developed individually in different cultures and political systems. In all of these developments similar or even identical patterns can be observed, such as a clear hierarchy, a strong seclusion to the outside, a code for their members, a strong potential for violence, operating within an indeterminate time period, no cooperation with state authorities, as well as greed and profit striving coupled with the re-investment of criminally generated profits. There were, for example, organised forms of criminality in the former Soviet Union, which were little known at all, due to the partitioning of the Communist system. These criminals, called “thieves in the law”, organised themselves in syndicates and were active almost in all criminal areas, which promised financial profit (*Ibid*). After the fall of the Iron Curtain and the dissolution of the former Soviet Union, the almost limitless possibilities of expansion were immediately recognised, and there was nothing to hinder an extension to the West and the extension of the thematic areas. The “thieves in the law” have always enjoyed great respect in the Russian-speaking population, and they are forbidden to cooperate with government authorities, found a family or even carry out a regular job.

As a second example, the *Yakuza* is said to be a group of criminals and criminal family clans in Japan (*Ibid*). They are among the oldest and most established criminal organisations in the world (*Ibid*). The influence of this TOC group extends to all areas of Japanese politics, in commerce, industry, banks, media, all social classes, not least based on the binding compliance and practice of old rituals.



Further examples of powerful and influential TOC groups are:

- *La Cosa Nostra* USA, *Medellin* cartel in North, Central and South America
- Chinese *Mafia* – *Triads* in Asia
- Albanian *Mafia*, Russian *Mafia*, and others in Europe.

The political developments and the dramatic changes that have taken place during the last 20 years have led to the emergence of new, internationally-operating structures, such as the successor states of the former Soviet Union, South East Europe and North Africa, as shown by Libya's example (Gehl, 2006).

WHAT IS ORGANISED CRIME?

Actions described in today's juridical understanding as organised forms of criminal machinations, can be traced back to human history by means of their patterns. People have always agreed to pursue their goals through the use of force or other unlawful procedures. The description of organised crime was decisively influenced by different developments of the individual societies, as well as a differentiated legal, economic and sociological view from the respective political systems (Jäger, 2013). As a result, today a variety of organised crime definitions have been developed, sometimes brief and concise, but conversely sometimes very detailed and extensive. An immediate and comprehensive response to a possible questionnaire asking ultimately *What is organised crime?*, appears initially to be relatively simple, but becomes more difficult and complex on closer inspection. The term of organised crime is very comprehensive and complex and difficult to grasp in a uniform definition. This is, *inter alia*, in the sense that the member states have not been able to reach an agreement on an EU-wide or globally unified definition of this concept and is used accordingly. The reasons for the different developments are that organised crime structures have developed over long periods of time in different political and legal systems with special regional and cultural influences (*Ibid*). This, at the same time, is an explanation for why the individual countries have different characteristics in the descriptions of organised crime compared to the definitions of international organisations. A first attempt by experts to put organised forms of criminality into words goes back in Germany to 1968. In the journal "Criminalistics", a specialised magazine for criminal science and practice, a German detective superintendent had asked the question: "Nip things in the bud – but how?" (Luzcak, 2004). On the basis of his statements related to the example of combating French criminals who were active at this time in Germany, it was noted that there would be no organised criminality in its literal meaning in Germany.

In 1973, a study was published commissioned by the Council of Europe to analyse the relevant aspects of organised crime and the possibility of professional crimes in Europe at that time (Kerner, 1973). This work focused mainly on the specific situation in Germany and the Netherlands. A main conclusion was that there were great differences to the conventional levels of understanding with regard to organised crime (compared to the Sicilian-Italian *Mafia* and the American *Cosa Nostra*) both in qualitative and quantitative terms. The notion of a general European "criminal industry" was described for the first time with simultaneous negation of organised crime (Luzcak, 2004). This new term was used to describe a criminality form that was largely commercial and widely used, and also pointed out that this "criminal industry" had reached new dimensions and the actors involved had developed new work practices. In the following years, these discussions were pushed forward mainly by officials from the Federal Criminal Police Office and the association of German Criminal Officers. One of the first results of this discussion process, a special documentation on the "development of modern strategies to combat organised crime" was published in 1975 (Jansen, 1975). From this period onwards, it



became clear that these organised forms of crime constituted an urgent threat to the internal security of the Federal Republic of Germany if appropriate countermeasures were not immediately taken. In the following years, both the intensity of the discussions held and the number of new discussants increased. In 1988, a first attempt at an empirical investigation carried out by the detectives Rebscher and Vahlenkamp, produced an up-to-date picture of the current situation with recognisable trends of development in the area of organised crime in Germany (Luczak, 2004). On the basis of their investigations and skilful interviews, the two experts came to the conclusion that the phenomenon “organised crime” from the USA could scarcely be compared with organised crime in Germany. Two basic structural forms were presented as a major result of this work:

- networks of offenders and/or groups of criminals with the aim of establishing purpose-based alliances, and
- independent groups of offenders.

In the 1990s, further empirical studies followed, of which the results were mainly based on the interviews of experts, and progressively a consensus was built that the state and society as a whole are at risk. In these discourses, the aspects of TOC and a Europe with permeable borders were then successively linked. A process of consciousness development began, that the existing border controls and their mechanisms were classified as inadequate, but on the other hand would offer a considerable potential for security-related issues. This was, so to speak, the starting point that stationary and mobile border controls were recognised as strategically important elements in combating cross-border crime. Almost automatically, the key words such as *Mafia*, drug trafficking, protection racket, weapon smuggling, trafficking in human beings and prostitution, but also rocker gangs and bet syndicates are associated with TOC. These are, however, only sub-areas of TOC and their various appearances and do not explain the fundamental individual characteristics therein. This impression is strengthened by a broad social acceptance of the terms, such as *Russian Mafia* or *drug Mafia*.

This makes it difficult for the impartial viewer to identify a clearly defined and recognisable phenomenon of this type of crime. Thus, the term “organised crime” has to be described only in its characteristic elements and components, in order to prevent the risk of misinterpretation.

In three basic statements, von Lampe describes the nature of organised crime as follows:

- 1) Organised crime, such as the official German definition, is essentially the planned commission of criminal offences.
- 2) According to a different view, criminal acts are not primarily organised, just the people committing them.
- 3) According to a third view, the central moment of organised crime is the exertion of power, either by criminals alone or in an alliance of criminals and social elites (Von Lampe, 2013).

According to the first point and the general and specific features of the German definition of the conceptuality of organised crime, the criminal area of gang crime also shows similar, or even the same, facts and characteristic features (Criminal Code (*StGB*), Art. 129). These include, *inter alia*, the description of a group of offenders, the proceedings of division of labour and planning. However, regarding organised crime the element of co-operation has no time boundaries, whereas in the case of gang crime, it is aligned to a specific period of time and thus limited. It is irrelevant if the period for the commissioning of criminal offences were not clearly defined.



The term “gang” presupposes the amalgamation of at least three persons, who have joined with the intention to commit in the future and of uncertain duration an unspecified number of serious crimes of the type of offence referred to in the criminal code. A particular “strong individual commitment to the gang” or “taking actions in an overreaching interest” is not necessary (Bundesgerichtshof, 2001).

Regarding Lampe's second point, criminals are organised in a group to commit crimes. Thus, the term organised crime is intended to explain the form that criminal organisations take, in that they are groups with defined and recognisable structures. The Federal Bureau of Investigation (FBI) defines organised crime as

[...] any group having some manner of a formalised structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of actual or threatened violence, corrupt public officials, graft, or extortion, and generally have a significant impact on the people in their locales, region, or the country as a whole (Federal Bureau of Investigation, 2016).

In his third point, Lampe describes power as the central element of organised crime. The exertion of power is ensured here on the one hand by threat of force or by the effective exercise of violence by individual criminals, or also by mutual interaction between individuals of social elites. In the first case Lampe speaks of illegal governance, respectively extra-legal governance (Von Lampe, 2013). It is about special manifestations in social classes, which cannot be regulated by state authorities in its competence to apply the monopoly of power, because the appropriate capacities for combating these criminal structures are not sufficient. This is highlighted by the fight against the drug cartels in Mexico, production of opium and heroin in Afghanistan, or irregular migration from North Africa, mainly organised in the northern part of Libya. Another option would be that a state has little interest in regulating the legal grievances, whether for traditional reasons such as parts of society deliberately isolating themselves and rejecting the rule of law, or for reasons of considerations in terms of investments and returns (cost matrix) (Isak, 2011).

In other constellations, TOC structures are finding an ideal breeding ground or shelter because the respective national legislation is not in alignment with the EU's neighbouring countries. For example, TOC groups use Switzerland as an international hub for cigarette smuggling to the detriment of EU member states. As a *modus operandi*, cigarettes under customs control are illegally removed from the transit procedure and subsequently smuggled into the EU member states declared as empty packaging. In 2013, the EC notes in its reports that the illegal tobacco trade is classified as a global threat and the EU is losing more than 10 billion Euros annually due to non-paid taxes and duties (EUR-Lex, 2013). As a consequence, the illegal cigarette trade is associated exclusively with organised crime groups. Despite the generation of billions of Euros of criminal profits, Switzerland plays down the role of international cigarette smuggling (Meinrado, 2000). For example, the EU and Switzerland have been discussing for years the enforcement of relevant EU member state's judicial assistance agreements and the conduct of requested extraditions of criminals living in Switzerland, which are attributed to TOC in the field of international cigarette smuggling.



CLASSIC AREAS OF TOC

The German definition in line with the joint guidelines of the Ministers of Justice and Home Affairs of the states on the cooperation in the prosecution of TOC (1990) is:

Organised crime is the planned commissioning of criminal offenses through striving for profit and power, which are individually or in their entirety of considerable importance, if more than two parties work on a longer or indefinite duration

- a) using commercial or business-like structures,
- b) by use of force or other means of intimidation, or
- c) influencing policy, media, public administration, the judiciary or the economy (Justiz, 2016).

In the first part the definition describes the general characteristics and in the second part (a-c) the special characteristics of TOC. Thus, the investigative proceedings in the field of TOC are based on specific perpetrator characteristics and are not offence-oriented. Furthermore, the definition does not include offences attributable to terrorism.

For differentiation: gang crime *versus* organised crime according to the German Criminal Code, Section 129 – Forming Criminal Organisations:

- (1) Whosoever forms an organisation the aims or activities of which are directed at the commission of offences or whosoever participates in such an organisation as a member, recruits members or supporters for it or supports it, shall be liable to imprisonment not exceeding five years or a fine. [...] (Criminal Code (*StGB*), Art. 129).

TOC uses almost every criminal field offered to them that promises high profit margins, which are listed as criminal offences in the German Code of Criminal Procedure (herein later referred to as *StPO*) in section 100a.

RELEVANT OFFENCE FIELDS AND LEGAL FOUNDATIONS

The portfolio of serious offences, which can be attributed to organised crime, are classified into areas of crime and refer to section 100a of *StPO*, which are listed in alphabetical order.

The following legal bases are relevant for the following areas of crime:

- Asylum Procedures Act – smuggling of human beings
- Commodities Control Act – environmental crime
- Criminal Code – *inter alia*, crimes against property, violent crimes
- Foreign Trade Legislation – smuggling related to economic sanctions
- General Fiscal Law – avoidance of taxation and customs offences
- International Criminal Code
- Medicines Law – crime of counterfeiting
- Military Weapons Control Act – illicit trafficking of military weapons



- Narcotics Law – illicit trafficking of drugs and drug smuggling
- Residence Act – trafficking in human beings and people smuggling
- Weapons Law – illicit trafficking of small arms and light weapons (SALW), arms smuggling.

ETHNIC ORGANISED CRIME GROUPS AND THEIR OFFENCE FIELDS

The Federal Criminal Police Office assesses the capacities of TOC groups based on the number and weighting factors of relevant indicators from the list of “general indicators for the detection of organised crime relevant issues” (*Bundeskriminalamt*, 2015). The Federal Criminal Police Office conducts evaluations of the actual phases after preparation and planning of the respective crimes. Both the duration of the investigation and the use of the resources used play a decisive role in determining the indicators. The Federal Criminal Police Office clearly points out that a low potential of a TOC group does not necessarily indicate a small degree of organisation and professionalism.

The crimes to be prosecuted under German jurisdiction in section 100a *StPO* are often committed by certain ethnic groups by tradition and not infrequently because of a division of the classical areas with other TOC groups. According to the Federal Criminal Police Office, the nationality of the persons responsible for the assignment, who have the leadership function in the TOC groups, is decisive (*Ibid*). These leaders need not necessarily represent the ethnic majority within a group. According to the Federal Criminal Police Office national situation report of 2014, the following ethnic organised crime groups are mainly concerned with the following areas of crime and are given here as exemplary and not exhaustive (*Ibid*):

- German-dominated organised crime groups
 - Illicit trafficking of narcotics and drugs smuggling, criminality in connection with economy, avoidance of taxation and customs offences, property criminality, money laundering, violent criminality, environmental criminality, counterfeit criminality, pimping, people smuggling, corruption, arms trafficking and smuggling, cybercrime
- Turkish-dominated organised crime groups
 - Illicit trafficking of narcotics and drugs smuggling, violent criminality, criminality in connection with economy, pimping, THB and people smuggling, avoidance of taxation and customs offences, property criminality, cybercrime, counterfeit criminality
- Polish-dominated organised crime groups
 - Property criminality, avoidance of taxation and customs offences, illicit trafficking of narcotics and drugs smuggling, counterfeiting
- Italian dominated organised crime groups
 - Illicit trafficking of narcotics and drugs smuggling, money laundering, avoidance of taxation and customs offences, counterfeit criminality, arms trafficking and smuggling, criminality of property, criminality in connection with economy
- Serbian dominated organised crime groups
 - Property criminality, criminality in connection with economy, illicit trafficking of narcotics and drugs smuggling, THB and people smuggling, violent criminality.



The respective different forms of organised crime are multifaceted and diverse. Their ideas are clearly structured and hierarchically organised and strengthened by ethnic and cultural solidarity, language and dialectics, habits and customs, as well as social and family ties. In addition, there are interrelationships between criminals of different intellectual ability, whose work-sharing interactions are determined by the implementation of the respective criminal interests. Such phenomena have recently been observed in the areas of THB and people smuggling by operating crime gangs in Libya to the EU member states and Syria to Turkey, respectively Cyprus and Greece, organised by purely purposive interests.

CONCLUSION

TOC comprises a huge potential of threats to national law enforcement services and other security agencies involved in border security and management, both of EU member states and non-EU countries with regard to their defined needs in terms of national security and public order. According to the glossary of the Federal Agency for Civic Education, TOC has been used since the 1980s as an internationally accepted term for complex and rational forms of crime that operates across national boundaries (BPB, 2012). This excludes all relevant offences, which are related to terrorism and the phenomenon of foreign terrorist fighters. The most important areas of TOC are all serious offences with regard to section 100a *StPO*, or their corresponding relevant offences.

In December 2006, during the 14th OSCE Ministerial Council meeting in Brussels, extensive measures were taken in the fight against TOC (OSCE Decision No. 5/06, 2006). At the beginning of 2006, however, it was recognised that the defined activities were unlikely to be achieved when appointed officials from OSCE participating States started to discuss the complexity of TOC.⁴ Despite intense expert discussions carried out during the course of meetings, initially the assigned “experts” faced enormous difficulties to find a level of common understanding for the description of organised crime. The reason was simple: the “experts” followed the respective national definitions, sometimes paired with a basic understanding of the definitions of Interpol and Europol. Since there was no common international definition available, this led to the misunderstandings of the participating organised crime experts and led to fundamental misunderstandings.

The comparison of descriptions for organised crime illustrates that a simple and absolutely certain implementation of the definitions for organised crime is complicated and difficult to manage. Both the content and the scope of the definitions of the respective EU member states and international organisations are very different. While the UN expresses itself with a one-sentence definition, other EU member states institutions or international organisations need almost a full page. On the one hand, in the analysis of the respective definitions, it turned out that the multiple use of the conjunction *or* promotes the inclusion of many different forms of criminal offences, instead of facilitating a clear and simple understanding of what organised crime is. On the other hand, the linking of the individual qualification characteristics with the conjunction *and* is also not uncomplicated, since it invariably raises the question of how many of these criminal offences must at least be listed in order to affirm organised crime as defined. Von Lampe is questioning the degree to which criminal offences can be organised rather than how organised the actual criminal offenders are in order to cover a specific portfolio of scene-type crimes (Von Lampe, 2013). A description of the organised crime should then usually refer to a criminal organisation, that is to say a group with formal structures, as in the definition of the FBI. A distinction between forms of organised crime and non-organised crime is therefore likely to be drawn between complex associations of criminals on the one hand and individually acting perpetrators on the other.

4 Note from the author: From 2005 to 2009, the author was the Senior Border Adviser in the OSCE Secretariat and present in all relevant meetings as the leading OSCE expert.



A further aspect of the description of TOC is to include the increasing co-operation of organised crime groups at an international level, which can take place either in accordance with long-term agreements or through specific project-related agreements. This can result either in an occasional collaboration as well as in a longer cooperation between organised crime groups based on labour division agreements, involving different nationalities, ethnic groupings and different languages. Behrens and Brombacher (Behrens, Brombacher & Jäger, 2015) assess TOC as one of the biggest threats to security in the 21st century and map out two dominant types for a better understanding of organised crime that relate to structural or procedural aspects of organised crime as a quest for profit. In this way, they strengthen the thesis of Von Lampes that organised crime as a structure refers to the organised commissioning of criminal offences and not to the organisational forms of the members of the respective organised crime groupings.

Without any doubt, the implementation of the European Arrest Warrant (EAW) can be assessed as a major achievement in the fight against TOC.⁵ As a result of the framework decision from 2002, this option increases the effectiveness of international police cooperation in the implementation of criminal proceedings and has been established as an EU-wide instrument for the enforcement of national arrest warrant of an EU member states. The EAW implies faster and simpler surrender procedures and an end to political involvement and EU countries can no longer refuse to surrender, to another EU member states, their own citizens who have committed a serious crime or are suspected of having committed such a crime in another EU member states, on the grounds that they are nationals. A high level of mutual trust and cooperation between EU member states made simplifying and improving the surrendering procedure possible.

The purpose of the EAW, specifically in the area of TOC expanded possibilities, is to apprehend the “back-men” and elute them from their organised crime structures and national protection area and bring them to justice. The country requested for extradition may in principle not check the legality of the arrest warrant. The main problem was the extradition of one's own nationals to another state for the purpose of criminal prosecution and/or execution of sentence.

The EU member states and their neighbouring countries are increasingly exposed to a large number of very serious threats in which TOC groups are engaged, *inter alia*, in trafficking in human beings and people smuggling, illicit trafficking of small arms and light weapons and drugs, child pornography, money laundering and tax evasion, just to mention a few of the most important areas. Additional threats have arisen through terrorism and its radicalised foreign terrorist fighters, as well as violent extremism.

Europol has a particular role to play in coordinating the work of the national police services of all EU member states in the areas of TOC and other specific transnational threats and ensuring an all-encompassing information exchange. Europol is the leading EU police agency in the fight against TOC defined as a transnational threat. Frontex, on the other hand, needs to be strengthened in its competences in order to work more effectively against TOC groups in the areas of irregular migration, trafficking in human beings and people smuggling, and thus other closely related offences, such as the production and distribution of false documents and here in particular counterfeit travel and identity documents.

⁵ European Commission (2016): The European Arrest Warrant (EAW) is applied throughout the EU since 1st January 2004. It replaced lengthy extradition procedures within the EU's territorial jurisdiction. It improves and simplifies judicial procedures designed to surrender people for the purpose of conducting a criminal prosecution or executing a custodial sentence or spell in detention. Available from: http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm



REFERENCES

1. Behrens, Timo / Brombacher, Daniel / Jäger, Thomas (Hg.) (2015): *Handbuch Sicherheitsgefahren. Transnationale Organisierte Kriminalität*.
2. Blair, Tony (1995): Leader's speech, Brighton 1995. Available from: <http://www.britishpolitical-speech.org/speech-archive.htm?speech=201>
3. BKA (2015): *Organisierte Kriminalität*. National overview of the situation in 2014.
4. Bossert, Oliver (2006): *Cosa Nostra – Die Geschichte der Mafia*. Available from: http://www.krimlex.de/artikel.php?BUCHSTABE=M&KL_ID=118
5. Bundesgerichtshof (2001): BGH GSSt 1/00, Beschluss v. 22.03.2001, HRRS-Datenbank, Rn. X. (Federal Supreme Court (2001): BGH GSSt 1/00, Decision of 22nd March 2001, HRRS-Data Base, Rn. X.)
6. *Bundeskriminalamt – BKA* German Federal Criminal Office (2015): Organised crime. National Situation Report 2014. Available from: <https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/OrganisierteKriminalitaet/organisierteKriminalitaetBundeslagebild2014.html>
7. BPB (2012): Glossary – Organised (transnational) Crime. Available from: <http://www.bpb.de/politik/grundfragen/deutsche-verhaeltnisse-eine-sozialkunde/138404/glossar?p=129>
8. Emperor, Günther (1996): *Kriminologie*.
9. EUR-Lex (2013): Communication from the Commission to the Council and European Parliament. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52013DC0324>
10. Europol (2017): EU Serious and Organised Crime Threat Assessment – Crime in the age of technology.
11. Eurostat (2016). Available from: http://ec.europa.eu/eurostat/statistics-explained/index.php/Passenger_transport_statistics
12. Federal Bureau of Investigation (2016): Definition „organised crime“. Available from: <http://www.fbi.gov/about-us/investigate/organizedcrime/glossary>
13. Gehl, Günter (2006): *Europa im Griff der Organisierten Kriminalität?* Examples are the Sicilian Mafia, the Neapolitan Camorra, the Ndrangheta, the American Cosa Nostra, the Chinese triads such as Kung Lock, Wo Hop To, Sun Yee On, 14K.
14. German Criminal Code. Available from: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1204
15. German Code of Criminal Procedure (StPO). Available from: https://www.gesetze-im-internet.de/englisch_stpo
16. Isak, Redi (2011): *Der Kanun in Albanien – Gewohnheitsrecht im modernen Staat?* Available from: <http://www.design.kyushu-u.ac.jp/~hoken/Kazuhiko/2011DerKanun.pdf>
17. Jäger, Thomas (2013): *Transnationale Organisierte Kriminalität*. Available from: <http://www.bpb.de/apuz/168912/transnationale-organisierte-kriminalitaet?p=all>
18. Jansen, Hans-Peter / Bund Deutscher Kriminalbeamter (Hg) (1975): *Zentrale Ermittlungsdienststellen als organisatorische Voraussetzung für die wirksame Bekämpfung krimineller Gruppen*.



19. Justiz Online (2016): *Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren der Länder über die Zusammenarbeit bei der Verfolgung der Organisierten Kriminalität*. Available from: <http://www.jvv.nrw.de/anzeigeText.jsp?daten=510&daten2=Vor>
20. Kerner, Hans-Jürgen (1973): *Professionelles und organisiertes Verbrechen. Versuch einer Bestandsaufnahme und Bericht über neuere Entwicklungstendenzen in der Bundesrepublik Deutschland und in den Niederlanden*.
21. Luczak, Anna (2004): *Organisierte Kriminalität im internationalen Kontext*.
22. Meinrado, Robbiani (2000): Inquiry to the Swiss National Council regarding international cigarette smuggling in connection with OC. Rationale. Available on: <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20003441>
23. OSCE Decision No. 5/06 Organized Crime. MC.DEC/5/06 OSCE (2006).
24. Rubrik Wirtschaft (2012): *Organisierte Kriminalität boomt – Mafia is the largest bank in Italy*. Available from: <http://www.n-tv.de/wirtschaft/Mafia-ist-groesste-Bank-Italiens-article5179561.html>
25. Runciman, Stevenson (1976): Universal Encyclopaedia. Available from: http://universal_lexikon.deacademic.com/301913/Sizilianische_Vesper
26. Schüler-Wahrig (2008): Foreign words dictionary, related words.
27. Soine, Michael / Gehl, Günter (Hg.) (2006): *Europa im Griff der organisierten Kriminalität?*
28. Southwell, David (2007): *Die Geschichte des Organisierten Verbrechens*.
29. Springer Gabler Verlag (2016): *Gabler Wirtschaftslexikon*. Available from: <http://wirtschaftslexikon.gabler.de/Archiv/75127/cyberspace-v9.html>
30. Thurich, Eckart (2011): *pocket politik. Demokratie in Deutschland*. Available from: <http://www.bpb.de/nachschlagen/lexika/pocket-politik/16414/freiheitliche-demokratische-grundordnung>
31. Von Lampe, Klaus (2013): *Was ist organisierte Kriminalität? From politics and contemporary history 63rd year, 2013*.



PROTECTION OF ADULT VICTIMS OF TRAFFICKING IN HUMAN BEINGS AND THE STATUS OF A PARTICULARLY SENSITIVE WITNESS

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Abstract: In addition to the introduction and conclusion, the paper consists of three logically related parts within which an analysis of certain international and national legal standards in the protection of victims of crime and particularly sensitive witnesses in criminal proceedings has been performed. Particular subject of analysis were the national criminal law provisions regulating the protection of adult victims of the criminal offence of trafficking in human beings. Key problems and omissions in the protection of these witnesses were identified, as well as suggestions for overcoming them. In its conclusion, the paper underlines that particularly sensitive witnesses are not always provided protection in accordance with minimum international standards, and the reasons can be found in the impossibility of providing technical conditions, insensibility of acting officers, as well as an inadequate assessment by the authorities in charge of applying certain elements of criminal law protection.

Keywords: witness, victim, particularly sensitive witness, trafficking in human beings.

INTRODUCTORY CONSIDERATIONS

“In theory and in comparative procedural legislation, according to different criteria, particularly sensitive witnesses are divided into following groups: children, juveniles and old witnesses, those with impaired health, severe physical disabilities, those with special mental status, victims of crime, witnesses who are in a state of extreme stress (which is a consequence of the experienced crime), those whose sensitivity is caused by various difficulties, impairment or illness relevant to testifying, those with

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severe intellectual disabilities, social functioning difficulties or mental disorders or diseases, those who are seriously physically or mentally disturbed by the committed crime, etc. This is done in order to adjust the manner of questioning, provide support and assistance, plan and take other protection measures for such witnesses during the criminal proceedings and after its completion” (Atanasov, 2016: 50). For that reason their protection is specific and particularly important, especially when it comes to victims of the criminal offences related to human trafficking. In Serbia, the criminal offence of trafficking in human beings was prescribed for the first time in 2003, under Article 111b of the Criminal Law (Official Gazette RS, 16/90), with amendments and after approval of the provisions of the Law on Ratification of the United Nations Convention against Transnational Organized Crime and Additional Protocols, Palermo Protocol – Protocol for the Prevention, Suppression and Punishment of Trafficking in Human Beings (Official Gazette RS, 6/01). Nowadays this criminal offence is prescribed by Article 388 of the Criminal Code (hereinafter referred to as “CC”) (Official Gazette RS, 85/05) whereby in paragraph 8 in connection with paragraph 1 of the Criminal Code³ the term victim is used, although this term is unknown for the Criminal Procedure Code (hereinafter CPC) (Official Gazette RS, 72/11). Namely, the term victim is a criminological term that has narrower meaning than the term injured party (which is used in the CPC) and that is one of the reasons why there are some advocates arguing against its use in the criminal law context. However, the term victim does not exist in the criminal procedural protection of persons but it is still imposed through some provisions related to criminal offence, so it can be said that legislative harmonization is needed. In addition, due to the amendments to the CPC, that have been introduced since 2003, victims of this criminal offence have periodically had the opportunity to obtain the status of a particularly sensitive witness under national law, which could have affected their secondary victimization during criminal proceedings. However, a question arises as to whether the protection of particularly sensitive witnesses was only formal when the law allowed it or whether it was really a case of protection ensured in accordance with international standards. The answer to this question can only be given by an analysis of each individual criminal proceeding for trafficking in human beings. There are obvious problems in the evidentiary procedure due to the specifics of the criminal offence, but also the victims who could be witnesses, and there are also the problems in terms of endangering the safety of witnesses, ensuring their maximum protection and preventing secondary victimization. These problems have long been the subject of international law that has introduced manners of protecting victims and witnesses of criminal offences in its conventions, directives and recommendations. In relation to the problem, protection and provision of support, the authors of this paper will mention relevant documents and manners in which that protection is provided.

INTERNATIONAL STANDARDS IN THE PROTECTION OF VICTIMS OF CRIME

Articles 24–26 of the United Nations Convention against Transnational Organized Crime regulate the terms for providing witness protection. States have to provide effective protection against potential retaliation or intimidation of witnesses who testify in criminal proceedings and, where appropriate, their relatives and other close persons. The witness participating in a proceeding should have the right to security, protection of privacy (provided by the criminal justice system) and the right to psychologi-

³ Whoever knows or should know that the person is a **victim** of trafficking, and abuse its position or allow to another to abuse its position for the exploitation envisaged in paragraph 1 this Article, shall be punished with imprisonment of six months to five years.



cal, social and professional support, which should be provided by specialized professionals, independent of the authority in charge of the formal crime control.⁴

Pursuant to the Directive 2012/29/EU of the European Parliament and the Council establishing minimum standards on the rights, support and protection of victims of crime (Replacing Council Framework Decision, 2001/220/JHA), minimum regulations regarding the protection of victims of crime are being established in the Member States of the European Union. These rules aim to protect the victim of a criminal offence during criminal proceedings, and in particular from actions that may lead to secondary victimization. According to Article 5, Chapter 2, and point 24, it is prescribed that the victim has to receive a written confirmation from the police on the submitted report, which should contain all the data on the report. Furthermore, point 26 prescribes the rules on how to enable the victim to exercise the right on information. It is necessary to provide the victim with the required information so that the victim could make a decision on participation in the proceedings and giving testimony, and then to have information on the course of the proceedings at each stage of the proceedings. Article 8 and Article 9 of the Directive, as well as point 37 and point 38, refer to the need to provide support to victims, which has to be present from the moment of learning about the victim and after the completion of the criminal proceedings. It is necessary to provide them with specialist support, which has to be based on an integrated and targeted approach, taking into account the needs of victims and all other circumstances. Specialist support services have to include shelter and safe accommodation, emergency medical care, referrals for medical and forensic examinations, short-term or long-term psychological counseling, care for traumatized persons, provision of legal advice and representation. In order to avoid secondary victimization and re-victimization, point 40 emphasizes that frequent referrals from one institution to another should be avoided, while point 53 states that interaction with competent authorities should be facilitated as much as possible, and that the number of such interactions should be reduced by use of video recordings of statements and permission for their use during criminal proceedings. Chapter 4 refers to the specialized support that is provided to victims. For instance, it is interesting to note that states have to provide separate waiting rooms in order to prevent any contact between the defendant and the victim of the criminal offence participating in the criminal proceedings (Article 19), then that the victim has to be questioned a minimum number of times and it can be done only if the questioning is strictly related to criminal investigation (Article 20). The need for individual assessment in the protection of the victim is also emphasized (Article 22) in order to avoid the risk of secondary victimization based on data on the personal characteristics of the victim, the circumstances under which the crime was committed and the nature and type of the criminal offence. The specific measures that may be applied after the assessment are prescribed in Article 23. They pertain to the manner of taking the statement, the person taking the statement, elimination of any contact with the defendant, use of communication technology, avoidance of questioning the victim's privacy if it is not related to a criminal offence, etc.

The Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims underlines that there have to be introduced measures of assistance and support to victims of crime in order to enable provision of free emotional, social and material support to victims before, during and after investigation and judicial proceedings, as well as the necessity to provide information and pay compensation. Much earlier, the Recommendation No. R (85) 11 of the Committee of Ministers to member states on the position of the victim in the framework of criminal law and procedure pointed out that special rules on the questioning of witnesses are necessary to prevent sec-

⁴ In addition, the foregoing rights have been proclaimed by the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted in 1985. *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, United Nations General Assembly A/RES/40/34, 29 November 1985. <http://www.ohchr.org>, accessed on December 15, 2020



ondary victimization, primarily direct victimization, and then indirect (insufficient flow of information between the victim and the criminal justice system, as well as compensation for damage). Thus, international documents take into account the fact that testifying is a particularly stressful experience and that therefore respective witnesses have to be granted the right to special protection.

PROTECTION OF PARTICULARLY SENSITIVE WITNESSES ACCORDING TO CERTAIN INTERNATIONAL DOCUMENTS

Particularly special protection should be provided to the victims of trafficking, and it has been underlined in the Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims. Namely, it refers to, *inter alia*, the need to provide victims of human trafficking with legal support during the proceedings and for a certain period after its completion (point 19 and Article 11), and to protect them from secondary victimization (point 20). It is necessary to avoid repeated questioning of the victim using video recordings, and based on the individual assessment of each victim, it is necessary to provide adequate treatment to the victim depending on the age of victims, potential pregnancy, health condition or presence of any disorder and other personal circumstances, but also physical and psychological consequences of the criminal offence to which the victim was exposed (Article 12). In addition, it is very important to emphasize their definition of vulnerability – a situation in which a person has no real or acceptable alternative other than to accept the abuse that is taking place (Article 2, paragraph 2), which can be important in assessing the credibility of the victim as a witness. It is emphasized that support should be provided regardless of whether the victim decides to participate in the criminal proceedings or not (Article 11, paragraph 3).

The emphasis on such measures for the protection of witnesses who are victims of criminal offences in the proceedings can also be seen in the text of the “Warsaw Convention” (Law on Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings, Official Gazette RS, 19/09) whose signatories are bound to implement measures that will protect privacy (Article 11), provide safe accommodation, medical and social support (Article 12), provide legal protection and guarantee damage compensation from the perpetrator, and even provide a compensation fund for victims (Article 15, Chapter III).

In addition, in the practical sense of enforcement of these standards in the protection of victims who are witnesses in criminal proceedings, the European Court of Human Rights has a notable role. The importance of implementing these measures to particularly sensitive witnesses is particularly emphasized. “There is a high degree of risk of secondary victimization in this category of witnesses, so the European Court of Human Rights considered that such persons would be particularly seriously traumatized by facing the defendant during the trial, which is why it considered justified to take certain measures to protect the intimacy of these types of witnesses and victims, as well as their psychological status, which could be seriously endangered or injured if these persons appeared directly at the trial” (Škulić, 2015: 18). In certain proceedings, it was considered justified to use video recordings of statements of witnesses, especially when the person could not be present for objective reasons: at trial, but they also preferred to use audio-video recording during the trial because it ensures factual immediacy in the proceedings and the witness gives a statement in “real time”.

As the assessment of witnesses is considered to be the basis for granting protection measures, the Council of Europe has identified factors to be considered in the assessment: the role of the person to



be protected in the investigation and/or case, the relevance and importance of testimony for the case, level and importance of threats and readiness and ability of the witness to adapt to protection measures (Burnside, 2018: 35). A particularly sensitive witness may receive the following protection measures: access to psychological and social assistance, a change in the method of questioning, including the possibility for the court to ask questions directly to the witness on behalf of the parties and defense counsel, the use of communication aids (technical devices for image and sound transmission such as a video conference call), shortened hearing times, or recovery periods and limitations in terms of complexity and length of questions (Burnside, 2018: 37).

By analyzing international documents, certain minimum standards in the protection of particularly sensitive witnesses in the relevant provisions of the national legislation can be recognized.

NATIONAL STANDARDS IN THE PROTECTION OF PARTICULARLY SENSITIVE WITNESSES

The institute of a particularly sensitive witness, i.e. special witness protection as such has not existed in the procedural legislation of Serbia for years, and it was first mentioned in the articles of the CPC dating from 2006 (Official Gazette RS, 46/06). However, until the CPC adopted in 2011⁵, witnesses to crimes (trafficking in human beings) could not be granted the status of a particularly sensitive witness.

The reason for determining this status may be age, life experience, lifestyle, gender, health condition, nature, manner or consequences of the committed crime, or other circumstances pertaining to the case that make the witness particularly sensitive (Article 103, paragraph 1 of the CPC). The formulation used in this Article “other circumstances pertaining to the case” can provide a wide range of indicators for assessment and interpretation. In the mentioned CPC the legislator did not prescribe one of the very important indicators for determining this status, which is the *individual assessment of the degree of endangerment of witnesses*. In this regard, special consideration should be given to the victim’s subjective assessment of their safety, sense of vulnerability, fears and problems that they have or anticipate as a result of testifying, without necessarily having an objective risk⁶. Performance of a comprehensive risk assessment could be entrusted to specialized professional services and organizations that also identify victims of crime (e.g. trafficking in human beings) at the request of the public prosecutor. In that case, after the assessment, the public prosecutor would issue a decision on determining the status of a particularly sensitive witness (Article 103, paragraph 2 of the CPC). Precise indicators would enhance the quality of such solution because “it is necessary that it contains an adequate explanation, although the appeal is not allowed, given that the use of the rules on the questioning of such a witness encroaches on the rights of the defendant” (Sinanović, 2014: 28) and, therefore, it is necessary to make it as well reasoned as possible.

The prescribed rules on the questioning of a particularly sensitive witness (Article 104 of the CPC) are in favor of the protection of a witness who has been granted that status. Only the authority in charge of the procedure, i.e. only the judge and the public prosecutor participating in the procedure can ask

⁵ The law did not commence to apply in 2011. In fact, its application started on January 15, 2012, for the procedures pertaining to organized crime, and on January 15, 2013, for other procedures.

⁶ The creation of a subjective feeling of insecurity can be influenced by the opinion about the perpetrator and their brutality, the “severity” of the crime, and a prescribed higher penalty, then the victim’s capacity to overcome the traumatic event but also to reactivate the experienced trauma by remembering it, which can lead to withdrawal from testimony.



questions to the witness. The questioning can be performed with the help of a psychologist, social worker or other professional, which is decided by the authority in charge of the procedure. It must be emphasized that it is necessary to perform the questioning in the presence of an expert in order to reduce the traumatization of the witness caused by the examination. The judge has the ability to control the course of the proceedings but also the course of testimony in terms of protecting witnesses from harassment, confusion or provocation. The judge can have impact on the tone and the way of asking questions, the type of questions, given the fact that the questions are asked exclusively through him. Inappropriate questions are questions that are confusing, unclear, that lead to an anticipated answer, suggest an answer, provoke, express some stereotypical attitude, cause anxiety, insult and humiliate, those that are asked in a disparaging tone. At this point the legislator's failure to prohibit the possibility of asking suggestive questions that are possible in a situation of cross-examination should be underlined (Article 98, paragraph 3 of the CPC). Suggestive questions tend to refute the witness's testimony, impair its quality or discredit the witness. Accordingly, there is an intention to guide one to the facts in favor of the cross-examining party. As the legislator failed to provide explanation pertaining to the possibilities of applying limited and unlimited examination, as well as to the possibility of compromising cross-examination during the main hearing, one can only rely on the sensibility and knowledge of the judges conducting the proceedings. Questions, insults and remarks are often not limited only to the witness, but also to their defense, to the persons who support them, and certainly it is additionally disturbing to the witness if the judge does not react to them. Such questions can be one of the sources of secondary victimization during criminal proceedings. In his analysis, Prof. Škulić concluded that "it is necessary to completely prohibit the possibility of asking suggestive questions in relation to the injured party against whom was committed a crime against sexual freedom or some other crime characterized by coercion or abuse (alternative: crime with elements of violence)". (Škulić, 2018: 68).

Witness protection is also possible by prohibiting confrontation with the suspect, unless otherwise assessed by the authority in charge of the proceeding (discretionary assessment of the court, which must be sensitized, taking into account that it has a particularly sensitive witness in front of it). Confrontation is not considered an independent means of evidence, but a preventive measure to ensure the credibility of testimony (Brkić, 2014: 216), and the court practice can still show that in a situation of disagreement between the testimony of the defense and witnesses, it can opt for confrontation. However, the credibility of the statement can be ensured if the statement is taken through technical means/video link and monitored through a monitor placed in the courtroom. In that case, the witness has to be in another room, safe, in the presence of an expert and has to be informed that they can be seen in the courtroom via a monitor during the questioning process⁷. The technical equipment enables the transmission of the tone and image, and ensures that the witness is not surrounded by all the people in the courtroom. Court security may be present in front of the room where the witness is located. This method of interrogation is especially important for witnesses of crimes with violent and sexual elements, given that such victims are under the impression of the experienced, under stress, fear, shame and additionally sensitive and disturbed by the formality of the investigation and court proceedings. The methods of technical organization of the trial and protection of such a witness are the burden for the holders of judicial functions who are obliged to ensure their protection and to be sufficiently sensitized to conduct such proceedings.

A particularly sensitive witness may be assigned an attorney, according to the order on the list of ex officio attorneys. However, the authors of this paper believe that it is disputable in Article 103 of the CPC that it does not prescribe an explicit obligation of the authority in charge of the procedure to

⁷ The questioning may be conducted in another courtroom, in the witness's apartment or any another room within an authorized institution that has professional staff trained to conduct questioning of particularly sensitive persons (Article 104, paragraph 3 of the CPC).



appoint an ex officio attorney to each particularly sensitive witness, but to leave it to them to assess “if he/ she deems it necessary”. Such amendment would guarantee legal protection to every witness with this status.

In addition, the legislator failed to regulate the possibility of mandatory exclusion of the public from the court process, which could reduce the secondary victimization of witnesses. When the witnesses are adults, the court may at any time make a decision either ex officio or at the request of the parties and the attorney to exclude the public, explain it and publish it (Article 363 of the CPC⁸).

Apparently, the application of the status of a particularly sensitive witness as a procedural measure of witness protection in our country is related only to the period lasting until the end of criminal proceedings with the aim to ensure psychological protection of witnesses, prevention of secondary victimization and providing quality testimony (evidence) for criminal proceedings. As the authors have noticed, the provisions prescribed by the CPC can be enforced, but some of them are not strictly binding and therefore always leave room for personal assessment or discretionary assessment of the authority in charge of the proceedings in each particular case, which may be seen as a flaw in the process of witness protection and ensuring legal certainty.

PROTECTION OF A PARTICULARLY SENSITIVE WITNESS AND TRAFFICKING IN HUMAN BEINGS

Witnesses of human trafficking can be considered to have the most drastically endangered human rights. Accordingly, their right to protection in court proceedings may be endangered, because it is a specific criminal offence (preparation for execution, manner of execution, psychological mechanisms of influence on the injured party, consequence of execution, etc.). The victim of a crime must not be forced to testify, even though the victim may be the only source of evidence, and must not give testimony in a legal case if that will put them in a more difficult situation than they already are. If the victim agrees, they must be prepared to testify, provided that the public prosecutor informs them of the rights, possibilities of protection and possible consequences of testifying, and the victim must not be promised anything that is not realistic to fulfill in terms of protection. The Special Protocol on the Conduct of Judicial Authorities in the Protection of Victims of Trafficking in Human Beings in the Republic of Serbia (Ministry of Justice of the Republic of Serbia, 2012) underlines that it is necessary to know whether there is something that the victim considers particularly private or intimate and doesn't want to be used during the procedure. If the victim provides some information and characterizes them as particularly intimate or private, it is necessary to respect their wish and not use the information if possible. If it is not possible, the victim should be explained why the public prosecutor's office has to use the information, or should be promised that the information will not be used unless necessary. If the personal history of a witness/victim of trafficking in human beings and sexual offenses is not protected during the court proceedings, we face a situation of secondary victimization because the defense can use data from the past of the witness⁹ in order to discredit the testimony.

⁸ Taking into account the legal basis from point 4 and point 5 –protection of privacy of the participants in the proceeding and protection of other justified interests in a democratic society.

⁹ It is particularly indicated by the provisions of Article 68 and Article 69 of the Law on Ratification of the Rome Statute of the International Criminal Court, *Official Journal of the FRY – International Agreements*, No. 5/2001.



In order to be able to provide adequate protection to the victim, the victim needs to be properly identified. The Public Prosecutor entrusts the identification of a victim of trafficking in human beings to authorized specialized professional services, given that it is one of the tasks within their competence, namely the Center for the Protection of Victims of Trafficking in Human Beings in Belgrade. After identifying the victim of trafficking, this service may propose obtaining the status of a particularly sensitive witness for the victim¹⁰. This is supported by the standard operating procedures for dealing with victims of trafficking, which underline that “identified victim of human trafficking” is a natural person who has been identified as a victim of trafficking within the identification process run by the Center for Protection of Victims of Trafficking (Ministry of the Interior of the Republic of Serbia, 2018). Given the assigned competence – to provide a specialized opinion and identify whether a person is a victim of a certain crime, the opinion of the Center should be respected. However, there are situations when that is not the case¹¹.

Apparently, during the procedure, sometimes there is no distinction made between a victim of human trafficking and a victim of mediation in prostitution, and the most common problem is the existence of the victim's consent to exploitation. To make a difference, it must be also pointed out that “as potential victims of human trafficking also recognized are the girls who agreed to be hired as prostitutes, but were deceived in terms of the conditions under which they would work (inability to choose clients, large number of clients, unprotected sexual intercourses, billing control, impossibility to quit, etc.). In relation to the mentioned fact, it should be borne in mind that the eventual consent of the victim to exploitation does not release the perpetrator from responsibility.” (Žarković, 2009: 80). Accordingly, a victim of human trafficking can willingly consent to exploitation by providing sexual services in exchange for money for various reasons (for example, difficult financial situation and difficult living conditions in which they find themselves). Exploitation of such conditions, exploitation by prostitution and enslavement is a feature of the criminal offense of trafficking in human beings (Article 388, paragraph 1 of the Criminal Code). It is very clear that majority of these victims are forced to participate in the provision of sexual services. Their vulnerability is enhanced by the presence of “push” factors which, due to the existence of misconceptions created by false promises, put them under the control of traffickers who exploit them (Simeunović-Patić, Kesić: 2016: 77-78). The abuse of the potential victim's vulnerability is evident when their sensitivity is deliberately used to be controlled and exploited for personal gain. A special problem poses the additional, secondary victimization that occurs due to omissions in the work of authorities of formal social control¹². However, some proceedings have

10 In addition, this service may: prepare a witness for court proceedings and for a psychiatric assessment of the psychophysical condition by court experts, attend the trial, request that the public be excluded from the trial and support the witness in all of the mentioned activities.

11 Files of court case number K. br.37/18 of the High Court in Valjevo. At the request of the public prosecutor, one of the victims was subject of the assessment and identified as a “victim of human trafficking for the purpose of sexual exploitation, owing to misuse of material circumstances and misleading, and use of force and threats, and therefore is recommended that they be granted the status of a particularly sensitive witness.” The public prosecutor reclassified the crime after a certain period of time, and the court finally convicted the defendant of the crime of mediation in prostitution (Article 184, paragraph 1 of the CC) in relation to the victim, and not of the crime of trafficking in human beings as it was originally qualified. The procedure was conducted in the period from 2016 to 2019 and the perpetrator was convicted of committing three criminal offenses of trafficking in human beings under Article 388 paragraph 1 of the CC and one criminal offense of mediation in prostitution under Article 184 para. 1 of the CC to a single sentence of imprisonment of 9 years and 2 months and a fine in the amount of RSD 30,000.00.

12 This witness of the High Court in Valjevo was only partially protected as a particularly sensitive witness because, as a victim, during the main trial she did not face the defendant, nor did she meet other participants in the proceedings, because she stayed in a special room equipped with audio-video system in the presence of a

shown that there is a difference between these two crimes¹³ and the fact is that in the case of trafficking in human beings, causing or inducing another person to prostitution is done for the purpose of sexual exploitation of the injured party. In addition, in Article 388 para. 10. of the CC the legislator tried to eliminate what in judicial practice we perceive as a problem in terms of changing the qualification of the crime, although there were features of the crime of trafficking in human beings. Accordingly, a positive practice that should be used is the rationale of the Constitutional Court of Serbia pertaining to the complaint of a victim of trafficking in human beings in case of violation of the ban on trafficking in human beings and incorrect prequalification of the criminal offence into a minor crime, referring to Article 26 paragraph 1–3 of the Constitution of the Republic of Serbia. It is very clearly pointed out in what way the authorities in charge of the procedure violated the rights of victims and failed to abide by the obligations of the state in terms of the application of the protective measures and provision of assistance to the victims of trafficking in human beings (Constitutional Court of the Republic of Serbia, No. UŽ-1526/2017). From the aspect of this analysis, the authors of this paper believe that the importance of proper qualification of a crime should be observed with aim to ensure the status of a particularly sensitive witness and proper identification of the victim of a particular crime who gives testimony so as not to be denied possibility to receive special protection.

Re-traumatization and secondary victimization should be eliminated by applying the institute of a particularly sensitive witness and all available mechanisms of protection. However, despite the existing positive legal solutions, judges in Serbia haven't granted the status of a particularly sensitive witness to victims of human trafficking, nor have they adequately protected the rights of victims during court proceedings. In 2020, 28 judgements were pronounced for the criminal offenses of mediation in prostitution, trafficking in human beings and trafficking in minors for the purpose of adoption. In the analyzed procedures, the public was excluded only in a certain number of cases when it came to adult victims, and always when it was a question of a plea agreement. In over 50% of the cases was applied a plea agreement while the number of pronounced suspended sentences or prison sentences was at the level of the legal minimum (in addition to fines) (NGO Astra, 2020).

CONCLUSION

By determining the status of a particularly sensitive witness in situations prescribed by law and special attention is drawn to the attitude toward a particular witness, emphasizing their sensitivity and the need for judicial protection. The witness is provided with a higher degree of protection of rights, personal security, and prevention of secondary victimization, which contributes to building trust in the judicial system and ensures the psychological gain that is necessary during the recovery process from traumatic experiences. However, decades after the international definition of the problem of human trafficking and the ways of protecting victims, and fourteen years after the introduction of the institution of a particularly sensitive witness in domestic legislation, it can be said that the quality of protection of these witnesses is still questionable in relation to minimum international standards. It appears that the lowest level of protection is available in psychological, social and medical assistance to victims/witnesses of human trafficking both during and after criminal proceedings. The authors of this paper are of the opinion that during the criminal proceedings it is necessary to ensure more adequate functioning of the *service for providing information and support to witnesses and injured parties*

psychologist. However, she experienced *secondary victimization* because she **repeated** her testimony **five times** before various officers for the purposes of the proceedings, over and over again, all within a period of one year after the commission of the crime.

13 Decision of the Court of Appeals in Novi Sad, Kž1 2386/2012 of 29 January 2014.



in all higher public prosecutor's offices (Republic Public Prosecutor's Office, No. 2/16) or to ensure functioning of such service within higher courts. It is necessary to strengthen professional capacities and further improve application of the protection measures for the particularly sensitive witnesses in accordance with the mentioned Directive 2012/29 and the National Strategy for Exercising the Rights of Victims and Witnesses of Crimes in the Republic of Serbia for 2020–2025 (Government of the Republic of Serbia, 2020). This strategy prescribes the measures that have to be applied in order to improve the situation, but even now it can be asked which, from the list of planned activities, can be done by the end of its validity in 2025.

REFERENCES

1. Atanasov, S. (2016). Uloga svedoka u otkrivanju i dokazivanju krivičnog dela. Doktorska disertacija, Pravni fakultet, Kosovska Mitrovica.
2. Burnsajd, S. (2018). Smernice o merama zaštite svedoka u međunarodnom pravu i zakonodavstvu Republike Srbije. Najbolja evropska praksa u kontekstu Republike Srbije. WINPRO III, Northern Ireland Co-operation Overseas (NI-CO).
3. Brkić, S. Posebno osetljivi svedoci. Zbornik radova Pravnog fakulteta u Novom Sadu, Novi Sad, No. 2/2014, pp. 211–227.
4. Žarković, M. (2009). Osnovni elementi postupanja policijskih službenika u suprotstavljanju trgovini ljudima, u: Suzbijanje trgovine ljudima-dobre prakse, priručnik za institucije, NVO Astra Beograd.
5. Simeunović-Patić, B., Kesić, T. (2016). Kriminalistička viktimologija. Kriminalističko-policijska akademija Beograd. Beograd.
6. Sinanović, B. Posebno osetljivi svedok u krivičnom postupku. Bilten Vrhovnog kasacionog suda, Beograd, No. 3/2014, pp. 28–42. Accessed on December 12, 2020:
7. <http://www.sudskapraksa.com/Vrhovni%20kasacioni%20sud%20-%20Bilten-3-2014.html>
8. Škulić, M. Položaj žrtve krivičnog dela/oštećenog krivičnim delom u krivičnopravnom sistemu Srbije, aktuelno stanje, potrebe i moguće promene, Misija OEBS u Republici Srbiji, 2015. Available at: <https://podrskazrtvama.rs/pdf>
9. Zakonik o krivičnom postupku "Sl. glasnik RS" Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019).
10. Zakon o potvrđivanju Konvencije UN protiv transnacionalnog organizovanog kriminala i dopunskih protokola, "Sl. glasnik RS – Međunarodni ugovori", No. 6/01.
11. Zakon o potvrđivanju Konvencije Saveta Evrope o borbi protiv trgovine ljudima "Sl. glasnik RS – Međunarodni ugovori", No. 19/2009.
12. Zakon o potvrđivanju rimskog statuta Međunarodnog krivičnog suda, "Sl. list SRJ – Međunarodni ugovori", No. 5/2001.
13. Krivični zakonik "Sl. glasnik RS" Nos. 85/2005, 88/2005 – ispr., 107/2005 – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.
14. Krivični zakon "Sl. glasnik RS" No. 16/90, 26/91 – odluka USJ br. 197/87, 75/91 – odluka USRS Nos. 58/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 102002, 11/2002-ispr., 80/2002 – dr. zakon, 39/2003, 67/2003.



15. Standardne operative procedure za postupanje sa žrtvama trgovine ljudima. Ministarstvo unutrašnjih poslova Republike Srbije, Beograd, 2018.
16. Nacionalna strategija za ostvarivanje prava žrtava i svedoka krivičnih dela u Republici Srbiji za period 2020–2025, Vlada Republike Srbije, July 30. 2020, pp. 9–14, pp. 20–21.
17. Opšte obavezno uputstvo o načinu postupanja službe za informisanje i podršku oštećenima i svedocima u javnim tužilaštvima. Republičko javno tužilaštvo Republike Srbije, No. 2/16 og December 5, 2016.
18. Poseban protokol o postupanju pravosudnih organa u zaštiti lica koja su žrtve trgovine ljudima u Republici Srbiji. Ministarstvo pravde Republike Srbije, Beograd, 2012. Accessed on February 17, 2021: <http://www.arhiva.mpravde.gov.rs>
19. Položaj i prava žrtava u krivičnom postupku. Analiza sudske prakse za 2020.godinu za krivična dela posredovanje u vršenju prostitucije, trgovina ljudima i trgovina maloletnim licima radi usvojenja. NVO Astra. Beograd. Accessed on August 20, 2020: https://astra/file/D/1ZdVakPM-Ld8YaQQsdDbwUCmZTM3FOnmPL/wiew/analizapравosudne_prakse_za_2020.srp.pdf
20. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations General Assembly A/RES/ 40/34, 29 November 1985. Accessed on December 15, 2020: <http://www.ohchr.org>
21. United Nations Convention against Transnational Organized Crime (and the Protocols). Palermo, Italy, UN General Assembly, 15 November 2000, resolution 55/25. Accessed on December 10, 2020: <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>
22. Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council framework Decision 2002/629/JHA, Strasbourg, April 5, 2011. Accessed on July 21, 2021: <http://www.eur-lex.europa.eu/32011L0036-en-eur-lex>
23. Directive 2012/29/EU of the European parliament and of the Council of establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA. Strasbourg, October 25, 2012. Accessed on July 12, 2021: <http://eur-lex.europa.eu/lexuriserv/lexuriserv.do?uri=oj:L2012:315:0057:0073:EN:PDF>
24. Council of Europe Convention on Action against Trafficking in Human Beings, No. 197. Committee of Ministers of the Council Europe. Warsaw, May 16, 2005. Available at: www.coe.int
25. Recommendation No. R (85)11 of the Committee of Ministers to Member states on the position of the victim in the framework of criminal law and procedure. Committee of Ministers, 28 June 1985. Accessed on February 15, 2021: [https://www.barobirlik.org.tr/dosyalar/duyurular/hsykkununkelifi/recR\(85\)11e.pdf](https://www.barobirlik.org.tr/dosyalar/duyurular/hsykkununkelifi/recR(85)11e.pdf)
26. Recommendation No. Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims. Council of Europe, Committee of Ministers, July 14, 2006. Accessed on February 25, 2021: https://victimsupport.eu/activeapp/wp-content/uploads/2012/09/Recommendation-Rec20068-of-the-Committee-of-Ministries_Council-of-Europe31.pdf
27. Rešenje Apelacionog suda u Novom Sadu, Kž1 2386/2012 of January 29, 2014.
28. Spisi sudskog predmeta broj K.br.37/18 Višeg suda u Valjevu
29. Presuda Ustavnog suda Republike Srbije broj UŽ-1526/2017 of March 4, 2021.





SUPPORTING VICTIMS OF GENDER-BASED VIOLENCE IN CRIMINAL JUSTICE SYSTEM

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Abstract: The paper is focused on the actual status of victims of gender-based violence (with emphasis on domestic violence) in Serbia regarding the efforts made in the field of gender equality and victim support and protection (recently adopted National Strategy for Preventing and Combating Gender-Based Violence against Women and Domestic Violence, as well as the National Strategy on the Rights of Victims and Witnesses of Crime, and the Law on Domestic Violence Prevention). The emphasize is on the empirical data gathered in previously and recently conducted researches on victims' satisfaction and needs articulated by their own experience from contacts with different state agencies, as well as on the requirements and recommendations of the Victims of Crime Directive 2012/29/EU and Istanbul Convention. Quality of the first contact with victim, offering relevant, useful information, efficient support and protection are of great importance not just for victims themselves, but also in proving criminal offences of gender-based violence in criminal proceedings. An adequately treated victim will more likely become a reliable witness.

Keywords: gender-based violence, domestic violence, victim, witness, protection, support, criminal proceedings

INTRODUCTION

Gender-based violence, especially domestic and sexual violence (whose victims are predominantly women) has been topical in Serbia for a very long time. Also, it has been in focus of many international organizations. The latest progress report of the European Commission (2020) criticizes Serbia for serious delay in the adoption of the strategy and action plan on violence against women and domestic violence; it points out that the implementation of the law against domestic violence needs to be

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improved (including for vulnerable women such as women with disabilities and Roma women); the risk of domestic violence increased under the COVID-19 state of emergency due to the imposition of curfews, the potential underreporting of cases or difficulties with removing perpetrators from their homes (EC, 2020: 37).

The first report by the Council of Europe's Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) is in the same line. It notes that in general, patriarchal attitudes and stereotypes still prevail in Serbia regarding the roles, responsibilities and the expected behaviour of women and men in society and the family. It encourages the authorities to continue eradicating prejudices and all practices based on the idea of the inferiority of women or stereotyped gender roles. GREVIO underlines that additional efforts are needed to ensure a more comprehensive response to all violence against women covered by the Istanbul Convention, not only domestic violence (rape, stalking, sexual harassment and forced marriage), and that the few existing support services for these cases of violence are predominantly run by NGOs (operating on a limited budget). Furthermore, police protocols do not mandate cooperation with specialist support services or the routine referral of victims, resulting in the under-utilisation of existing NGO expertise. An integrated system for collecting and monitoring cases of violence disaggregated by type of violence and by relationship between perpetrator and victim does not exist. GREVIO urges the authorities to establish a dialogue with women's organisations and ensure appropriate funding for specialist support services dealing with all forms of violence, including long-term grants based on transparent procedures. It also invites the Serbian authorities to gradually reduce its dependency on international donors and ensure a wider share of funding from the state budget for activities to combat violence against women (GREVIO, 2020: 6-7).

When it comes to criminal justice response, GREVIO stresses that the rates for most forms of violence against women are extremely low. The reasons therefore range from low levels of reporting to lack of guidance on how to build a case, and insufficient training on more recently introduced offences. Although domestic violence cases have seen an increase in the number of persons charged since 2012, which GREVIO welcomes, they have seen an even more marked increase in the number of charges ultimately dropped. Where convictions close the case, the sanctions imposed are often conditional and the full sentencing range is rarely made use of (*Ibidem*).

Serbian Strategy for Preventing and Combating Gender-Based Violence against Women and Domestic Violence 2021–2025² confirms that the system of support and assistance services for women victims of domestic violence is not in line with international standards; existing services are not equally available to all victims, and there are no publicly available data on available services (Government of the RS, 2021: 35). Also, ministries of internal affairs, justice and family protection have not agreed about the manner of exchanging notifications and data among the persons designated for liaison (according to the Law on Domestic Violence Prevention³, Article 24, paragraph 2). No rulebook on cooperation has been adopted (which would regulate in more detail the mutual rights, obligations and cooperation of state agencies responsible for domestic violence prevention and the provision of protection and support to victims of domestic violence and other crimes envisaged in the Law on Domestic Violence Prevention). In practice, meetings of the groups for coordination and cooperation are not held within the legally prescribed period of at least 15 days; protection and support plans are not adopted in all considered cases (but only if high risk from violence is assessed). Members of most groups have difficulty in adequately understanding the phenomenon of domestic violence and intimate partnerships, in identifying specific forms of violence, the consequences of violence, and some have prejudices about violence against women and specific prejudices against minority groups. It has been observed that in

2 Official Gazette RS, No. 47/2021

3 Official Gazette RS, No. 94/2016



assessing risk factors and choosing measures to ensure safety of women and children in a sustainable manner and when planning protection and support, previous violence is often not investigated or taken into account. There are challenges in recognizing particularly dangerous risks of recurrence or escalation of violence, such as possession and/or use of firearms in previous incidents, participation of perpetrators in armed conflicts in the former SFRY or belonging to certain professions (e.g. police, army) which allows access to legal or illegal weapons. It is also noted that groups for coordination and cooperation did not include in their work representatives of other relevant institutions, nor specialized women's organizations (although they are obliged to do that according to Act on Domestic Violence Prevention), and even victim of violence has not been involved in making individual plans of protection and support (Protector of Citizens, 2020:21-23)

Having in mind previously mentioned problems and obstacles, it is undoubted that victims of gender-based violence, despite different normative solutions, do not enjoy the level of support and assistance that could meet their needs properly and help them in rehabilitation process. So, this kind of response (incoherent, with many flaws and gaps) is more deterring for victims when it comes to their active participation in criminal proceedings. A part of the solution for the problem with criminal justice response to the domestic violence (and other forms of gender based violence) could be found in an adequate relation (especially in the first contact) between a victim of gender-based violence and a state agency (e.g. police, public prosecutor or center for social work), and in the support that must be provide for victim after offence reporting, during the trial and afterwards.

VICTIM (DIS)SATISFACTION WITH CRIMINAL JUSTICE RESPONSE AND SOCIAL SUPPORT

Victims of domestic violence (or other forms of gender-based violence) who initially turn to the criminal justice system for intervention may be so dissatisfied with the outcome that they do not call for help the next time they need it. Bad experience of other victims could also be deterring, as well as the contact with some other state agency (e.g. centre for social work) which is called for help. So, the first contact with the victim is of great importance. Many research results point out that one of the reasons for not reporting domestic violence or other form of violence (e.g. sexual assault) is distrust of institutions and poor response victims obtained from the professionals (Ćopić, 2002; National Institute of Justice, 2006; Jovanović, Simeunović-Patić, Macanović, 2012; Jovanović, 2015; Petrušić, Žunić & Vilić, 2018; Jovanović, 2018; OSCE, 2019).

According to the survey, conducted by the Autonomous Women's Centre from Belgrade about the experiences of women victims of sexual and partner violence, over 60% of victims were dissatisfied with the information given by the police. The information that the victims find important were related to: their rights and the proceedings - 79%; assistance and protection - 79%; compensation - 60%. The victims got no useful information by the public prosecutors in 56% cases. Also, the victims were not satisfied with the attitude of officials towards them (58% when it comes to the police, and 48% when it comes to the public prosecution office). Over 85% of respondents said officers should be more cooperative and show compassion, rather than suspicion. It should be noted that representatives of the police and the public prosecution office admit that they don't have sufficient knowledge about techniques for interviewing victims, and that they need training in this regard. Besides, representatives of the state authorities do not have leaflets for victims to learn about existing programs of assistance and protection, and most of them are not aware of the existence of NGOs or other agencies providing support. The victims do not receive information on the release or escape of the offender (Jovanović, 2015: 272)



Ten years have passed since the aforementioned survey, but distrust of institutions and inadequate assistance and support are still present as important factors for not reporting violence or to participate actively in the proceedings (these topics were vividly discussed at recently held conference Trust in Institutions - Comprehensive Victim Support organized by the Provincial Protector of Citizens – Ombudsman, September 8-10, 2021⁴). The latest OSCE survey on violence against women in Serbia also noted that women are reluctant to report violence, and that one of the reasons is distrust of institutions. General dissatisfaction with the relevant services prevails, especially distrustful Roma women and members of other marginal groups, because, they say, violence against them is treated as a matter of culture and custom, and is not responded to. Another important finding is the lack of assistance and support services (OSCE, 2019: 57, 66). According to researchers of the domestic violence cases in judicial practice, a relatively small number of victims have previously addressed the competent institutions seeking help, which, among other things, points to a low degree of victims' trust in the institutions of the system (Petrušić, Žunić & Vilić, 2018: 139).

Contacts with social work centres are assessed similarly. The latest research shows that even in these contacts, every third woman received information about the rights she has as a victim of violence, and none have received information about the possibility of organising a case conference to inter-sectorally discuss her situation and needs (Ignjatović, 2021: 19). Although almost all respondents (98.3%) expressed the need for psychosocial support, less than half (40.7%) received information about where they could be obtained, while none received help from the CSR itself (*Ibidem*). In general, more than a third of respondents were completely dissatisfied with the CSR's support (37.3 per cent did not receive support), 28.8% were partially satisfied, while less than a third were fully satisfied (Ignjatović, 2021: 21). Blaming a victim occurred in 18.6%, and 20.3% of the respondents said it was occasionally happening (*Ibidem*: 22).

It seems that women who are the victims of domestic violence want to enhance their own safety, maintain economic viability, and protect their children, so they primarily need relevant information and support. They are less concerned about upholding the law and helping police officer, prosecutor, and judge, especially when they do not trust them. Thus, the victims must not be treated solely as the source of information, as an object – secondary party in criminal proceedings, nor should they be blamed for their own victimization. There is responsibility not only to seek swift justice for criminal offence, but to ease the victims' suffering and make them cooperative.

WHAT DO VICTIMS WANT AND WHAT ARE THEIR RIGHTS?

The first contact with the victim is of great importance as it is the moment when victim could feel the (dis)trust and decide whether to join the criminal procedure becoming a reliable witness. Thus, it is very important to pay attention to victim needs and rights, trying to meet them from the first contact.

Victims of Crime Summit from 1999 (IACP Victims Summit, 2000) point out what really victims of violent crimes wanted:

- Safety: protection from perpetrators and revictimization;
- Information: verbal and written information about justice system processes and victim services that is clear, concise, and user-friendly;

4 Plenary session Trust in Institutions - Comprehensive Victim Support (ПЛЕНАРНИ СКУП “ПОВЕРЕЊЕ У ИНСТИТУЦИЈЕ - Целовита подршка жртви”) – Protector of Citizens (ombudsmanapv.org)



- Support: services and assistance to enable participation in justice processes, recovery from trauma, and repair of harm caused by crime;
- Continuity: consistency in approaches and methods across agencies; continuity of support through all stages of the justice process and trauma recovery.

Victims also wanted to be taken seriously; to be treated with empathy and care; to be questioned without provocation and humiliation; to be accompanied by a “trustworthy person”; not to be bothered with unnecessary, multiple hearings, as well as not to be humiliated and pressed by unnecessary questions by defendant and his/her attorney (Löffelmann, 2006).

According to the results of one survey in Croatia, victims want: information, free legal aid, psychological and emotional support, protection of safety and privacy, compensation (Turković, Ajduković, Mrčela & Krešić, 2007). The same results and conclusions came out of the aforementioned research on needs and attitudes of victims of domestic and sexual violence in Serbia: information and support (medical, psychological, legal, material) are priorities.

Undoubtedly, victims of crime must be treated as persons with specific needs which have been recognized as rights by so called Victims of Crime Directive 2012/29/EU⁵. Its purpose is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. It is emphasized that women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence.

The importance of the information is emphasized in Article 3 articulating right to understand and to be understood from the first contact and during any further necessary interaction they have with a competent authority in the context of criminal proceedings, including where information is provided by that authority. The communications with victims should be given in simple and accessible language, orally or in writing. Such communications shall take into account the personal characteristics of the victim including any disability which may affect the ability to understand or to be understood. Also, it is recommended to allow victims to be accompanied by a person of their choice in the first contact with a competent authority where, due to the impact of the crime, the victim requires assistance to understand or to be understood.

It should be ensured that victims are offered the following information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in the Directive: a) the type of support they can obtain and from whom, including, where relevant, basic information about access to medical support, any specialist support, including psychological support, and alternative accommodation; (b) the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures; (c) how and under what conditions they can obtain protection, including protection measures; (d) how and under what conditions they can access legal advice, legal aid and any other sort of advice; (e) how and under what conditions they can access compensation; (f) how and under what conditions they are entitled to interpretation and translation; (g) if they are resident in a Member State other than that where the criminal offence was committed, any special measures, procedures or arrangements, which are available to protect their interests in the Member State where the first contact with the competent authority is made; (h) the available procedures for making complaints where their rights are not respected by the competent

5 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220 / JHA, Official Journal of the European Union L 315, 14. 11. 2012.



authority operating within the context of criminal proceedings; (i) the contact details for communications about their case; (j) the available restorative justice services; (k) how and under what conditions expenses incurred as a result of their participation in the criminal proceedings can be reimbursed (Article 4).

Do victims in Serbia obtain the previously mentioned information? The answer is no, despite the obligation set in the Criminal Procedure Code (CPC)⁶. The public prosecutor and the court are obliged to inform the injured party of rights enlisted in Art. 50 of the CPC. In practice it means that professionals from the prosecution offices simply hand over to victim a sheet of paper with the rights written on it. The same practice is applied in the police, as some participants at the Conference Trust in Institutions – Comprehensive Victim Support said. Information on rights in the criminal proceedings are important, but the information about certain services for support and protection are much more important (e.g. information on contacts of the local NGOs that provide relevant services). Also, lay persons hardly understand legal language, so the information do not mean much if they are not presented properly (in plain and accessible language). Directive 2012/29/EU has suggested that the police officers should provide information to victims (e.g. by handing leaflets). It is proved that the best are those systems in which police officers have a legal obligation to provide specified information to the victim (at the first contact), and to file a report (e.g. the Netherlands and Belgium⁷).

When it comes to the rights of the injured party, there are some omissions in the CPC provisions on attending certain evidentiary actions. Namely, Article 300, paragraph 3 stipulates that the injured party may be present at the examination, but has not provided the obligation of informing her/him. The paragraph 6 does not even mention the injured party, so he/she might miss the examination of witnesses and experts. Thus his/her right to be informed about the time and place of taking certain evidentiary actions has been violated, as well as the opportunity to actively participate in the proceedings, which might have negative impact on the quality of the evidence (Jovanović, 2015:271).

Victim also needs information on offender's release from prison or (on offender's custody) as that information is very important for their sense of safety, but they don't get it nor they know where to ask for it. The Law on Execution of Criminal Sanctions⁸ contains the provisions on notification of victims (Article 181) of the criminal offences against life and body, against sexual freedom or against marriage and family when convicted person is released from the enforcement of a custodial sentence, i.e. released conditionally, as well as in case of the escape from prison. The penitentiary institution shall deliver the information to the victim if he/she has demanded that, and if the assessment of risk by the penitentiary institution is indicative of the need for preventive protection of the victim. This Article has no wider application in practice, victims do not know about its existence (nor do professionals), and the second condition related to the risk assessment should be erased (thus the victims of certain violent crimes should be informed anyway if they ask to be informed).

National Strategy on the rights of victims and witnesses of crime for the period 2020-2025⁹ set as an objective enhancing the status of victims and witnesses in the criminal justice system of the Republic of Serbia in line with EU standards set in the Directive 2012/29/EU, and the first specific goal is setting up a sustainable National Network of Victim and Witness Support Services in the Republic of Serbia.

6 Official Gazette RS, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021- Constitutional Court Decision, 62/2021- Constitutional Court Decision

7 These countries are highly positioned on the list of those who show exceptional care for victims. See: Brien, M. E. I., Hoegen, E. H., 2000: 1159

8 Official Gazette RS, No. 55/2014, 35/2019

9 Strategija-ENG.docx (live.com)



Next one is raising awareness among victims and witnesses of crime of the rights afforded to them in the legal system of the Republic of Serbia, while continually informing the general public with that aim in mind. We hope the Strategy and its Action Plan will not be just promising declarations and that victims will really be provided with better, available and coherent services.

GENDER-BASED VIOLENCE IN JUDICIAL PRACTICE: WHAT IS WRONG WITH THE CRIMINAL JUSTICE RESPONSE?

Statistic data point to a worryingly high proportion of dismissed criminal complaints for domestic violence, and among the reasons for dismissal are deferring criminal prosecution (which results in the dismissal of the criminal complaint if the suspect has fulfilled certain obligation or more of them enlisted in Article 283, paragraph 1 of the CPC). According to data of the Statistical Office of the Republic of Serbia (SORS) in 2004 the percentage of dismissed criminal complaints for domestic violence was 24.9%. Since 2010 the percentage has begun to raise (29.3%); in 2011 it was 35.8%, in 2016 -64.4%, and in 2019 – 60%¹⁰. In 2019, among the reasons for dismissing criminal complaints, there was deferring criminal prosecution in 3% of cases, while in 78.9% of cases reasons were “no grounds for suspicion that a criminal offence which is prosecutable *ex officio* has been committed” or “inexpediency of criminal prosecution” (which again indicates the possible application of the so-called “prosecutorial opportunism”), and in 15.6% of cases the public prosecutor assessed that “the reported offence is not a criminal offence which is prosecutable *ex officio*” (SORS, 2020: 16). Presented data indicate the need of conducting research related to such a high number of dismissed criminal complaints for previously mentioned reasons, especially those related to the prosecutorial opportunism. Namely, about ten years ago, it was noted that in the large number of cases of dismissed criminal complaints for domestic violence (at that time about 30%) there were no real or legal reasons for such a decision of the public prosecutor (Konstantinovic Vilić, Petrušić, 2007: 108), so it is worth researching if there are any grounds for such a conclusion today.

Perpetrators of domestic violence are most often conditionally sentenced (in 2019, suspended sentence was represented in the structure of imposed sanctions with 69.5% (SORS, 2020: 77), but a suspended sentence with protective supervision rarely appears in practice, which should be changed. Namely, a conditional sentence with protective supervision is a far better solution, as the convict is obliged to perform certain obligations that are specially-preventive, which is also one of the recommendations of the Istanbul Convention¹¹ (Article 45, paragraph 2).

The latest statistical data show that 146 persons convicted for domestic violence have been sentenced to prison in the premises where they live (so-called house arrest) (SORS, 2020: 77), but there is a suspicion that among them are those who should not have been sentenced to serve such a sentence, bearing in mind that the commissioners for alternative sanctions indicate that the courts impose “house arrest” on offenders living with victims, which often leads to new violent acts.¹² Criminal Code is clear

10 Statistical Office of the Republic of Serbia, Adult Perpetrators Charged with Domestic Violence 2004-2019, <https://data.statgov.rs/Home/Result/140202?languageCode=sr-Cyrl>

11 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic violence, CETS 210, 2011

12 The commissioners for alternative criminal sanctions spoke about it at the Conference “Perspectives of Alternative Criminal Sanctions and Measures of Restorative Justice in Serbia”, organised by the Centre for Democracy Foundation and Victimology Society of Serbia (30.6.2015, Belgrade). See: Mrvić-Petrović, N., Jovanović, S., 2015.



on that issue as well (although it would be quite logical in the given situation not to think at all about this way of serving the sentence even without explicit provisions about it): Article 45, paragraph 7 of the CC envisages a ban on determining execution of a prison sentence in the premises where the convict lives with a victim of the criminal offence against marriage and family committed by convicted person.

The results of the latest research on domestic violence in judicial practice also indicate a mild penal policy in cases of domestic violence and the presence of an old problem – automatism in stating circumstances relevant to sentencing (still far more mitigating ones) without previous deep consideration (Petrušić, Žunić & Vilić, 2018: 140). Indicative are the results of a survey of domestic violence that occurs in the migrant population, in reception and asylum centres (Marković, Cvejić, 2017) when the failure of employees in these centres under current regulations is justified by “old answers”: “it is a different culture, religion, tradition”; “it is normal for them”; “they will not report, they will not cooperate”; “reporting and conducting the procedure would make their position more difficult, because they don’t want to stay in Serbia”... (Jovanović, 2018: 32-40). On the other hand, the Istanbul Convention imposes general obligation on Member States to ensure that culture, tradition, religion or so-called ‘honour’ is not considered a justification for any act covered by the Convention (Article 12, paragraph 5).

One of the basic needs of the victim of gender-based violence is safety, and it seems that there are problems with that issue in practice. The Law on Domestic Violence Prevention envisages urgent measures that separate offenders and victims which are imposed on offenders by the police immediately, but without victim referral to relevant services for support and information, they could remain ineffective. In contrast to previous research whose results show that detention was ordered very rarely - only in 12.9% of cases, the recently conducted research indicates that detention of domestic violence perpetrators was ordered much more frequently, in as many as 46% of cases. Ordering detention because of the possible influence on witnesses, which is one of the legal grounds for detention, was much less frequent. However, the research has shown that perpetrators of violence have a significant influence on witnesses, especially victims, as evidenced by a large number of victims who later refuse to testify at the main hearing and state that they do not join the criminal prosecution (Petrušić, Žunić & Vilić, 2018: 57-58). As the suspended sentence is still the most common sanction for domestic violence offences, safety of the victim is also questionable, especially if the security measure of prohibiting convergence and communication with the victim is not imposed on offender. Suspended sentence with protective supervision seems to be much better solution for offences where risk of revictimization is low.

That there is something wrong with the risk assessment and the criminal justice response is shown by the data on the number of femicides in Serbia which is not decreasing. More than 30 women are victimized by murder in the context of domestic violence every year, although cases in which the victim of domestic violence has previously sought help from state agencies are very common¹³.

13 There are no official data on femicide (although there should be, as it is an international law requirement), so we have to use data of the Network Women Against Violence. See: Annual Reports on Femicides in Serbia 2010-2020, <https://zeneprotivnasilja.net/femicid-u-srbiji>, accessed on 15. 9. 2021

CONCLUDING REMARKS

Can our criminal justice system, having an offender and his/her rights in focus, ever meet victims' needs? It seems that a victim is more an object and source of information relevant for criminal proceedings than a person who suffers and has some real needs in order to survive and move on after the offence and criminal proceedings that sometimes add more suffering due to secondary victimization. Adequate contact with the victim, professional but kind, without blaming and deterring is of greatest importance. Relevant information on available services for (medical, psychological, material, legal etc.) support and protection is also important, so it should be considered how to offer it to a victim in an appropriate manner.

Having in mind that Serbia cannot cope with femicide, despite very good legal solutions, improving safety of the victims is of the greatest importance. Proper risk assessment, and the right choice of measures that will protect the victim from the offender, but also giving the necessary information to the victim (about whether the offender is in custody, whether he/she is released from prison on parole or after serving a prison sentence) can make the victim feel more safe and also gain trust in institutions.

We must not forget that the most common cause of prosecution failure is the loss of a witness which was cooperative at the beginning but stopped cooperating with a justice system that was indifferent to his/her basic human needs.

REFERENCES

1. Brienens, M. E. I., Hoegen, E. H. (2000) *Victims of Crime in 22 European Criminal Justice Systems: the Implementation of Recommendation (85)11 of the Council of Europe on the Position of the Victims in the Framework of Criminal Law and Procedure*. Nijmegen: Wolf Legal Productions
2. Criminal Procedure Code, Official Gazette of the Republic of Serbia“, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021- Constitutional Court Decision, 62/2021- Constitutional Court Decision
3. Ćopić, S. (2002) Domestic Violence and Social Reaction. In: Nikolić-Ristanović, V. (Ed.) *Domestic Violence in Serbia* (pp. 91-105), Belgrade: Victimological Society of Serbia, Prometej.
4. Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA
5. European Commission, Serbia 2020 Report, serbia_report_2020.pdf (europa.eu), accessed on: 1. 8. 2021.
6. GREVIO (2020) Baseline evaluation report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Serbia, Final report on Serbia (coe.int), accessed on: 1. 8. 2021.
7. Ignjatović, T. (2021) *Challenges in Achieving Protection and Support for Women with Experience of Partner Violence and their Children in Serbia*. Belgrade: Autonomous Women's Centre



8. Jovanović, S. (2018) Factors of Non-Reporting Violence against Women and Children in Reception and Asylum Centres in the Republic of Serbia. *Proceedings of the Institute of Criminological and Sociological Research*, (37)2, pp. 29-44.
9. Jovanović, S. (2015) The Legal Status of the Injured Party and Victim of Crime. In: Kolarić, D. (Ed.) *Archibald Reiss Days* (vol. II, pp. 267-274), Belgrade: Academy of Criminalistic and Police Studies
10. Jovanović, S., Simeunović-Patić, B., Macanović, V. (2012) *Criminal Justice Response to Domestic Violence in Vojvodina*. Novi Sad: Provincial Secretariat for Economy, Employment and Gender Equality
11. Konstantinović-Vilić, S., Petrušić, N. (2007) *Criminal Offence of Domestic Violence: Actual Judicial Practice in Belgrade and Niš*. Belgrade: Autonomous Women's Centre and Women's Research Centre for Education and Communication, Niš
12. Law on Execution of Criminal Sanctions, Official Gazette RS, No. 55/2014, 35/2019
13. Law on Domestic Violence Prevention, Official Gazette RS, No. 94/2016
14. Löffelmann, M. (2006) The Victim in Criminal Proceedings. *Resource Material Series No.70* (pp. 31-41), Tokyo: UNAFEI
15. Marković, J., Cvejić, M. (2017) *Violence against Women and Girls in Refugee and Migrant Population in Serbia*. Belgrade: Atina – Citizens Association for Combating Trafficking in Human Beings and all Forms of Gender-Based Violence
16. Mrvić-Petrović, N., Jovanović, S. (2015) Recommendations for Improving the Application of Alternative Criminal Sanctions and Restorative Justice Measures. In: Nikolić, N. (Ed.) *Promotion of the Alternative Criminal Sanctions and Restorative Justice Measures* (pp. 42-54), Belgrade: Centre for Democracy Foundation and Victimology Society of Serbia
17. National Institute of Justice (2006) Victim Satisfaction with the Criminal Justice System, January 1, 2006, nij.ojp.gov: <https://nij.ojp.gov/topics/articles/victim-satisfaction-criminal-justice-system>, accessed on 10. 8. 2021.
18. National Strategy for Preventing and Combating Gender-Based Violence against Women and Domestic Violence 2021–2025, Official Gazette RS, No. 47/2021
19. Network Women against Violence, Annual Reports on Femicides in Serbia 2010-2020, <https://zeneprotivnasilja.net/femicid-u-srbiji>, accessed on 15. 8. 2021
20. OSCE (2019) OSCE-led Survey on Violence against Women: Well-Being and Safety of Women, Serbia – Results Report. 419750_1.pdf (osce.org), accessed on 3.8.2021.
21. Petrušić, N., Žunić, N., Vilić, V. (2018) *The Criminal Offence of Domestic Violence in Judicial Practice - New Trends and Challenges*. Belgrade: OSCE
22. Protector of Citizens (2020) Special Report on Activities of the Groups for Coordination and Cooperation in Belgrade. Poseban izveštaj zastitnika gradjana.pdf (ombudsman.rs), accessed on 3. 8. 2021.
23. Statistical Office of the Republic of Serbia (SORS) Adult Perpetrators Charged with Domestic Violence 2004-2019, <https://data.statgov.rs/Home/Result/140202?languageCode=sr-Cyrl>, accessed on: 5. 8. 2021.
24. Statistical Office of the Republic of Serbia (SORS) (2020) Adult Perpetrators of Criminal Offences in the Republic of Serbia, 2019. *Bulletin*, (665), Belgrade.



25. Turković, K., Ajduković, D., Mrčela, M., Krešić, M. (2007) Results of the Research on Support for Victims and Witnesses of Crimes in Croatia (UNDP, 2007). In: Kuzmić, M. (Ed.) Actual Issues of Criminal Legislation, (pp. 190-194), Zagreb: Engineering Bureau
26. U.S. Department of Justice, IACP Victims Summit (2000) What do Victims want? 189372NCJRS.pdf (ojp.gov), accessed on: 12. 8. 2021.





DIGITAL EVIDENCE AND CRIMINAL LAW COOPERATION IN THE DIGITAL AGE

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Abstract: Perpetrators of crimes, especially those that can be classified as economic crime, use various means to cover up the commission of crimes. These means include the use of information technologies, and many of these crimes are difficult to prove without special knowledge. Due to that, the detection and proving of these criminal acts is extremely difficult.

During the pandemic caused by the SARS-CoV-2 virus, there was a great need for the use of electronic evidence in criminal proceedings. Therefore, in an official communication, the European Commission addressed the European Parliament, the European Social Council and the Committee of the Regions by submitting a document on digitalization at the level of the European Union which offered recommendations for overcoming the identified problems.

In this paper the authors started from the assumption that the national legislation of the Republic of Serbia needs to be further improved to be able to use electronic evidence at the national level and during criminal cooperation at the international level. The authors' conclusions are based on an analysis of international regulations, EU documents and national legislation.

Keywords: digital evidence, criminal law cooperation, digital age, national level, EU level.

INTRODUCTION

Issues of electronic evidence and international cooperation in the digital environment are connected by the need to effectively prevent and prosecute high-tech crime,³ but also any other form of organized

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³ Cybercrime or computer crime is any form of criminal behavior in the cyber environment in which computer networks appear as means, citation, evidence or environment of a committed crime. Importance of cy-



and individual criminal activity in which information technology is used. The importance of using electronic or digital evidence⁴ in a digital environment is growing. In practice, the need for submitting printed records is reduced, the hearing from the digital recording is enabled, and the procedure itself becomes faster and cheaper. This contributes to strengthening the trust of citizens in the judicial system, and thus strengthening the rule of law. Hence the need to examine whether the national normative framework enables adequate implementation of international standards related to the establishment of cross-border cooperation in criminal matters.

The competent authorities in Serbia, in accordance with national regulations, are involved in all forms of organized international cooperation in relation to organized and high-tech crime, based on ratified conventions (Law on Ratification of the United Nations Convention against Transnational Organized Crime and Additional Protocols⁵, Official Gazette SRY, 6/2001, Law on Ratification of the Convention on High-Tech Crime⁶, Official Gazette RS, 19/2009). In the Ministry of Interior and the judicial system of the Republic of Serbia, there are special bodies responsible for the prevention of and combating high-tech crime (Law on Organization and Competences of State Bodies for Combating High-Tech Crime – ZODOVK, Official Gazette RS, 61/2005). Following the amendment of the law in 2009, various procedures were established to identify, collect and evaluate evidence. However, the lack of financial resources for the procurement and maintenance of a single electronic data exchange system may prevent it from being established. On the other hand, older and insecure systems that are used are more exposed to the risk of cyber threats, which calls into question the integrity of digital data that can serve as evidence in criminal proceedings. A particular obstacle to the use of electronic evidence may be the different levels of knowledge and technical skills of civil servants working in prosecution institutions and the judiciary.

Given that transnational crime is increasingly taking advantage of information technology,⁷ legislative solutions are being prepared at the European Union (EU) level to enable the smooth and rapid flow of electronic evidence for law enforcement and courts, especially for the exchange of information between public prosecutors and judges. From a legal point of view, it is necessary to set standards by which evidence gathered in one country via digital tools could be used in other jurisdictions. In accordance with the provisions of CETS 185, an initiative has been launched to strengthen direct private-law cross-border cooperation. Therefore, in the Communication of 2 December 2020 (EC COM (2020) 710 final) the European Commission (EC) expressed the need to accelerate digitalisation in EU

bercrime, especially via the internet, has grown with the use of computers in economy, entertainment and government. Cybercrime includes computer crimes as well as computer-related crimes and crimes committed by illegal use of the internet, which may become organized (form of not-traditional organised crime) and evolve into the online criminality (Tropina, 2012: 159–160).

4 They are important because they do not refer exclusively to crimes in the field of high-tech crime, but also to all other crimes that can be committed using information technology.

5 UN Convention (UNTOC) adopted by General Assembly Resolution 55/25 of 15 November 2000, entered into force in 2003.

6 CoE, Convention on Cybercrime (CETS No. 185), Budapest, 23 November 2001.

7 At the end of the 20th century, the phenomenon of cyber-assisted crime was noticed, i.e. traditional organized crime that “moves” into cyberspace and becomes more efficient due to the use of computers in the digital environment, while, on the other hand, organized groups for high-tech crime are emerging (Tropinov, 2012: 159). This trend is a consequence of the hedonistic calculation of perpetrators: according to Depauw (2018) – dealing with organized crime is economically extremely profitable, but there are high risks to the physical integrity of perpetrators, while in high-tech crime there are significantly lower investments but low risks to physical integrity. and that is why criminal activity brings practically the same, if not greater, illegal property benefit to the perpetrator.



space, estimating that there is an uneven use of information and communication tools in the member states.⁸

The latest EU initiatives are a reason to reconsider whether it is necessary in the Republic of Serbia to improve the system of collection, storage and processing of electronic evidence and to make additional efforts in order to bring these procedures in line with international standards. The assumption is that there is a need for this in our law and practice. The authors will prove this by analyzing the provisions of international legal acts, national regulations and initiatives of EU institutions.

INTERNATIONAL REGULATION

Cybercriminals, who steal from internet users and companies, use hacking infrastructure and hosting to commit crimes. Criminal organizations also use the “bulletproof hosting” infrastructure as protection against cyber threats from the competition (for example, DDoS Protection Service). Moreover, this infrastructure is the basis of their entire “business” model. Illicit trade in goods and services, as well as laundering of money gained from crime, take place with the use of cryptocurrencies and the advantages of numerous small transactions (“micro-laundering”).⁹ Given that cyberspace is becoming an area for committing crimes in the field of both organized and high-tech crime, it is necessary to analyze the provisions of international acts intended for their prevention. Of particular importance are the UNTOC (United Nations Convention against Transnational Organized Crime) and CETS 185 (Convention on Cybercrime).

The UNTOC was adopted to enhance international cooperation in the prevention of certain transnationally organized criminal activities, the description of which indicates a possible link between computer and organized crime. The signatories are obliged to improve their legislation by prescribing criminal offenses in the field of transnational organized crime (money laundering, corruption offenses, drug trafficking, human trafficking, etc.), to provide for punishment for preparatory actions (agreement to commit a criminal offense or organize a criminal group) and stricter sanctions for the activities of organized criminal groups. The Article 6 of the UNTOC emphasizes the importance of finding, seizing and confiscating proceeds of organized crime and the need to provide for the widest possible range of predicate offenses in national legislations, while Article 7 prescribes the obligations of the signatory states regarding the prevention of money laundering and emphasizes the need to establish mutual cooperation of institutions and efficient exchange of information at the national and international level. In modern conditions, illegal activities to conceal the origin of property acquired through crime imply the use of information and communication technologies, and the application of these technologies is important for cooperation in their detection. Therefore, in every institution, as well as

8 Digitization of the administrative and judicial system is becoming an imperative for successful cooperation at the national and international level in criminal matters. The needs and requirements of the competent authorities must be in line with the obligation to respect the rights of defendants to a fair trial and fair trial (Art. 47 of the Charter of Fundamental Rights, 2016) and the protection of personal data under the General Data Protection Regulation, 2016.

9 Europol (2018) reports that cyber-organized criminals use semi-automated cryptocurrency exchange and decentralized (peer-to-peer) exchange for money laundering that do not require user identification and verification. The COVID-19 pandemic has intensified criminal activities “from the shadows”: the Europol report for 2020 states that a large number of smaller short-lived markets have been replaced by large “dark” web markets (Europol, 2020: 56), which is confirmed by information from January 2021 that DarkMarket, the world’s largest illegal web market, was closed (Press Release, 2021, January 12).



at the national level, there should be adequate technical equipment and staff who have the appropriate technical knowledge. The Article 18 of the UNTOC regulates mutual legal assistance in investigation, prosecution or judicial proceedings, which is established upon the request of the requesting state, and is realized in accordance with the law, international treaty, agreement or arrangement. It is exceptionally possible for the competent authorities of the states concerned to exchange information directly, provided that they do not thereby infringe national laws (Article 18, paragraphs 4 and 5). If the states have not concluded an agreement, the cooperation shall take place, in accordance with paragraph 13, through the central bodies, authorized to receive requests for mutual legal assistance. In that case, prolongation may prevent timely collection of evidence and timely exchange of information between the competent authorities of the signatory states, and thus means effective prevention of computer crime, which is decisively influenced by the time factor (Stamenković et al., 2014, p. 6).

The CETS 185 regulates the specifically applicable methods of action of state bodies in investigations related to high-tech crime, as well as the minimum standards of protection against abuse of great powers that state bodies acquire in order to effectively combat high-tech crime.¹⁰ That is why CETS 185, which adapts “classic” procedural measures to the conditions of the digital era, is of great importance for the practical work of special police units and prosecutor’s offices for high-tech crime, especially if one keeps in mind that in the digital era, the crime scene is at a long distance from the place where the perpetrator is, often on the territory of another country.

According to the provisions of the CETS 185, the contracting parties are obliged to adopt legislative and other measures in order to effectively conduct investigations and criminal proceedings, both in respect of criminal offenses that can be considered computer crimes and other crimes that can be committed through a computer system. These measures also concern the collection of evidence against perpetrators in electronic form, which is regulated in procedural part (II) of the CETS 185. Articles 16–21 define and prescribe procedural measures that enable urgent storage of computer data, storage and partial storage of traffic data, search and seizure of stored data, collection of data and traffic data in real time, as well as interception of data on the content of communication. From the point of view of the needs of practice, the provision of Article 19 of the CETS 185 (data order) which, according to Stamenković et al. (2017: 26), is a flexible measure that members of the detection authorities could apply in different cases, especially in those moments when other types of measures, such as search orders, seizures, interception of communications and the like, require the fulfillment of more significant and demanding legal and technical conditions.

The provisions of Articles 23–35 regulate international legal assistance. States Parties may, without the permission of the other Contracting Party, access stored computer data available to the public, regardless of where the data are geographically located, access or receive, through a computer system in their territory, stored computer data located in another Contracting State if they obtain legal and voluntary consent from persons who have the legal authority to disclose data to it through that computer system (Article 32). The provisions of the CETS 185 also provide for mutual assistance in real-time data collection. Contracting States should provide such assistance in order to collect data relating to certain communications in their territory in real time, which are transmitted via a computer system. This type of assistance shall be provided in accordance with the conditions and procedures provided for by national law, within the time frame and for similar offenses prescribed by national law. Mutual assistance for the purpose of collecting and providing relevant data shall be provided in accordance with the mutual legal assistance agreements of the signatory countries and their national legislation.

¹⁰ CETS 185 also provides initiatives for inclusion of material criminal law norms, some procedural aspects of criminal acts relicts in digital space and first response measures in securing and handling traces and digital evidence.



The provisions of the CETS 185 aim to speed up mutual assistance, but the formality of the procedure stipulates that it lasts between 6 to 24 months (T-CY Cloud Evidence Group, 2016: 9) and is incompatible with the instability and rapid mobility of electronic evidence. “Cloud computing” imposes the need to “circumvent” the limitations of the territorial jurisdiction of national authorities and establish the possibility of direct communication with providers, as indicated in the report of the T-CY Cloud Evidence Group (2016: 11), because data is increasingly distributed across multiple providers and locations, and is rarely found on a device or in a closed network.

CHARACTERISTICS OF THE NATIONAL NORMATIVE FRAMEWORK

In the legislation of the Republic of Serbia, procedural measures related to electronic evidence are provided either by the Criminal Procedure Code – CPC (Official Gazette RS, 72/2011), or as part of special procedures of bodies responsible for conducting investigations into criminal offenses that can be committed by using information communication technology.

The CPC stipulates that evidence can be collected in several ways. Some of them are: using records as evidence, checking accounts and suspicious data (obtaining data, monitoring suspicious transactions, temporarily suspending suspicious transactions), seizure of items, secret surveillance of communication, video and audio recording, etc. There is no legal definition of electronic evidence, it is only provided that, for the purposes of proof, computer data suitable or intended to serve as evidence of a fact established in the procedure may be considered a document (Article 2, paragraph 1, line 26 in conjunction with Article 83, paragraphs 1 and 2). The precondition for further use is the same as for other evidence, and that is to be obtained in a lawful manner. In Article 2, paragraph 1, lines 29–32 of the CPC are defined: electronic record, electronic address and electronic signature, which would be relevant for determining the concept of electronic evidence. An electronic record is audio, video or graphic data that is in electronic (digital) form. An e-mail address is a series of characters, letters, numbers and a signal that is intended to determine the destination of the connection. The term electronic document, which is a set of data defined as electronic document, is interpreted in accordance with the definition from the law governing the electronic documents. An electronic signature is considered to be a set of data that is defined as an electronic signature, in accordance with the law governing electronic signatures.

According to Article 2, paragraph 1, line 4 of the Law on Electronic Document, Electronic Identification and Trust Services in Electronic Business – ZED (Official Gazette RS, 94/17, 52/21) electronic document is a set of data composed of letters, numbers, symbols, graphics, audio and video materials, in electronic form. Having in mind the frequency of use of electronic documents, Article 7 of the ZED stipulates that such document cannot be challenged for validity, probative value, or written form simply because it is in electronic form. According to ZED, the original electronic document was originally created in electronic form (Article 10, paragraph 1), but a digital record identical to the original is also considered original (Article 10, paragraph 2). From the point of view of the possible use of an electronic document as evidence in criminal proceedings (or other court proceedings), the provisions of the ZED (Articles 11 and 12) governing the procedure and powers of public authorities regarding the certification of digitized or printed electronic documents (copies) are important. These provisions clearly favor the probative value of electronic records in official records kept on the basis of law, for which the presumption of reliability applies.



Defining the concept of the original document in electronic form is also important for the interpretation of the provision of Article 139 of the CPC, according to which the document is obtained by the agency or legal person in charge of procedural actions or the parties submit it, as a rule, in the original. Only if the original document has been destroyed, disappeared or cannot be obtained, a copy of the document can be obtained. As the same digital record is legally equated with a paper original, it should be possible to use a paper original, electronic document, electronic image or printed electronic document in court proceedings under equal conditions, which is not the case now. Avoiding unnecessary printing of electronic documents, for the needs of mutual communication between institutions, would provide speed and significant savings.

The CPC allows the use of electronic evidence, but does not determine the content of that term, which has already been pointed out in connection with the previous CPC in the research of Komlen Nikolić et al. (2010: 80). The content of special secret investigative actions allows the conclusion that they should be undertaken with the use of computers and modern devices in order to intercept data that are exchanged in cyberspace and obtain electronic evidence. As for the “open” procedural actions, Article 104, paragraph 2 provides for the possibility of online examination of particularly sensitive categories of witnesses, Article 147, paragraph 1 seizure of devices for automatic data processing and equipment on which electronic records are stored or can be stored, search of these devices (Article 152, paragraph 3) and procedure of their search (Article 157, paragraph 3). To date, the CPC has been amended several times (four times only until the entry into force), but the legislator did not consider that the specifics of the use of electronic data should be further regulated, although they are specific to the extent that they cannot be identified with material evidence.¹¹

The seizure of electronic evidence is carried out in accordance with the CPC and the law ratifying the CETS 185. The handling of data from electronic communications by operators and competent state bodies for the purposes of conducting criminal proceedings or security protection are regulated by the Law on Electronic Communications (Official Gazette RS, 44/2010, 60/2013, 62/2013, 95/2918). Its provisions prescribe the manner of legal interception of electronic communications, the obligation to keep records by operators and competent state authorities on undertaking such activities, providing the necessary technical and organizational conditions to ensure the protection of such data, and which can be retained if necessary for record keeping, criminal proceedings or security protection of the Republic of Serbia. In addition, the Law prescribes both the form in which such data are retained, as well as the quality and level of their protection in order to preserve them for the aforementioned purposes (Articles 126–130a). Thus, on the basis of Article 147 of the CPC, seized and temporarily confiscated computers and mobile phones are sealed and opened in the presence of the accused and the witness, and after a forensic image is taken, they are sealed again in the presence of the same persons. According to the CPC, electronic evidence is treated as physical property (material evidence): when the evidence is collected, it is sent to the prosecutor, and forensic experts keep reports that are used later in the trial. The plaintiff keeps that evidence, i.e. deposits it until the indictment is submitted to the court. Although it is prescribed that the prosecution is responsible for the safe storage of evidence in adequate conditions, when it comes to electronic evidence, it is necessary to predict in detail what is meant by this, the question of the integrity of evidence is raised and their change is risky (it can be

¹¹ Electronic data is not tangible, in electronic exchange only a copy of the original data is usually transferred (to the device on which it is stored or as a printout on paper). If they are on the internet, it is possible to access them (but also take them away) from anywhere in the world, they are transmitted with great speed, regardless of national borders, it is easier to create, process and hide their traces anonymously. There is a great risk of altering the original data during further manipulation of the obtained evidence, because it must be converted into a readable format that allows its further processing implies the risk of intentional, unintentional, and even unnoticed manipulation of the original information.

unintentional or even unrecognized).¹² Moreover, in criminal matters, it is necessary to ensure the reliable permanent storage of some electronic records that have great potential for later use as evidence (for example, data from prosecutorial files on unfinished investigations or from police files relating to unsolved criminal cases).

In the research of Komlen Nikolić (2010), it was emphasized that the urgent protection of electronic data from the CETS 185 is not ensured by the rules of the CPC. As the authors stated in the previous part of this paper, such protection is defined by the Law on Electronic Communications. However, the prosecutor's obligation to address the court in order to obtain an order for the implementation of a certain measure certainly calls into question the urgency of action.

Adequate enforcement of the law requires continuous training of judges and prosecutors in obtaining, processing and using electronic evidence along with advances in technology, because prosecutors need to take care of their collection and security, and judges need to decide on factual issues based on disputed electronic evidence, and not experts who record that evidence or digital forensic scientists who will discover and expertise it. An expert may be engaged in gathering evidence, but there should be no obligation for him or her to be present when the prosecutor presents evidence from the indictment at the main trial. Experts may be hired only if required by the court, the prosecution or the defense, which is an additional cost for the prosecution or the court (CoE Assessment report, 2018). A particular problem may be the contestation of evidence by the expert adviser of the opposing party during the proceedings. When it comes to criminal acts that fall under the jurisdiction of special departments of the court and public prosecutor's office for organized crime and special departments for the fight against corruption, it is possible to use the knowledge and skills of financial forensic scientists when collecting electronic evidence. However, the question is to what extent they possess the knowledge and skills necessary to recognize electronic evidence and use it in criminal proceedings.¹³ Therefore, it is necessary to organize specialized trainings for them as well.

Based on the CETS No. 185, different jurisdictions can exchange data through contact points or requests for mutual legal assistance, and this option is used by the competent authorities of the Republic of Serbia. However, shortcomings are also noted here that jeopardize the efficiency of investigations, both in the CETS 185 itself and in the application of domestic legislation.

The establishment of international cooperation through mechanisms of mutual justice assistance may take too long, thus increasing the risk that data may be deleted or altered. Electronic evidence should be seized on a portable device, because the seizure of hardware or related devices is outdated, and may impede the economic activity of legal entities that did not participate in the criminal act of their employee. The problem of obtaining evidence of illegally acquired property of the suspect in cryptocurrency is also pronounced, because the data can be easily deleted, which indicates the need to find and record data on the existence of such property when searching and collecting electronic evidence (CoE Assessment report, 2018).

Since 2011, the criminal procedure in Serbia has been modified according to the adversarial model, in which the testimonies of witnesses and defendants, obtained directly at the main trial, in oral and adversarial hearings, have a special evidentiary significance.¹⁴ During the state of emergency in Serbia (from March 15 until May 6, 2020) due to the epidemic of the SARS-CoV-2 virus, when criminal courts acted only in emergencies, the problem of applying online hearings came to the fore. The issue

¹⁴ Therefore, Anglo-Saxon law specifically regulates the admissibility of electronically recorded statements, see: Model Law of Electronic Evidence, 2017; The Uniform Electronic Evidence Act in Canada, 2011, according to Duranti, Rogers & Sheppard, 2020.



of protection of the rights of the defendants and the probative value of the testimony given in the on-line hearing thus undertaken were also in questions.

The so-called trials via Skype were organized on the basis of written information from the Ministry of Justice to be applied in urgent proceedings against persons who do not respect self-isolation decisions, who are usually sentenced to three years in prison. Subsequently, the Government adopted a Decree on the manner of participation of the accused in the main trial in criminal proceedings held during the state of emergency declared on March 15, 2020 (Official Gazette RS 49/20). The Decree allows the accused to testify online if the judge declares that the presence of the accused at the main trial is not safe due to the danger of spreading the infection, and there are technical condition for the accused to be heard online. Because the Decree derogates from the CPC, which does not provide for such a possibility, and because the right to a fair trial has been violated, lawyers and NGOs have sent an initiative to the Constitutional Court to review the Decree, which the Court has not yet ruled on. This example, as well as previous observations, show that our normative framework needs to be supplemented by amendments to the CPC or the adoption of another legal act whose application would be allowed in criminal proceedings, to regulate the specifics of using electronic evidence, perhaps in general for all proceedings (judicial and administrative) as shown by the examples of the above acts of the Commonwealth and Canada. In addition, a way of facilitating international cooperation must be envisaged, as indicated by the reasons for the latest legislative initiatives in the EU regarding electronic evidence.

EUROPEAN INITIATIVES AND DIGITALIZATION OF JUSTICE

Since 2016, regulations have been prepared in the EU that would facilitate the acquisition, exchange and use of e-evidence, in various ways. They have been designed at least twice: E-Codex Initiative and Project EVIDENCE Road. The former should provide the necessary infrastructure for a reliable and secure exchange of requests and evidence, while the latter should provide a methodology and formal language to enable a reliable and secure exchange (Biasiotti, 2017: 2). In mid-2019, the European Commission undertook activities to conclude a cooperation agreement with the United States, to enable the use of "Cloud" evidence and to prepare the Second Additional Protocol to the CETS 185. The pragmatic reason was that research showed that 2/3 of e-evidence were localized in another EU country or in a third country outside the EU (Tinoco-Pastrana, 2020: 46–47). Efforts are being made to facilitate access to electronic evidence circulating or stored outside the EU, and these agreements should simplify legal aid mechanisms and increase its efficiency through direct cooperation with service providers and shortening deadlines for access to electronic data. To the same end, cross-border cooperation has been facilitated within the EU.

The digital environment imposes the need that cross-border cooperation in all crimes committed through computer systems or the internet, when there may be a conflict of jurisdiction of different jurisdictions, must be developed through different mechanisms in relation to the procedure of mutual international assistance. Therefore, in October 2020, the Committee of the European Parliament for Civil Liberties, Justice and Home Affairs adopted the report on the legal proposals from 2018 on electronic evidence in criminal proceedings.¹⁵ The new rules should allow Public Prosecutor's Office to directly request to obtain electronic data necessary to investigate and prosecute perpetrators from electronic service providers operating in the EU, regardless of where the data is stored. Accordingly, service providers should appoint an authorized person (representative) to provide evidence and respond to requests submitted to applicants (competent authorities) (Bakowski & Vornova, 2020).



The Communication of the European Commission COM (2020) 710 final of December 2020 emphasizes the need to harmonize the regulations of the member states regarding access to digital information and evidence. This would facilitate access to evidence located in the territory of another jurisdiction (whether it is an EU member or a third country) (EC COM (2020) 710 final).

In the mentioned document, the EC states that in order to improve the national judicial systems for the sake of digitalization, it is necessary to improve the transnational cooperation of the competent authorities. Such cooperation implies full respect for the human rights guaranteed by the EU Charter of Fundamental Rights. Different challenges due to the existence of differences still exist at the level of member states, such as, for example, the possibility of access to electronic evidence in cases before the competent courts. According to the EC, in the coming period it should be possible for evidence to be submitted to the court exclusively in digital format. This should allow the exchange of a large amount of data in different formats. Therefore, the EU should provide financial support to member states, support in amending regulations in order to meet the requirements regarding digitalization, which would enable better access to justice and promote transnational cooperation, including the field of artificial intelligence. Legal representatives need to be trained to provide support to their parties in order to communicate with the judiciary and submit documents in a safe and efficient manner. In addition to transnational cooperation, member states should enable cooperation between relevant national institutions and the secure and efficient exchange of information with judicial and prosecuting authorities. Electronic signatures and stamps should be accepted when submitting evidence in the same way in all member states. Regulations at the national level should enable the processing of personal data in accordance with the provisions of the General Regulation on Personal Data Protection, and therefore the report of the competent ombudsman has been requested (EC COM (2020) 710 final: 2–5, 10).

The Office of the European Public Prosecutor, Europol and Eurojust should have an adequate level of cooperation with both member states and non-member countries, but it is necessary to provide assistance and support to Europol and Eurojust. The efficiency of such cooperation would be enhanced by cooperation in electronic environments. This would facilitate and expedite communication by enabling the joint work of joint investigation teams in conducting transnational investigations (EC COM (2020) 710 final: 17). Such cooperation would reduce administrative costs and facilitate access to various registers relevant to gathering evidence.

CONCLUSION

Criminal law must keep pace with technological changes by regulating the possibility for electronic data to be used as evidence in criminal proceedings. In Serbia, as well as throughout Europe, there is a lack of special regulations in this area (both quantitatively and qualitatively). Walken (2018: 227) also states that the normative frameworks, in the countries where they exist, are fragmentary and do not explicitly refer to criminal proceedings, while, on the other hand, legal gaps are filled by interpreting the provisions relating to material evidence. The practice, however, requires explicit rules to be made, for example, on obtaining electronic data from any third party other than the telecommunications service provider, on obtaining information between devices, on preliminary data retention measures (“expedited preservation of stored computer data”), on handling large amounts of Big Data and procedures that guarantee and confirm the integrity and authenticity of the data set (Walken, 2018: 227).

Procedural legislation of the Republic of Serbia should be supplemented to ensure full implementation of the CETS 185. It lacks special rules that will more fully regulate the use of electronic evidence



in modern conditions, in order to strengthen legal equality of citizens and establish more efficient cooperation of competent authorities at the national level and international prosecution and the trial of perpetrators. Possible obstacles are the need for an interdisciplinary approach when adopting such rules, the need to standardize the exchange of electronic data on one or fewer platforms (following the example of the E-government web portal or similar), continuous education of public sector employees to recognize evidence in electronic form and ensure its integrity. Submitting data in digital form through electronic communication systems would simplify the procedure, enable a trial within a reasonable time and would be a saving for those institutions that are authorized applicants for criminal charges. Direct submission of data to the competent judicial authorities would save time and prevent the integrity of the evidence from being compromised, especially if the storage is used adequately.

In the digital age, mutual legal assistance established through diplomacy is an inefficient solution. According to the latest proposals of EU legislation, the limitations of competences arising from territorial sovereignty should be overcome by allowing the competent authorities to directly request the necessary electronic data for prosecution and proceedings from service providers who would have special legal representatives in charge of those services. The EU regulations on electronic evidence, which are expected to be adopted soon, mark a new stage in the development of judicial cooperation, within the EU and beyond, because they represent a segment in the general effort to prevent dangerous forms of crime committed in that area or by using computers. It will be increasingly difficult to fit into these requirements, if our regulations are not improved in time.

REFERENCES

1. Bakowski, P. & Vornova, S. (2020). Electronic Evidence in Criminal Matters. European Parliamentary Research Service. https://www.europarl.europa.eu/thinktank/nl/document.html?reference=EPRS_BRI%282021%29690522. Accessed on August 20, 2021.
2. Biasiotti, M-A. (2017). A proposed electronic evidence exchange across the European Union. *Digital Evidence and Electronic Signature Law Review* 14(1): 1 –12. <https://journals.sas.ac.uk/deeslr/article/view/2337/2289>- Accessed on August 20, 2021.
3. CETS 185 – Explanatory Report to the Convention on Cybercrime (200.1). <https://rm.coe.int/16800cce5b>. Accessed on August 20, 2021.
4. CoE Assessment report (2018). Assessment report on the acquisition and use of electronic evidence in criminal proceedings under domestic law in the countries of Southeast Europe and Turkey, version of March 5, 2018. <https://rm.coe.int/3156-52-iproceeds-electronic-evidence-report-serbian/16807bdf3>. Accessed on August 20, 2021. EC COM (2020) 710 final.
5. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Region, Digitalisation of justice in the European Union. A toolbox of opportunities, Brussels, December 2, 2020. https://ec.europa.eu/info/sites/default/files/communication_digitalisation_en.pdf. Accessed on August 20, 2021.
6. Council of Europe, Convention on Cybercrime (CETS No 185), Budapest, November 23, 2001. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680081561>. Accessed on August 20, 2021.



7. Council of Europe, Cybercrime Division (2020), Summary report, Meeting of the 247 points of contact (CP) of the Budapest Convention on Cybercrime, November 2020. <https://www.coe.int/en/web/cybercrime/all-reports>. Accessed on August 20, 2021.
8. Charter of Fundamental Rights of the European Union (2016). *OJ C 202*, 7. 6. 2016, pp. 403–403. ELI: http://data.europa.eu/eli/treaty/char_2016/art_47/oj. Accessed on August 20, 2021.
9. Criminal Procedure Code – CPC, *Official Gazette of the Republic of Serbia*, Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – US decision and 62/2021 – US decision.
10. Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, Strasbourg, April 17, 2018, COM(2018) 226 final, 2018/0107(COD), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A226%3AFIN>, Accessed on August 20, 2021.
11. Duranti, L., Rogers C. & Sheppard, A. (2020). Electronic Records and the Law of Evidence in Canada: The Uniform Electronic Evidence Act Twelve Years Later. *Archivaria*, 70, 95–124, <https://archivaria.ca/index.php/archivaria/article/view/13296>. Accessed on August 20, 2021.
12. EC COM (2018) 225. Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters. April 17, 2018. 2018/0108 (COD).
13. EC COM (2018) 226. Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings. April 17, 2018. 2018/0107(COD).
14. EC COM (2020) 710 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Region, Digitalisation of justice in the European Union A toolbox of opportunities, Brussels, December 2, 2020. https://ec.europa.eu/info/sites/default/files/communication_digitalisation_en.pdf. Accessed on August 20, 2021.
15. EC ECEPRS: BRI (2021) 690522_EN. Briefing EU Legislation in Progress, <https://www.europarl.europa.eu/etudes/BRIE>. Accessed on August 20, 2021.
16. EC COM (2020) 710 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Digitalisation of justice in the European Union, a toolbox of opportunities Brussels, December 2, 2020, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:710:FIN>. Accessed on August 20, 2021.
17. Enhanced Cooperation and Disclosure of Electronic Evidence: Towards a New Protocol to the Budapest Convention on Cybercrime, <https://www.coe.int/en/web/cybercrime/enhanced-cooperation-and-disclosure-of-electronic-evidence-towards-a-new-protocol-to-the-budapest-convention>. Accessed on August 20, 2021.
18. Europol (2018). Internet Organised Crime threat Assessment (IOCTA), <https://www.europol.europa.eu/activities-services/main-reports/internet-organised-crime-threat-assessment-iocta-2018>. Accessed on August 20, 2021.
19. Europol (2020). Internet Organised Crime threat Assessment (IOCTA), <https://www.europol.europa.eu/activities-services/main-reports/internet-organised-crime-threat-assessment-iocta-2020>. Accessed on August 20, 2021.
20. General Data Protection Regulation (2016). Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the



- processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. OJ L 119, May 4, 2016, pp. 1–88. ELI: <http://data.europa.eu/eli/reg/2016/679/oj>. Accessed on August 20, 2021.
21. Komlen Nikolić, L., Gvozdenović, R., Radulović, S., Milosavljević, A., Jerković, R., Živković, V., Živanović, S., Reljanović, M. & Aleksić, I. (2010). *Suzbijanje visokotehnološkog kriminala*. Beograd: Association of Public Prosecutors and Deputy Public Prosecutors.
 22. Law on Ratification of the Convention on High-Tech Crime, *Official Gazette of the Republic of Serbia*, No. 19/2009.
 23. Law on Ratification of the United Nations Convention against Transnational Organized Crime and Additional Protocols, *Official Gazette of the Federal Republic of Yugoslavia – International Agreements*, No. 6/2001.
 24. Law on Electronic Communication, *Official Gazette of the Republic of Serbia*, Nos. 44/2010, 60/2013 – decision of the Constitutional Court, 62/2014 and 95/2018 – other law.
 25. Law on Electronic Document, Electronic Identification and Trust Services in Electronic Business – ZED, *Official Gazette of the Republic of Serbia*, Nos. 94/17, 52/2021.
 26. Law on Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption, *Official Gazette of Republic of Serbia*, Nos. 94/2016, 87/2018 – other law.
 27. Model Law of Electronic Evidence 2017. Office of Civil and Criminal Justice Reform.: The Commonwealth. https://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_7_ROL_Model_Bill_Electronic_Evidence_0.pdf. Accessed on August 20, 2021.
 28. Press release, January 12, 2021. Darkmarket: world's largest illegal dark web marketplace taken down, press release, January 12, 2021. <https://www.europol.europa.eu/newsroom/news/darkmarket-worlds-largest-illegal-dark-web-marketplace-taken-down>. Accessed on January 20, 2020.
 29. Stamenković, B., Balota, A., Pavličić, V., Paunović, B. & Backović, J. (2014). *Visokotehnološki kriminal*, A practical guide to contemporary criminal law and case studies. Podgorica: OSCE Mission to Montenegro.
 30. Stamenković, B., Živanović, S., Paunović, B. & Stevanović, I. (2017) Vodič za sudije i tužioce na temu visokotehnološkog kriminala i zaštite maloletnih lica u Srbiji. Belgrade, Save the Children. A practical guide to modern criminal law and practical examples. Podgorica: OSCE Mission to Montenegro.
 31. Tinoco-Pastrana, Á (2020). The Proposal on Electronic Evidence in the European Union. *EuCLR European Criminal Law Review* 1, 46–50, <https://doi.org/10.30709/eucrim-2020-004> /. Accessed on August 20, 2021.
 32. Tropina, T. (2012). The Evolving Structure of Online Criminality. How Cybercrime is Getting Organised. *EUCRIM* 4/2012, 158–165, <https://www.corteidh.or.cr/tablas/r15111.pdf>. Accessed on August 20, 2021.
 33. T-CY Cloud Evidence Group, Criminal justice access to data in the cloud: cooperation with “foreign” service providers, May 3, 2016. <https://www.coe.int/en/web/cybercrime/ceg>. Accessed on August 20, 2021.



THE ROLE OF CRIMINAL LAW IN TRADE SECRET PROTECTION

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Abstract: The protection of confidential business information is one of crucial elements of corporate security policy. It is also an important tool for securing corporate reputation and market competitiveness. Trade secrets have legal protection through norms of Penal, Civil, Trade and Labor law. This paper focuses on the role of Criminal Law in prevention and reaction in cases of trade secret abuse. The author presents and analyses the provisions of Serbian Criminal Code that regulates trade secret breach. He also considers relations between different forms of liability for trade secret misuse in Serbian legal system. Special attention is given to the problem of poor court practice since criminal sanctions are very rarely imposed for trade secret breaches.

Keywords: The Role of Criminal Law, Trade Secret, EU Directive 2016/943.

INTRODUCTION

The aim of this paper is to provide theoretical analyses of the provisions of Serbian Criminal Code concerning trade secret disclosure. Although trade secrets are the subject of multiple legal protection (through Civil Law, with its sub-branches: Labour and Trade Law), Criminal Law, as ultima ratio, have a distinctive role, which should be carefully examined. The concept of trade secret in Serbian legislation was built on the ground provided by international treaties, so the analyses needs to consider their relevant provisions, and also the definitions of trade secret in other domestic legislative acts. The article is intended to achieve mentioned research goals. In the first part, we shall briefly present the establishment and main characteristics of the trade secret concept and point to two international legal documents that established the international concept of trade secret, which is now widely accepted. The central part of the article will be dedicated to relevant provisions of Serbian Criminal Code. Subjective and objective elements of criminal offense of trade secret disclosure will be thoroughly examined. In the conclusion, we shall try to provide a well based and overall assessment of these provisions and study the reasons for lack of court practise.

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THE CONCEPT OF TRADE SECRET AND RELEVANT ACTS OF INTERNATIONAL LAW

The criminal offense of trade secret breach was introduced in modern Criminal Codes in order to protect the security of confidential business data, which is of great importance in the contemporary market economy. Trade secrets gained legal protection after other intellectual property rights, first in Anglo-American law. First case in which the court provided legal protection to trade secrets is considered to be *Peabody vs. Norfolk*, back in 1868 (although *Newbery v. James* in 1817 was the first case in which the trade secret was debated), while with the adoption of the American Restatements of Tort², in 1939, the protection of trade secrets acquired a legislative character. (Jameison, 1993: 521; Jovičić, 2018: 8).

The formula for making perhaps the most famous non-alcoholic beverage in the world - Coca-Cola, is not protected as a patent, but has been kept a trade secret for decades. A trade secret may remain permanently unknown to other economic entities, while the patent becomes publicly available after a certain period of time (depending on national legislation), provided that the patent holder gives permission for its use and is entitled to monetary compensation. A trade secret lasts as long as its holder can ensure secrecy. (Mandić, Putnik, Milošević, 2017; Jovičić, 2018: 12, 13).

Although a trade secret can remain hidden indefinitely, if another business entity manages to independently develop an identical formula, the holder of the trade secret does not enjoy protection as a patent owner and the entity that discovered the formula by independent research has the right to use the formula and start its own production. (Jovičić, 2018: 10, 11). This fact makes trade secret protection very important. (Mandić, Putnik, Milošević, 2017).

A trade secret provides a comparative market advantage only as long as it is hidden from competition. Trade secret breach can cause substantial economic harm to the holder (e.g. disclosure of a formula, recipe, method, market plan or strategy, results of a study or research, etc.). In addition to innovations, formulas, recipes, research, etc., examples of trade secrets include: estimated value of public procurement, the amount of income of individual employees, the content of corporate security risk assessment etc. (Milošević, Mladenović, 2017). In the information age trade secrets are obviously becoming more important. (Peterson, 1997).

Important instrument of International Law concerning trade secret was adopted by the World Trade Organization, in 1994 - The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

(Available at: https://www.zis.gov.rs/upload/documents/pdf_sr/pdf/trips.pdf; last retrieved: 30.06.2021).

Next significant act was introduced by European Union: Directive of the European Parliament and of the Council on the protection on undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. (Official Journal of the European Union, L 157/1; available at: <https://eur-lex.europa.eu/eli/dir/2016/943/oj>; last retrieved: 25. 08.2021). Those documents strengthened (practically established) the international legal concept of trade secrets. The previous development of trade secret concepts in different legislatures was not always coherent, and is even characterized by some authors as sporadic. (Hilton, 1990: 287).

² It defines trade secret as: “any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it.” (cited according to: Wingo, 1997: 196).



TRADE SECRET DISCLOSURE IN SERBIAN CRIMINAL CODE

This criminal offense, stipulated in the Article 240 of the Serbian Criminal Code (Serbian Criminal Code, 2005), has three forms - basic, aggravated (qualified) and privileged. It is classified as a crime against the economy. (Stojanović, 2018; Delić, 2021).

The basic form of disclosing a trade secret is present when the perpetrator unauthorisedly discloses, hands over or makes available (in another way) trade secret data or obtains the same data with the intention of handing them over to an unauthorized person. The Code stipulates prison sentence from six months to five years.

The subject of this crime is a trade secret. The concept of trade secret is defined in several domestic regulations: the Law on the Protection of Trade Secret (Law on the Protection of Trade Secret, 2011; Law on the Protection of Trade Secret, 2021), the Law on Companies (Law on Companies, 2011) and the Criminal Code itself.

The Criminal Code defines it in Article 240, within paragraph 4: data and documents that have been declared a trade secret by law, other regulation or decision of a competent body passed on the basis of law, the disclosure of which would cause or could cause harmful consequences for a business entity. Given that this definition refers to other laws ("... data and documents that have been declared a trade secret by law, other regulation or decision of the competent authority issued on the basis of the law"), it is important to know the legal definition of trade secret in those laws. (Mandić, Putnik, Milošević, 2017: 302). In other words, this provision is sort of a blanket norm and its true meaning cannot be determined without examination of the law on which it refers.

Bearing in mind that the definition of trade secrets exists in two other legal acts – Law on Companies and Law on Trade secret Protection, the question is which one of them is of crucial significance. However, since one of them is a special law (*lex specialis*) dedicated exclusively to the matter of trade secrets, we will focus on the Law on Protection of Trade Secret.³

Still, we also have to stress that this Law was substantially changed ten years after it came into force. The reason for legislative change lies in the need of harmonising Serbian law with the Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

The Article 4 paragraph 1 of the Law/2011 states: "For the purposes of this Law, a trade secret is considered to be any information that has commercial value because it is not generally known or available to third parties that could be of economic benefit by its use or disclosure, and which is protected by its holder by appropriate measures, in accordance with the law, business policy, contractual obligations or appropriate standards in order to preserve its secrecy, and the disclosure of which to a third party could harm the holder of a trade secret."⁴

3 The Law on Companies provides definition of trade secret in Article 72.3. This definition matches criteria established by the Law on Trade Secret Protection and the essential elements of those legal definitions are the same, so there is no need to analyze it separately.

4 However, in Article 4.2.2, there is a provision that, at first sight, questions this conclusion, because it states: "other information that has been declared a trade secret by a special law, other regulation or act of a legal entity is also considered a trade secret". But, the act of the legal entity that provision mentions also has to be harmonized with the Law, so the conclusion stands – information that does not have the characteristics described in the previous paragraph cannot be considered a trade secret.



New Law on Protection of Trade Secret was introduced in 2021 (Law on Protection of Trade Secret, 2021; further: Law/21). The definition of trade secrets is very similar to the previous version. Although the legislator uses different style and formulations, they maintained the essential characteristics of the former legislative determination. Law/21, in Article 2.2.1, also stipulates three basic requirements which data has to meet in order to deserve the designation „trade secret“: 1. it must not be generally known or easily available to those who, through their regular activities, get in touch with that sort of information; 2. the data needs to have commercial value due to its secrecy; 3. a holder of trade secrets is obliged to take reasonable measures in order to adequately protect the data. (Law on the Protection of Trade Secret, 2021).

Both definitions reveal essential elements of a trade secret: it is information that has a commercial (market, economic value) precisely because it is hidden, i.e. inaccessible to a wider circle of persons; the knowledge about it by unauthorized person potentially brings economic benefits to the perpetrator and the holder of a trade secret has taken protective measures - which means that it can enjoy criminal protection only if the holder has taken reasonable measures to remain its secrecy. (Jovicic, 2018: 11). It is of crucial importance, therefore, that the holder takes appropriate measures (physical-technical, personnel, organizational, personal) to protect data (Mandić, Putnik, Milošević, 2017). U.S. case law confirms that simple business precautions are not sufficient. It is necessary for the holder to take more serious measures, to show that this kind of data is kept separately and more securely in relation to other business data. (Jovicic, 2018: 12). Therefore, the subject of the criminal offense can only be the information that meets the requirements of the Law. (Mandić, Putnik, Milošević, 2017: 302).⁵

ACTUS REUS OF OFFENSE

The actus reus of this crime is alternatively determined. The first form of action (actus reus) of the offense is to reveal a trade secret to an unauthorised person. Since the essential feature of a trade secret is exclusivity, it is only available to a narrow, limited circle of people. Any disclosure of information to a person outside that circle constitutes a breach of professional secrecy. For example, if a technologist from food company A, transfers to the director of food company B a recipe for making a special cured meat product, characteristic exclusively for company A. It is clear that a representative of a competing firm can have an important economic benefit from the knowledge gained, just as firm A has obvious harm. However, it is not necessary for the damage to occur and for the unauthorised person to benefit. Only revealing a secret to an unauthorised person is a completed criminal offense, and possible damage can only be an aggravating circumstance. Revealing (disclosure) of trade secrets can be done in a variety of ways. The legislator lists communication (orally, in writing, electronically, etc.), submis-

⁵ It is important to notice that previous Law on Trade Secret Protection introduced the so-called illegal trade secret, thus determining which data cannot be labeled as secret. Article 3 of the Law/2011 did not allow information to be classified as secret if it was made secret for the purpose of concealing a criminal offense, abuse of official position, exceeding of authority or other illegal conduct. Also, information that has to be made public by provisions of special laws cannot be proclaimed a trade secret (e.g. annual financial reports of legal entities must be publicly available on the website of the Business Registers Agency, and cannot maintain secrecy). However, the Law/21 failed to explicitly determine the concept of illegal trade secret, although it provided the indirect definition through provisions of Article 17.1, which explains the exceptions of the implementation of the Law. The approach is different in comparison with Law/11 – the legislator does not forbid of some sort of data to be labeled as trade secret but stipulates that the person who reveals it will not be subject of sanctions or other legal measures and actions provided by the Law.



sion (by physically submitting a document containing data, e.g. a register with all research data and its results, or a prototype, sample, etc.) and making it available otherwise (a general clause introduced in order not to miss some form of revealing a trade secret that cannot be classified as disclosure or surrender, e.g. giving the key to a metal locker containing trade secret documents or giving a password for electronic access to a protected data).

The second (alternative) form of the offense exists when the perpetrator collects the trade secret data with the purpose of handing it over to unauthorised person. For example, person A asks his relative, person B, employed by CC, to collect market research data, which the company keeps as a trade secret. Person B did it unnoticed. The act could also be committed by a computer hacker, who would decipher electronic protection and get someone's trade secret, if they intends to hand over such data to an unauthorised person, i.e. if he does so with mentioned intention. (Almeling, 2012). This sort of breaching a trade secret is (in literature) sometimes also called betrayal of a trade secret. It is interesting that the name of this criminal act in the former Criminal Code of SR Serbia was “betrayal and obtaining a trade secret”, on which this interpretation is based. (Sržentić et al., 1986: 459). It should be borne in mind that the second alternative action is, by its legal nature, a preparatory action, which is elevated to the level of the act of execution by the will of the legislator. It is not necessary for the perpetrator to actually hand over trade secret data to an uninvited person. The offense is completed when he collected the data with the appropriate intention. The fact that data was actually handed over is considered aggravating circumstances.

The perpetrator of the offense is one who is authorised to keep the data or the document in control. He is considered to be in control of the document/data even if he doesn't have the mandate to be acquainted with the content of the document. It is enough for him to be authorised to control the access to documents. These are persons to whom a trade secret has been entrusted in some way, but without the authority to disclose it to other, uninvited persons. First, these are people who know the content of a trade secret (e.g. one of the technologists or engineers in the company, who participates in the preparation of the recipe or conducting the study). Then, persons who do not know the content of the trade secret, but are entrusted with a document containing the data.

A document is a data carrier (e.g. paper, electronic file, external memory, disk, etc.). (Mandić, Putnik, Milošević, 2017: 303). For example, the document is entrusted to a courier or archivist. Finally, the perpetrators may also be persons authorized to indirectly keep documents that contain trade secrets - e.g. those who secure the room or other enclosed space in which it is located. So, the perpetrator is the person who is in legal control of the information/document or in the legal control of access to it. This conclusion stands without dispute for the first form of actus reus (disclosure of trade secret). But in the case of the alternative form of offense action (acquiring data with the purpose of handing it over to an uninvited person) one can argue that even an unauthorised person, who accidentally has the opportunity to access the data/document, can be the perpetrator of the offense. Following that reasoning, we can conclude the perpetrator is the person who controls (or can achieve control of) the data/document in fact, legally or illegally. In other words, this form of offense can be performed by person that abuses the factual circumstances in order to illegally obtain data and then hands it over to another uninvited person; and also by the authorised person who exceeds or misuse their authority with intent to collect and hand over data to unauthorised person. This could be performed in the manner of social engineering. (Mandić, Putnik, Milošević, 2017a). The circle of potential perpetrators, if we accept this interpretation, would be significantly wider than in the case of the first alternative action.

However, this conclusion is not on solid ground, due to the fact that the legislator did not explicitly state the first alternative action is performed exclusively by an authorized person who reveals data in



excess of the authorization, while the second action is performed by authorised or uninvited person. Moreover, the legal title of the offense (disclosure of trade secret) and the formulation of the provision implied that the perpetrator is exclusively the person in legal control of access to data. Court practice (which is poor) supports this view. In the case of banking secret breach, the court states: „the defendant unauthorisedly submitted data representing the banking secret to R.Đ. and an excerpt on the balance on four accounts kept in the name of V.J. - number ..., whose owner is appointed VJ, account number ..., technical account for functional operations of Branch P, account number ..., technical account for functional operations of Branch K. and account number ..., technical account for the functional business of Branch V., which R.Đ. announced in the television show “T.” on Television B. A.“ The defendant was a bank clerk, while the person that published the secret data in the TV show had no criminal charges. (Presuda Osnovnog suda u Nišu K 65/14, 2015).

However, this leads us to the next conclusion – only illegal disclosure of trade secrets is a criminal offense in our law, while unlawful acquisition of data by unauthorised person is not under the scope of Article 240 of Criminal Code. If someone, for example, uses instruments of social engineering to acquire trade secret data, his conduct could not be qualified as a criminal offense under this Article. Only breach of trust and duty by a person who has legal control of access to data was in the focus of our legislator. Unlawful acquisition of trade secret data was not characterised as socially dangerous behaviour, although, actually, it is clearly not less harmful than disclosure of data. The same conclusion stands for illegal use of trade secret data, since the unauthorised person cannot be the perpetrator of this offense.

According to that, if someone accidentally comes into possession of a trade secret data and then uses it without authorisation (e.g. found a folder with papers containing test results), his conduct is not under the scope of Criminal Law. Of course, the described act could be a violation of law (depending on the circumstances, civil, commercial or labour law sanctions could be imposed). One should also keep in mind the Article 3 of the Law/21, that allows third parties to acquire, use and reveal trade secrets in a legal way (id by independent discovery or creation). In this case, the conduct would be lawful. (Bone, 1998).

As for the liability of the unauthorised person who persuaded the perpetrator to perform an offense or aided him in it, according to the provisions of the general part of the Criminal Law, the same will be considered an accomplice. (Stojanović, 2018; Delić, 2021). On the other hand, if that person did not previously persuade the perpetrator to collect data or helped him, but only used the data that were disclosed, the issue of liability would be very complex, and there would probably be no place for imposing criminal, but possibly other legal sanctions.

SUBJECTIVE ELEMENTS OF THE OFFENSE (MENS REA)

Disclosure of a trade secret is always performed with intent. The intention is to acquaint the unauthorised person with the content of the trade secret. The fact that the legislator requires the determination of particular intention unequivocally means that the act can be committed only with direct intent. Although this intention has to be determined only in the case of second alternative offense action, the nature of this crime clearly leads to the conclusion that the perpetrator acts with direct intent in both cases. Qualified form of disclosing a trade secret exists if the perpetrator commits the act out of greed or if the disclosed data was particularly confidential. The legislature prescribed a sentence of two to ten years in prison and also a fine (cumulatively). Greed is an incentive to acquire illegal material gain.



It is not necessary that the gain was actually achieved. It is sufficient that the perpetrator disclosed the trade secret with the incentive to gain benefits (e.g. he was promised money or employment).

Particularly confidential data are those from which disclosure the holder of a trade secret could have significant damage. However, in order to conclude that some trade secret information was particularly confidential in relation to others, it is necessary for the holder to treat it with a higher degree of protection and to take stricter measures compared to one applied to protect other trade secret information. (Mandić, Putnik, Milošević, 2017: 303). In the previous Criminal Code of SR Serbia (Criminal Code of SR Serbia, 1977) one of the qualifying circumstances was the disclosure of a trade secret for the purpose of its use abroad. Judgments from earlier court practice are also cited in the literature: „the perpetrator systematically provided foreign companies with data on the needs of construction, expansion or reconstruction of some of our companies“, as well as: „the perpetrator informed a foreign company that one of our companies does not intend to procure a certain type of machine“. (Sržentić et al., 1986: 459, 460).

Although these verdicts are a consequence of a somewhat broader definition of trade secrets in the previous legislation, we consider it more adequate in comparison with the present solution. Today, Serbian legislator no longer incriminates disclosing a trade secret with an element of foreignness, but practically equates it with disclosing a secret in the domestic environment.

Industrial espionage can be an important factor of endangering the stability of economic systems. However, Serbian legislation lacks adequate criminal law protection from this phenomenon.

PRIVILEGED FORM OF OFFENSE

Disclosure of a trade secret is also criminalized when it was done out of negligence. The existence of a privileged form is of great importance, because it influences the prevention of crime through the strengthening of security culture. A negligent form will exist when, for example, one of the employees does not adhere to the prescribed company procedures and protection standards, lightly holding that the data will not fall into the hands of an uninvited person or that he will be able to prevent it, and because of this misconduct, trade secret data is disclosed by unauthorized person. The same will be the case when the perpetrator did not want or was not aware that their actions could lead to a violation of trade secrets, but they were obliged and could have foreseen that, based on his personal characteristics and circumstances. For example, when he leaves written down parameters for electronic access to data on his office desk (unprotected from “other people’s views”), not thinking that someone could notice and use them. A prison sentence for negligence form of offense is of up to three years of prison. It is not clear why legislator did not prescribe fines as an alternative sanction, considering the nature of this crime. Although the existence of a negligent form of disclosing a trade secret is a sign of the importance that the legislator attaches to its protection, the problem of delimiting the perpetrator’s liability under the Criminal Code and the Law on the Protection of Trade Secret arises here as well.



TRADE SECRET DISCLOSURE IN OTHER BRANCHES OF PENAL LAW

The breach of trade secret is sanctioned by provisions of Criminal, Commercial and Labour law. This paper aims to analyze criminal liability. However, the relation between criminal and liabilities stipulated in other laws is sometimes complex and challenging.

The relationship between civil and criminal liability is relatively less complex, as criminal and civil sanctions can be imposed in parallel. The Law on Trade Secret Protection introduces civil liability for the acts of trade secret illegal acquisition, use and disclosure, but also proclaims those acts to be misdemeanors and commercial offenses (the category of illegal conduct that was exclusively established in former Yugoslavia and still exists in Serbia). (Đorđević, 2013). The potential problem lies in the relation between criminal and other penal liability (misdemeanor and commercial offense).

The Article 21.1 of the Law on Trade Secret Protection (Law/21) introduced the commercial offense of unlawful acquisition, use or disclosure of trade secret data. The prescribed fine for a legal person is from 100.000 up to 3.000.000 Serbian dinars. The fine for the responsible person in the legal entity is envisaged in the amount of 50,000 to 200,000 Serbian dinars. If a natural person illegally obtains, uses or discovers a trade secret, the Article 21.4 qualifies that conduct as a misdemeanor and proscribes a fine from 20.000 up to 150.000 Serbian dinars. For the same misdemeanor, the entrepreneur can be convicted to fine from 50.000 up to 500.000 Serbian dinars. The previous Law also envisaged fines for breach of trade secrets.

The unlawful acquisition, use or disclosure of trade secret data is defined in Article 4 of the Law/21. The Article 4.1 defines unlawful acquisition: „unauthorized access, misappropriation or copying of documents, objects, materials, substances or electronic files that are under the legal control of the holder of a trade secret, and contain a trade secret, or a trade secret can be derived from them, or other conduct which, in the given circumstances, is considered to be contrary to good business practice“.

According to Article 4.2 of Law/21, use and disclosure is unlawful if: „the person (previously) obtained a trade secret illegally; violated the confidentiality agreement or other obligation related to the prohibition of disclosure of trade secrets; or violated a contractual or other obligation limiting the use of trade secrets“. Even negligence is legal ground for liability, because Article 4.3 of the Law/21, clearly states that acquisition, use and disclosure are illegal „if the person at the time of acquisition, use or disclosure knew or had to know in the given circumstances that the trade secret was obtained directly or indirectly from another person who illegally used or disclosed the trade secret“.

The same conclusion stands for „production, offering or placing on the market of infringing goods..“, as a form of illegal use of trade secrets. Those acts are also considered unlawful if „the person who performed the stated activities knew or in the given circumstances had to know that the trade secret was used illegally“ (Article 4.4).

CONCLUSION

The Role of Criminal Law in Trade Secret Protection is significant in contemporary market economy. Although Serbian Criminal Code envisaged the criminal offense of trade secret disclosure, long before Law on Trade Secret Protection was even adopted, there are certain shortcomings of the provision of Article 240. First of all, the act of acquiring a trade secret is not criminalized, although the level of its



social danger is relatively high. Second, trade secret disclosure with an element of foreignness is not envisaged as a separate offense (industrial espionage) or aggravated form of this offense.

Other downsides of Criminal Law protection of trade secrets in Serbia are the consequence of the systemic inconsistency of the relevant laws.

The Law on Trade Secret Protection qualifies trade secret disclosure (and also unlawful acquisition and use) as a misdemeanor or commercial offense (depending on the category of perpetrator – individual, entrepreneur or legal person). Thus, the same conduct can be qualified differently by those two laws - as a crime, misdemeanor or commercial offense. The constitutional right not to be tried or punished twice (the non bis in idem principle) is guaranteed and it prohibits double jeopardy. In accordance with that principle, a person cannot be trialed for the same conduct as a misdemeanor, commercial offense and criminal offense. Having in mind that three different type of courts (misdemeanor, commercial and courts of general jurisdiction - criminal departments) could have jurisdiction for misuse of trade secret (depending on which of the laws is reported to be breached), practical problems with implementation of legal norms are obvious and naturally arise from mentioned inconsistency of laws. Also, the fact that unlawful acquisition and use of trade secret data is a misdemeanor and not a criminal offense, while disclosure can be qualified as both, clearly demonstrates lack of consistent and rational legislative approach. This fact is particularly striking if one compares proscribed sanctions for misdemeanor and criminal offense.

The natural consequence of systemic inconsistency of the relevant laws is poor court practise. Legal framework is not solid and coherent enough. Apart from that, the criminal court cases in this matter are rare because Civil Law protection seems like a preferable option (although court practise is not developed here, either).

However, the responsibility is also on the holders of trade secrets, who do not take protective measures, and later cannot prove that the revealed information was a trade secret. (Mandić, Putnik, Milošević, 2017). Corporate security culture is underdeveloped, and legal entities usually fail to create and implement adequate internal regulation and provide legal, organisational, personal, technical and other reasonable measures to prevent trade secret breach and demonstrate, in an eventual court case, that they have performed all necessary steps for data protection.

REFERENCES

1. Almeling, D. (2012). „Seven reasons why trade secrets are increasingly important“.
2. *Berkeley Technology Law Journal*, Vol. 27, pp. 1091-1117.
3. Bone, R. (1998). „A New Look at Trade Secrets Law: Doctrine in Search of Justification“. *California Law Review*, Vol. 86, 2/1998, pp. 243-270.
4. Criminal Code of the Republic of Serbia, 2005 (Krivični zakonik Republike Srbije, „Sl. Glasnik RS“, br. 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16, 35/19)
5. Criminal Code of the SR Serbia, (Krivični zakon Republike Srbije, „Službeni glasnik SRS“, br. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89 i 42/89, „Službenik glasnik RS“, br. 21/90, 16/90, 26/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02, 80/02, 39/03 i 67/03)
6. Deliće, N. (2021). *Krivično pravo – posebni deo*. Beograd: Pravni fakultet Univerziteta u Beogradu.



7. Đorđević, Đ. (2013). *Prekršajno pravo sa osnovama privrednoprestupnog prava*. Beograd: Kriminalističko-policijska akademija.
8. Hilton, E. (1990). What Sort of Improper Conduct Constitutes Misappropriation of a Trade Secret. *30 IDEA Journal of Law and Technology*.
9. Jamieson, K. „Just Deserts: A Model to Harmonize Trade Secret Injunctions“;
10. *Nebraska Law Review*, Vol. 72, 2/1993.
11. Jovičić, K. (2018). Poslovne tajne: određenje i osnovi zaštite. *Strani pravni život*, 62 (1), pp. 7 – 19.
12. Law on Protection of Trade Secret of the Republic of Serbia, 2011 (Zakon o zaštiti poslovne tajne, „Sl.glasnik RS“, broj 72/11)
13. Law on Protection of Trade Secret of the Republic of Serbia, 2021 (Zakon o zaštiti poslovne tajne, „Sl.glasnik RS“, broj 53/21)
14. Law on Companies of the Republic of Serbia, 2011 (Zakon o privrednim društvima, „Sl. Glasnik RS“, br. 36/11, 99/11, 83/14 - dr. zakon, 5/15, 44/18, 95/18, 91/19)
15. Mandić, G., Putnik, N., Milošević, M. (2017). *Zaštita podataka i socijalni inženjering – pravni, organizacioni i bezbednosni aspekti*. Beograd: Univerzitet u Beogradu-Fakultet bezbednosti.
16. Mandić, G., Putnik, N., Milošević, M. (2017a). Contemporary Deception Techniques: Social Engineering – Semantic, Phenomenological and Security Aspects. In: Bošković, M. (Ed.), *Security Risks: Assessment, Management and Current Challenges* (pp.111-127). New York: Nova Science Publisher, Inc.
17. Milošević, M., Mladenović, M. (2017). Upravljanje pravnim rizicima kao element korporativne bezbednosne politike. *Srpska politička misao*, broj 3/2017, god. 24., vol. 57., pp. 289-304.
18. Peterson, G. (1998). *Trade Secrets Protection in an Information Age*. Glasser Legal Works.
19. Presuda Osnovnog suda u Nišu K 65/14, od 23.04.2014. godine.
20. Srzentić, N., Stajić, A., Kraus, B., Lazarević, Lj., Đorđević, M. (1986). *Komentar krivičnih zakona SR Srbije, SAP Kosova i SAP Vojvodine*. Beograd: Savremena administracija.
21. Stojanović, Z. (2018). *Komentar Krivičnog zakonika*. Beograd: Službeni glasnik.
22. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), World Trade Organisation, 1994.
23. Available at: https://www.zis.gov.rs/upload/documents/pdf_sr/pdf/trips.pdf (last retrieved: 30.06.2021).
24. The Directive of the European Parliament and of the Council on the protection on undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. (Official Journal of the European Union, L 157/1; available at: <https://eur-lex.europa.eu/eli/dir/2016/943/oj>; last retrieved: 25. 08. 2021).
25. Wingo, H. (1997). Dumpster Diving and the Ethical Blindspot of Trade Secret Law. *Yale Law & Policy Review*, Vol. 16 (195), pp. 195-219.



BULK SURVEILLANCE BETWEEN NATIONAL SECURITY AND RIGHT TO PRIVACY

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Abstract: An author deals with the bulk surveillance and its relationship with right to privacy. Intensive ICT development enables various modern techniques and methods of crime investigation but also results in some new types of criminal offences that could be committed using ICT. Expansion of the fundamental rights and their protection, especially in Europe, raised global awareness about right to privacy and the need to protect it. Having that in mind it seems that the main question that should be answered by legislator is: Where is the borderline between the right to privacy and the public interest to investigate or prevent crime and collect evidence. European Court of Human Rights deeply examined this issue and developed criteria earlier established in famous judgement in a case Weber and Saravia. States enjoyed a wide margin of appreciation in deciding what type of interception regime was necessary to protect national security, but considered that the discretion afforded to states in operating an interception regime would necessarily be narrower. The ECtHR had identified six “minimum safeguards” which should be set out in law to avoid abuses of power: the nature of offences which may give rise to an interception order, a definition of the categories of people liable to have their communications intercepted, a limit on the duration of interception, the procedure to be followed for examining, using and storing the data obtained, the precautions to be taken when communicating the data to other parties, and the circumstances in which intercepted data may or must be erased or destroyed. The author in this paper explains international legal instrument that authorize surveillance of communication as well as its boundaries.

Keywords: bulk surveillance, the right to privacy, national security, ECtHR’s jurisprudence

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INTRODUCTION

The relationship between technology and society has been a notoriously complex and slippery area of scholarship for decades. In the modern time it is getting a new form (Kiernan & Mueller, 2021: 22). Besides numerous changes, the technology changed the way we relate to another and to government (Leavens, 2015: 709). George Orwell's distant and dark 1984 would probably agree that one of the most effective ways in which an oppressive government can eliminate the personal liberties of its citizens is to deprive them of their privacy (Weber, 1971; Turanjanin, 2020: 268). In ideal world, government surveillance has to be driven by public security and enforcement interests and checked by individual privacy rights, but in recent years this balance has been gradually shifting as a result of growing national and global unrest, developing surveillance capabilities, and the erosion of privacy protections (Yadin, 2017: 709). Our communications and activities today routinely leave rich digital traces that can be collected, analyzed, and stored at low cost (Wong, 2015). Government surveillance of cyberspace is, unfortunately, unreasonably extensive and constant, mostly unhindered by legal restrictions; surveillance of physical spaces is not as prevalent or as unrestrained (Yadin, 2017: 709). In the United States, 11 September 2001 significantly altered the rules of privacy (Heymann, 2016: 428), while the globalisation of crime and terrorism justified the creation of an *Orwellian state* (Robis, 2014: 203), but we could say that is a problem in the rest of the world that is going toward totalitarian society (Nomikos, 2017; Jacobs, 2009). Although surveillance is not a new phenomenon, mass surveillance is (Franks, 2017). In the United States, surveillance that people cannot feasibly escape receives more Fourth Amendment scrutiny, while surveillance that can be avoided receives less, or none (Tokson, 2021).

Tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on law that is particularly precise (Jayawickrama, 2002: 629). Also, property rights are not excluded (Woodburn, 2016). This is, in addition, a very sensitive area due to the protection of the data (Norris, Hert, L'Hoiry, & Gletta, 2017; Flaherty, 1989: 371-377).² So, societies directed by the rule of law consider that governments should only gather information about us when it is useful to reach a goal more important than our personal right to be a manager of what gets known about us (Moonen, 2010: 98). Significant contribution in this field arising from the European Court of Human Rights (hereinafter: the ECtHR) standpoint (more than 20 years old) that legislators should clearly recognize circle of subjects who could be exposed to this measure but also nature (types) of crime where it is applicable; time limitations of its application; conditions for taking the record on the measure; methods of controlling these records and reasons for destroying collected material.³ These standpoints could be seen as the steps towards unification, which is the milestone and essential starting point of the idea to establish a united Europe. Interception of communications is a very complex issue (Rona & Aarons, 2016: 512) and the ECtHR has, from the *Leander* case onwards, always moved towards a progressive extension of the scope of Article 8 (Sicurella and Scalia, 2013: 434-435).

² The mass surveillance is a very interesting issue in time of coronavirus (Ram & Gray, 2020). Our protection, however, can be improved by surveillance intermediaries (Rozenshtein, 2018: 99).

³ *Huvig v. France*, ECtHR, Application no. 11105/84, April 24, 1990 and *Kruslin v. France*, ECtHR, Application no. 11801/85, April 24, 1990.



THE BULK INTERCEPTION OF COMMUNICATIONS

The bulk interception of cross-border communications,⁴ which is usually implied within the broader term of digital surveillance (Ünver, 2018), by the intelligence services faces specific difficulties.⁵ The Grand Chamber of the ECtHR reached decision in two important cases: *Big Brother Watch and Others v. the United Kingdom* and *Centrum för Rättvisa v. Sweden*. Article 8 of the Convention does not prohibit the use of bulk interception to protect national security and other essential national interests against serious external threats, and states enjoy a wide margin of appreciation in deciding what type of interception regime is necessary. However, such a system the margin of appreciation afforded to them must be narrower and a number of safeguards will have to be present in a case of bulk surveillance.

During the years, the ECtHR established certain minimum safeguards which should be set out in law to avoid abuses of power: the nature of offences which may give rise to an interception order, a definition of the categories of people liable to have their communications intercepted, a limit on the duration of interception, the procedure to be followed for examining, using and storing the data obtained, the precautions to be taken when communicating the data to other parties⁶, and the circumstances in which intercepted data may or must be erased or destroyed.⁷ Additionally, the ECtHR takes care of the arrangements for supervising the implementation of secret surveillance measures, the existence of notification mechanisms and any remedies provided for by national law.⁸

According to the ECtHR, the stages of the bulk interception process which fall to be considered can be described as follows:

- (a) the interception and initial retention of communications and related communications data (that is, the traffic data belonging to the intercepted communications);
- (b) the application of specific selectors to the retained communications/related communications data;
- (c) the examination of selected communications/related communications data by analysts; and
- (d) the subsequent retention of data and use of the “final product”, including the sharing of data with third parties.⁹

At the first stage, electronic communications will be intercepted in bulk by the intelligence services. Normally, these communications will belong to a large number of individuals and some communications may be filtered out at this stage.¹⁰ The initial searching takes place at the second stage, when different types of selectors, including “strong selectors” (such as an email address) and/or complex queries are applied to the retained packets of communications and related communications data. This may be the stage where the process begins to target individuals through the use of strong selectors.¹¹ At the third stage, intercept material is examined for the first time by an analyst.¹² The final stage is when the intercept material is actually used by the intelligence services. This may involve the creation of an intelligence report, the disseminating of the material to other intelligence services within the intercepting State, or even the transmission of material to foreign intelligence services.¹³ At the end of this process, the need for safeguards will be at its highest,¹⁴ whose approach is in line with the finding of the Venice Commission. Particularly important is the fact that the ECtHR believes that the initial interception followed by the immediate discarding of parts of the communications does not constitute a particularly significant interference.



In assessing whether the state acted within its margin of appreciation, the ECtHR started to develop a new, wider range, of criteria than the six *Weber* safeguards – in addressing jointly *in accordance with the law* and *necessity* as is the established approach in this area, the ECtHR added eight criteria:

1. the grounds on which bulk interception may be authorised;
2. the circumstances in which an individual's communications may be intercepted;
3. the procedure to be followed for granting authorisation;
4. the procedures to be followed for selecting, examining and using intercept material;
5. the precautions to be taken when communicating the material to other parties;
6. the limits on the duration of interception, the storage of intercept material and the circumstances in which such material must be erased and destroyed;
7. the procedures and modalities for supervision by an independent authority of compliance with the above safeguards and its powers to address non-compliance;
8. the procedures for independent *ex post facto* review of such compliance and the powers vested in the competent body in addressing instances of non-compliance.¹⁵

Some states today share material with their intelligence partners and even, in some instances, allowing those intelligence partners direct access to their own systems. Unfortunately, the ECtHR has not provided specific guidance regarding the precautions to be taken when communicating intercept material to other parties. The ECtHR considers that the transmission by one state to a foreign state(s) or international organization(s) of material obtained by bulk interception should be limited to such material as has been collected and stored in a Convention compliant manner and should be subject to certain additional specific safeguards pertaining to the transfer itself.

The ECtHR in *Big Brother Watch and Others* emphasized four important rules that have to be followed in these cases. First of all, the circumstances in which such a transfer may take place must be set out clearly in domestic law. Secondly, the transferring state must ensure that the receiving state, in handling the data, has in place safeguards capable of preventing abuse and disproportionate interference. In particular, the receiving State must guarantee the secure storage of the material and restrict its onward disclosure. This does not necessarily mean that the receiving state must have comparable protection to that of the transferring state; nor does it necessarily require that an assurance is given prior to every transfer. Thirdly, heightened safeguards will be necessary when it is clear that material requiring special confidentiality – such as confidential journalistic material – is being transferred. Finally, the ECtHR considers that the transfer of material to foreign intelligence partners should also be subject to independent control.¹⁶

THE RECEIPT OF INTELLIGENCE FROM FOREIGN INTELLIGENCE SERVICES

The second problem in this field is the receipt of intelligence from foreign intelligence services. In *Big Brother Watch and Others* we have the receipt by the United Kingdom authorities of material from foreign intelligence services, more specifically the receipt of material intercepted by the NSA under PRISM and Upstream. The question is was it in breach of the rights under Article 8 of the Convention.



The Chamber took the position that there is no violation of Article 8. The Chamber applied a modified version of the six minimum safeguards, because the first two requirements could not apply to the act of requesting intercept material from foreign governments. The Chamber instead asked whether the circumstances in which intercept could be requested was circumscribed sufficiently to prevent States from using the power to circumvent domestic law or their Convention obligations. It then applied the final four requirements to the treatment of intercept material once it had been obtained by the United Kingdom intelligence services. The Chamber considered that the domestic law, together with the clarifications brought by the amendment of the IC Code, indicated with sufficient clarity the procedure for requesting either interception or the conveyance of intercept material from foreign intelligence services. Moreover, the Chamber found no evidence of any significant shortcomings in the application and operation of the regime. In the Chamber's view, the interception of communications by foreign intelligence services could not engage the responsibility of a receiving State, or fall within that State's jurisdiction within the meaning of Article 1 of the Convention, even if the interception was carried out at that State's request.

The ECtHR developed another applicable test. First of all, the Chamber considered that these would only be relevant if the foreign intelligence services were placed at the disposal of the receiving State and were acting in exercise of elements of the governmental authority of that State; if the receiving State aided or assisted the foreign intelligence services in intercepting the communications where that amounted to an internationally wrongful act for the State responsible for the services, the receiving State was aware of the circumstances of the internationally wrongful act, and the act would have been internationally wrongful if committed by the receiving State; or if the receiving State exercised direction or control over the foreign Government. Secondly, according to the ECtHR's case-law the interception of communications by a foreign intelligence service could only fall within the receiving State's jurisdiction if that State was exercising authority or control over the foreign intelligence service.¹⁷ The Grand Chamber agreed with the Chamber that none of these elements were present in the situation under consideration. Therefore, any interference with Article 8 of the Convention could only lie in the initial request and the subsequent receipt of intercept material, followed by its subsequent storage, examination and use by the intelligence services of the receiving State.¹⁸

Furthermore, where a request is made to a non-contracting State for intercept material the request must have a basis in domestic law, and that law must be accessible to the person concerned and foreseeable as to its effects.¹⁹ It will also be necessary to have clear detailed rules which give citizens an adequate indication of the circumstances in which and the conditions on which the authorities are empowered to make such a request²⁰ and which provide effective guarantees against the use of this power to circumvent domestic law and/or the States' obligations under the Convention. Upon receipt of the intercept material, the ECtHR considers that the receiving State must have in place adequate safeguards for its examination, use and storage; for its onward transmission; and for its erasure and destruction. These safeguards, first developed by the ECtHR in its case-law on the interception of communications by Contracting States, are equally applicable to the receipt, by a Contracting State, of solicited intercept material from a foreign intelligence service. If States do not always know whether material received from foreign intelligence services is the product of interception, then the ECtHR considers that the same standards should apply to all material received from foreign intelligence services that could be the product of intercept.²¹ Finally, the ECtHR considers that any regime permitting the intelligence services to request either interception or intercept material from non-Contracting

21 *Big Brother Watch and Others*, § 497.



States, or to directly access such material, should be subject to independent supervision, and there should also be the possibility for independent *ex post facto* review.²²

In *Big Brother Watch and Others* the ECtHR considered that the regime for requesting and receiving intercept material was compatible with Article 8 of the Convention. There existed clear detailed rules which gave citizens an adequate indication of the circumstances in which and the conditions on which the authorities were empowered to make a request to a foreign intelligence service; domestic law contained effective guarantees against the use of such requests to circumvent domestic law and/or the United Kingdom's obligations under the Convention; the United Kingdom had in place adequate safeguards for the examination, use, storage, onward transmission, erasure and destruction of the material; and the regime was subject to independent oversight by the IC Commissioner and there was a possibility for *ex post facto* review by the IPT. Accordingly, there had been no violation of Article 8 of the Convention.

CONCLUSION

To establish a balance between the protection of the right to privacy and human rights on the one hand, and the protection of society from crime and national security on the other, should be one of the key goals of the state in modern forms of state response to crime. It is definitely not an easy task to respect privacy, provide security, and protect against abuse in the contemporary, modern, digitally connected world (Daskal, 2017). As the jurisprudence of the ECtHR often shows, states very easily slip into the field of human rights violations.

REFERENCES

1. *Big Brother Watch and Others v. the United Kingdom*, Application nos. 58170/13, 62322/14 and 24960/15 (ECtHR May 25, 2021).
2. *Centrum för Rättvisa v. Sweden*, Application no. 35252/08 (ECtHR May 25, 2021).
3. Flaherty, D. H. (1989). *Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada, and the United States*. University of North Carolina Press.
4. Franks, M. A. (2017). Democratic Surveillance. *HARV. J. L. & TECH.* 30, no. 2, 425-489.
5. Freiwald, S. (2008). Electronic Surveillance at the Virtual Border. *Miss. L.J.*, 78, 333-368.
6. Heymann, P. B. (2016). An Essay on Domestic Surveillance. 8 *J. NAT'l Sec. L. & POL'y*, 421-435.
7. *Huvig v. France*, Application no. 11105/84 (ECtHR April 24, 1990).
8. Jacobs, B. (2009). Keeping Our Surveillance Society Non-Totalitarian. *Amsterdam L.F.*, 1, 19-34.
9. Kiernan, C. J., & Mueller, M. L. (2021). Standardizing Security: Surveillance, Human Rights, and the Battle Over Tls 1.3. *Journal of Information Policy*, 11, 1-25.
10. *Kruslin v. France*, Application no. 11801/85 (ECtHR April 24, 1990).
11. Landau, S. (2016). Choices: Privacy & Surveillance in a Once & Future Internet. *Daedalus*, 145, 54-64.

²² *Id.*, § 498.



12. Leavens, A. (2015). The Fourth Amendment and Surveillance in a Digital World. *J. C.R. & ECON. DEV.*, 27, 709-746.
13. Nomikos, L. (2017). Are We Sleepwalking into a Surveillance Society. *BLR*, 2017, 111-122.
14. Norris, C., Hert, P. d., L'Hoiry, X., & Gletta, A. (2017). *The Unaccountable State of Surveillance: Exercising Access Rights in Europe*. Cham: Springer.
15. Ram, N., & Gray, D. (2020). Mass Surveillance in the Age of COVID-19. 7 *J.L. & Biosciences*.
16. Robis, L. A. (2014). When Does Public Interest Justify Government Interference and Surveillance. 15 *Asia-PAC. J. oN HUM. Rts. & L.*, 203-218.
17. Roman Zakharov v. Russia, Application no. 47143/06 (ECtHR December 04, 2015).
18. Rozenshtein, A. Z. (2018). Surveillance Intermediaries. *Stan. L. REV.*, 70.
19. S. and Marper, Applications nos. 30562/04 and 30566/04 (ECtHR December 04, 2008).
20. Schweda, S. (2015). UK surveillance under judicial scrutiny: GCHQ intelligence sharing with NSA contravened human rights, but is now legal. *Eur. Data Prot. L. Rev.*, 1, 61-69.
21. Scott, P. F. (2017). General Warrants, Thematic Warrants, Bulk Warrants: Property Interference for National Security Purposes. *N. IR. LEGAL Q.*, 68, 99-121.
22. Squires, D. (2006). The Problem with Entrapment. *Oxford Journal of Legal Studies*, 26(2), 351-376.
23. Tokson, M. (2021). Inescapable Surveillance. *CORNELL L. REV.*, 106, 409.
24. Turanjanin, V. (2020). Video Surveillance of the Employees Between the Rights to Privacy and Rights to Property after Lopez Ribalda and Others v. Spain. *University of Bologna Law Review*, Vol. 5, no. 2, 268-293.
25. Ünver, H. A. (2018). Politics of Digital Surveillance. *National Security and Privacy* 5 .
26. Yadin, G. (2017). Virtual Reality Surveillance. 35 *CARDOZO Arts & ENT. L.J.*, 707-743.
27. Weber, S. J. (1971). Habeas Data: The Right of Privacy Versus Computer Surveillance. *U.S.F. L. REV.*, 5 , 358.
28. Wong, C. M. (2015). Internet at a Crossroads: How Government Surveillance Threatens How We Communicate. *World report, HUMAN RIGHTS WATCH*, 1-13.
29. Woodburn, N. (2016). NSA Surveillance and Interference with Citizens' Property Rights. *FAULKNER L. REV.*, 7, 287-299.





SANCTIONING THE VIOLATION OF DECISIONS ON THE PROHIBITION OF STATING FAKE NEWS AND THE SPREAD OF PANIC RELATED TO THE COVID-19 VIRUS IN BOSNIA AND HERZEGOVINA – PROBLEM OF APPLICATION AND PROVING IN MISDEMEANOR PROCEEDINGS

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Abstract: The author deals with the sanctioning for violating decisions on the prohibition of stating false news and spreading panic related to the COVID-19 virus, adopted by the authorities in Bosnia and Herzegovina (BiH). In this regard, the author first points out the shortcomings of these decisions both in terms of nomotechnics and in terms of non-compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHRFF). Through a review of several misdemeanour proceedings in which these decisions were applied, the author tends to point out how the poor formulation of the provisions of these decisions created problems for the police in their application. The author wants to address the problem of proving the offences of stating and dissemination of fake news and spreading panic in misdemeanour proceedings in BiH, which is caused by inadequate regulation as well as the lack of adequate training of police officers related to providing of evidence for spreading fake news.

Keywords: fake news, causing panic, COVID-19, misdemeanours, sanctions, proving

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INTRODUCTION

Since the beginning of the crisis with the COVID-19 virus at the level of BiH various levels of government have issued decisions, decrees and orders banning the stating or transmission of false news that are unfounded in the Constitution of BiH, entity constitutions and the Brcko District Statute, and in direct conflict with the ECHRFF and the case law of the European Court of Human Rights (ECHR) when it comes to freedom of opinion and expression. The formulations used in these decisions, orders, or ordinances are too general and too broad, which creates space for abuse and arbitrary restriction of freedom of opinion and expression, especially when it comes to online interactions. Based on the analysis of the texts of the provisions of these decisions, which are presented below, we can see that no precise criteria have been set for what is meant by terms used such as fake news, claims, panic or serious disturbance of public order or peace. What should be pointed out here is that in some cantonal Laws on Public Order and Peace at the level of the Federation of BiH there are misdemeanours concerning the dissemination of false news and in the part related to the meaning of terms in these laws definitions of false news are given. However, at the level of the Republic of Srpska and the Brcko District of BiH, where such decisions have been made by the state authorities, the same has not been done. Regarding the quality of the provisions prescribed by these acts, they should be accessible and predictable, i.e. precise enough to give citizens the opportunity to anticipate what will be considered, in this case, a misdemeanour, so that they can align their behaviour with it (Išerić, 2020:32). Also, it should be noted here that at the level of the Federation of BiH there was an initiative of the Federal Ministry of Interior to enact a decree with legal force introducing a ban on stating or transmitting false news or allegations, with more or less the same formulation as in Republic of Srpska, but this decree was not adopted.

In a number of cases in which the police issued misdemeanour warrants, i.e. submitted a request to initiate misdemeanour proceedings acting on these decisions, these were posts on social networks, which have absolutely nothing to do with spreading panic or disturbing public order or disturbing the work of authorities organs. We note that criticisms of the authorities enjoy protection within the meaning of Article 10 paragraph 2 of the ECHRFF. In this regard, in the next part of the paper, the provisions of these decisions will be presented first, while after that, individual cases will be presented in which they were applied, i.e. when citizens were sanctioned for violating them in which the misdemeanour liability is not proven beyond a reasonable doubt. The cases presented in this paper were collected during the research for the requirements of the "Study of mapping institutional human rights violations in BiH", which was made within the project "Contribution of the academic community to human rights in BiH", conducted by the University of Business Engineering and Management Banja Luka and the Association for Democratic Initiatives (ADI) Sarajevo, with the financial support of the European Union, in the period from January 2021 to December 2022.

DECISION ON PROHIBITION OF CAUSING PANIC AND RIOTS DURING THE EMERGENCY SITUATION AND DECREE ON PROHIBITION OF CAUSING PANIC AND RIOTS DURING THE STATE OF EMERGENCY OF THE GOVERNMENT OF THE REPUBLIC OF SRPSKA

At the proposal of the Ministry of Internal Affairs of the Republic of Srpska, on March 19, the Government of the Republic of Srpska adopted the Decision on the Prohibition of Panic and Riots during the Emergency Situations (Decision), and then, Decree with legal force on the prohibition of causing panic and disorder during a state of emergency (Official Gazette of Republic of Srpska, No. 32/2020 (Decree).



Item 2 of the Decision stipulates that: *“During the emergency situation referred to in item I of this Decision, it is prohibited to present or transmit false news or allegations that cause panic or seriously disturb public order or peace or significantly hinder the implementation of decisions and measures of state bodies and organizations exercising public authority (paragraph 1). The prohibition referred to in paragraph 1 of this item shall also apply to actions committed through the media, social networks or other similar means (paragraph 2).”* Item III of this decision prescribes sanctions for acting contrary to the prohibition from item 2 of this decision in a way that will be punished with: *„a fine in the amount of 1000 KM to 3000 KM for a natural person who acts contrary to the above provision, or a fine in the amount of 3000 KM up to 9000 KM for a legal entity, and 1000 KM up to 3000 KM for a responsible person in the legal entity who acts contrary to the above provision“.* Item IV of this decision obliges the Ministry of Internal Affairs of the Republic of Srpska to implement it.

Article 1 of the Decree stipulates that: *“This decree with legal force prescribes the prohibition of disturbing public order and peace by causing panic and disorder during the state of emergency for the Republic of Srpska and misdemeanour sanctions imposed on the perpetrators of misdemeanours.”* Also, Article 2 of the Regulation stipulates that: *“It is prohibited to present or transmit false news or allegations that cause panic or seriously disturb public order or peace or prevent or significantly impede the implementation of decisions and measures of state bodies, other institutions and organizations engaged in public powers (paragraph 1). The prohibition referred to in paragraph 1 of this Article shall also apply to actions committed through the media, social networks or other similar means (paragraph 2).”* Article 3 of this Regulation prescribes the same sanctions as item 2 of the Decision. Apart from slight linguistic differences, there are no significant differences in the content of the Decision and the Decree. The biggest difference is that the Regulation has a greater legal significance compared to the Decision which was thus withdrawn (Halilović & Džihana, 2020:4).

The adoption of the said Regulation led to the reaction from a number of international and domestic human rights organizations, who commented on the regulation and stated that such a regulation could lead to censorship and self-censorship, as well as arbitrary and disproportionate penalties, which could violate media freedom and the basic human right to freedom of expression. The authorities of the Republic of Srpska first limited the application of the Decree only to cases that come upon the application of citizens and excluded the application *ex officio* of the Ministry of Internal Affairs of the Republic of Srpska. On April 16, 2020, at the proposal of the Ministry of Internal Affairs of the Republic of Srpska, the Government of the Republic of Srpska adopted the Proposal of the Decree with legal force on termination of the Decree with legal force on banning panic and riots during the state of emergency, after which it was sent to the President of the Republic of Srpska for adoption. The published statement of the Ministry of Internal Affairs of the Republic of Srpska pointed out that the Decree on Prohibition is being withdrawn because *“citizens complied with the measures and instructions of the competent authorities”* and that they *“informed themselves about the epidemiological situation through official notifications from the competent institutions”*. It was also announced that *“in accordance with this, the Ministry of Internal Affairs of the Republic of Srpska will withdraw all misdemeanour warrants previously issued in accordance with the Decree with legal force on the prohibition of causing panic and riots during a state of emergency, as well as the Decision on prohibition of causing panic and riots during the emergency situation on the territory of the Republic of Srpska, which was put out of force by the Government of the Republic of Srpska on April 3, 2020”* (<https://mup.vladars.net/lat/index.php?vijest=23281&vrsta=novosti>, accessed on May 05, 2021).



ORDER ON PROHIBITING PUBLIC DISCLOSURE AND TRANSMISSION OF FALSE INFORMATION REGARDING THE CORONA VIRUS OF THE CRISIS STAFF OF THE BRČKO DISTRICT OF BOSNIA AND HERZEGOVINA

On March 21, 2020, the Crisis Staff of the Brčko District of BiH issued an Order on prohibiting the public disclosure and transmission of false information regarding the corona virus (Official Gazette of the Brčko District of BiH, No. 15/2020). Article 1 of the said Order stipulates: “all representatives and employees of public institutions of the Brčko District of Bosnia and Herzegovina, as well as all citizens of the Brčko District of Bosnia and Herzegovina, shall be prohibited from publicly presenting and transmitting false news and information related to the corona epidemic viruses and which can cause fear and panic in the population or otherwise negatively affect the implementation of measures to protect the population from the epidemic. Article 2 of the said Order stipulates that: “*public disclosure and transmission of false information referred to in Article 1 of this Order means the release of such information through the media, social networks, as well as any other means of disseminating such information*”. Article 3 of the mentioned Order stipulates that: “*acting contrary to this order will be considered a violation in terms of Article 10 of the Law on Public Order and Peace of the Brčko District of BiH (Official Gazette of the Brčko District of BiH, No. 32/2009 and 14/2010 - corr.), and criminal charges will be processed in terms of Article 222 of the Criminal Code of the Brčko District of Bosnia and Herzegovina (Official Gazette of the Brčko District of BiH, No. 19/2020 - consolidated text), and in the case of official actions to be performed by the competent authorities, then in terms of Article 363 paragraph (2) of the Criminal Code of the Brčko District of Bosnia and Herzegovina*”. Analyzing the content of the above provisions, it should be noted that, unlike the Order of the Government of the Republic of Srpska, the Order of the Crisis Staff of the Brčko District of BiH prescribes that violation of the Order is treated as a violation of public order and peace, but also as a criminal offense, provisions similar to the Republic of Srpska Order.

ANALYSIS OF THE SANCTIONING OF VIOLATIONS OF THE DECISION AND THE DECREE IN THE REPUBLIC OF SRPSKA

- 1) In the procedure against one person where the Police of the Republic of Srpska issued a misdemeanor order against the defendant for violating the Decision. The misdemeanor order was issued because of her statement given to a media house in which she talks about health problems in Republic of Srpska, that there are not enough ventilators, beds or intensive care services, and for claims that Republic of Srpska is unprepared for the upcoming crisis. The person was accused of spreading false news and was ordered to pay a fine in the amount of 1000 KM. In this case, it is an opinion criticizing the work of the authorities which enjoying protection in terms of Article 10 of the ECHRFF and Article II3 (h) of the Constitution of Bosnia and Herzegovina (Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina and “Official Gazette of BiH”, No. 25/2009 - Amendment I), and therefore there was no basis for misdemeanor sanctioning.
- 2) In the procedure against one person where the Police of the Republic of Srpska in March 2020 issued a misdemeanor warrant for violating the Decision because he posted the following text on his Instagram profile: “*You will kill us with the media and depression, not with the CORONA, stop talking anymore about that! Having three main TV news per day is too much! You brag that there is no virus in our city, in order to raise it above other cities in RS ..., and here you are hiding that one person has*



been tested and infected and has been in house quarantine for 7 days now. Since you do that, we don't need such fake media, you do everything politically, not for people's health! If it was for our health, we would have closed everything for 28 days a long time ago and finished with that! I am now appealing to our citizens to dispel depression and to stop talking about it more! Their goal is to destroy our economy and dull our brains, not to protect us ... Because I repeat, there is silence in our municipality (city) about positive tests!" The defendant was sentenced to a fine in the amount of 1000 KM. In this case, too, it is an opinion criticizing the work of authorities which enjoying protection in terms of Article 10 of the ECHRFF and Article II3 (h) of the Constitution of Bosnia and Herzegovina.

3) In the procedure against four persons in whom the Police of the Republic of Srpska, in April 2020, issued misdemeanour orders for violation of Article 2, paragraph 2 of the Decree. Namely, the defendants were charged with misdemeanour warrants for committing the aforementioned misdemeanour by: *"publishing false claims on their Facebook profiles in public groups XX that caused panic among citizens during the state of emergency, thus violating the Decree."* The defendants were fined 1000 KM each with the mentioned misdemeanour orders. Taking into account the way in which the factual description of the misdemeanour was given, we can say that it is incomplete and does not reflect the essence of this misdemeanour, because there are no alleged allegations based on whose analysis it could be determined whether they are false and lead to panic among citizens. Also, it is not stated in what way the claims of the defendants caused panic among the citizens. Accordingly, we are of the opinion that the misdemeanour orders conceived in this way imposed a penalty for something which according to what is stated in the factual description does not reflect all the elements of this misdemeanour.

4) In the procedure against one person in which the Republic of Srpska Police issued a misdemeanour order in March 2020 for violating paragraph 1 item 2 of the Decision. Namely, the defendant was charged with the misdemeanour order that he committed the aforementioned misdemeanour by: published the text: *"People, let us become aware and drive this out of power. Whoever stays in this CIRCUS state should be publicly shot. This is a mouldy state, etc."* The mentioned misdemeanour order imposed a fine of 1000 KM on the defendant. In the given case, the defendant expressed his opinion criticizing the government. Also, values such as "reputation/honour of the country or government", "reputation/honour of the nation", "state or other official symbols", "reputation / authority of public authorities" (except courts) are not provided for in paragraph 2 of 10 of the ECHRFF and, therefore, they do not constitute legitimate aims justifying a restriction on freedom of expression. Accordingly, we are of the opinion that in this case, by punishing this person for the given violation, a violation of his right to freedom of expression was committed.

5) In proceedings against three persons where the Police of the Republic of Srpska issued misdemeanour warrants with a fine of 1000 KM each for violating the Decision. One person was punished for posting a comment on social networks with a photo of several people gathering at a time when all public gatherings in Republic of Srpska were banned due to the epidemiological situation. The other person was punished because, after he was previously issued a misdemeanour order, he repeated the misdemeanour by publishing a text commenting on the work of the institutions of the Republic of Srpska and rudely insulting the representatives of state bodies. A third person was fined because he posted a photo on Facebook where he was drinking beer with the comment *"Where is that CORONA so I can breathe it?"* As in previous cases, this case is an opinion criticizing the work of authorities enjoying protection in terms of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article II3 (h) of the Constitution of Bosnia and Herzegovina, and by which the rights of others are not endangered nor public order and peace are disturbed, and therefore there are no grounds for misdemeanour punishment.



ANALYSIS OF THE SANCTIONING OF VIOLATIONS OF THE ORDER ON THE PROHIBITION OF PUBLIC DISCLOSURE AND TRANSMISSION OF FALSE INFORMATION RELATED TO THE CORONA VIRUS OF THE CRISIS STAFF OF THE BRČKO DISTRICT OF BOSNIA AND HERZEGOVINA

1) The procedure against one person in which the Police of the Brčko District of BiH in March 2020 submitted a request to initiate misdemeanour proceedings for a misdemeanour punishable under Article 10 of the Law on Public Order and Peace of the Brčko District of BiH, in connection with the Order. Namely, the defendant was charged with initiating misdemeanour proceedings by committing the aforementioned misdemeanour in such a way that: "In March 2020, in the area of the Brčko District of BiH, he violated public order and peace by exposing or transmitting false news, rumours or allegations. After the article published on the eBrčko portal entitled "Brčko: Ten people did not respect the curfew, the Chief of Police of the Brčko District of BiH GP at the conference", was registered on the social network Facebook as "A. A.", commented news with the following words: *"It's not that it's 10 but 110, and that's up to you, but you are ashamed to admit that you are incapable of performing a curfew. In our environment is like there is no curfew, I have never seen you come in order to check it or maybe I may not have understood maybe the curfew is only in the city and not in rural areas and it's all up to you"* and thus publicly presented and transmitted false news and information that are in any way related to the corona virus epidemic and that can cause fear and panic or otherwise adversely affect the implementation of measures to protect the population from the epidemic.

First of all, we emphasize that, in our opinion, only the adoption of such a provision, which criminalizes punishment for presenting and transmitting false news in a too broad and imprecise is contrary to Article 10 of the ECHRFF. Also, we are of the opinion that in the specific case the application of such a disputable provision further violated the right of this person to freedom of opinion and expression under Article II3 (h) of the Constitution of Bosnia and Herzegovina and Article 10 of the ECHRFF, for the factual situation described in request for misdemeanour proceedings does not constitute an act of the being of the aforesaid offense. Namely, Article 10 of the Law on Public Order and Peace of the Brčko District of BiH stipulates that this violation is committed by: "who presents or transmits false news, rumours or allegations that may cause harassment of citizens or endanger public order and peace". Based on the analysis of the factual description from the misdemeanour order, we can see that the action attributed to the defendant does not meet the elements of the essence of this misdemeanour, i.e. that the legal description of the violation does not correspond to the factual description. First, the breach of public order and peace is not a feature of the nature of this offense, and it is stated in the factual description. From the analysis of the legal text, we can see that the existence of this violation does not require that public order and peace be disturbed, but that it is news, rumours or allegations that may cause a threat to public order and peace. Due to this, the factual description itself is unreasonable and contradictory, because at the beginning of the factual description it is said that he violated public order and peace, but the part in which the violation of public order and peace is reflected is missing, while the last part of the factual description says that the content presented by the defendant could cause fear and panic among the population. Also, the factual description states that in this way he publicly presented and transmitted false news and information that are in any way related to the corona virus epidemic and that can cause fear and panic among the population or otherwise negatively affect the implementation of measures to protect the population from the epidemic. From the aspect of the nature of this offense, false news, rumours or allegations should be such that they may cause disturbance to citizens or endanger public order and peace. In this regard, the question arises as to whether the information provided by the defendant in the form of comments on the published news could cause such consequences. Also, as already pointed out in this paper, when evaluating the presentation



of untrue information, it is very important to take into account the purpose of presenting the same, so that it can be claimed that it is false news (news that aims to cause harm). In this case, the defendant expressed his opinion and his views, which primarily reflect the criticism of the work of state bodies. In this regard, we recall the case law of the ECHR, according to which it is not possible to prove whether someone's opinion, which represents the views or personal assessments of an event or situation, is true or not, and this basic segment of the right to freedom of expression enjoys the highest degree of protection and protection not only opinions that are favourably received or considered offensive or unresponsive, but also those that may offend, shock or disturb, which is a precondition for pluralism, tolerance, free-thinking, and which are essential for democratic society.

2) The procedure against one person in which the Police of the Brčko District of BiH, in March 2020, filed a request to initiate misdemeanour proceedings for a misdemeanour punishable under Article 10 of the Law on Public Order and Peace of the Brčko District of BiH, in connection with the Order. Namely, the defendant was charged for the aforementioned misdemeanour committed in the way that: "on a certain day in March 2020, in the area of the Brčko District of BiH, he violated public order and peace by presenting or transmitting false news, rumours or allegations on the occasion, he sent a message via the Viber application: *"Friends and relatives. Apologies for writing so late. Unfortunately, a case of corona virus has been confirmed in Bijela. 7 people arrived, 4 people were tested and all were positive. It would be good if someone had information who came to write everything. And spread further, please, until you see what and how in the morning"*, and in that way he spread false information about the infection of a certain number of people with corona virus from the area of Bijela, Brčko District of BiH, which caused anxiety among the citizens.

As in previous cases, the request to initiate misdemeanour proceedings was filed on the basis of the disputed order, which is in itself contrary to Article 10 of the ECHRFF. In addition, the factual description itself is contradictory and confusing in the sense of stating "disturbed public order and peace", because it is a consequence that is not foreseen in the essence of this violation. Then, in the last part of the factual description, it is stated that he caused the citizens to be disturbed by the actions he is charged with. The incrimination of the violation from Article 10 of the Law on Public Order and Peace of the Brčko District of BiH does not require that the harassment of citizens occurred by presenting false news, but the element of the nature of this violation is the possibility of harassment of citizens. However, if it has already been stated that the harassment occurred, it is not clear from the factual description what it is reflected in, as well as the causal link between the defendant's actions and the alleged harassment of citizens. We note once again that from the aspect of fake news, it is very important to take into account the intention of the person who places the news. Of course, intent is not prescribed as an element of the nature of this offense, but it is logical that in the actions of the defendant, in such situations it is monitored, otherwise there will be no difference between false news, which has malicious intent and false news that has no malicious intent (Katsirea, 2019:175). In a given case, the defendant places certain facts and asks for feedback. We remind you that the right to freedom of expression, in addition to the right to have one's own opinion, includes the freedom to receive and communicate information. Here we should also take into account the fact that during the crisis with COVID-19, the authorities were very briefly informed about the cases of infection by the authorities, which certainly had an impact on the appearance of such content. Finally, the defendant is charged with having committed the act via the Viber application, but the factual description does not show how many people the message reached, as well as whether it could have caused public harassment or disturbance of public order. All in all, the factual description does not reflect all the elements of the misdemeanour from Article 10 of the Law on Public Order and Peace of the Brčko District of BiH, and the procedure was initiated in connection with the disputed Order, which is why we believe that to be violation of the right to freedom of opinion.



CONCLUSION

Based on everything mentioned above, we can conclude that through the adoption of the Decision on the Prohibition of Panic and Disorder during the Emergency Situation in the Republic of Srpska, the Decree on the Prohibition of Panic and Disorder During the State of Emergency of the Government of the Republic of Srpska and the Order on the Prohibition of Public Disclosure and Transmission of False Information corona virus of the Crisis Staff of the Brčko District of BiH represent interference with the right to freedom of opinion and expression in BiH. The provisions of these acts sanctioning the presentation and dissemination of false news in connection with COVID-19 are given too broadly, without explaining the meaning, which significantly jeopardizes the right to predictability of the norm. Due to this state of affairs, there were problems in the application of these acts, in the way that they punished persons, i.e. initiated misdemeanour proceedings against them for the opinions expressed that enjoy the protection of the ECHRFF, or for the stated opinions that do not materialize these misdemeanours. In this regard, in order to prevent the unjustified punishment for spreading fake news through social networks in the future similar situations, we propose that provision makers should offer a much more precise definition of the meaning of fake news, on the one hand, and to organize specialized training for police officers on the other, to better understand the practice of the ECHR, as well as better providing establishing the factual status of such violations and providing evidence.

REFERENCES

1. Constitution of Bosnia and Herzegovina, (Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina and Official Gazette of BiH, No. 25/2009 - Amendment I).
2. Criminal Code of the Brčko District of Bosnia and Herzegovina (Official Gazette of the Brčko District of BiH, No. 19/2020 - consolidated text)
3. Decree with legal force on the prohibition of causing panic and disorder during a state of emergency (Official Gazette of Republic of Srpska, No. 32, April 6, 2020).
4. Halilović, M. & Džihana, A. (2020). *Ograničavanje prava na slobodu izražavanja u BiH u toku trajanja pandemije COVID-19*.
5. <https://mup.vladars.net/lat/index.php?vijest=23281&vrsta=novosti>, Accessed on May 05, 2021.
6. Išerić, H. (2020). Koronavirus u pravnom poretku BiH: kratka dijagnoza bolesti, *Sveske za javno pravo*, br. 39, god. 11, Fondacija Centar za javno pravo, Sarajevo, 21-43.
7. Katsirea, I. (2019). "Fake news" reconsidering the value of untruthful expression in the face of regulatory uncertainty, *Journal of Media Law*, 10 (2), Taylor & Francis, 159-188.
8. Law on Public Order and Peace of the Brčko District of Bosnia and Herzegovina (Official Gazette of the Brčko District of BiH, No. 32/2009 and 14/2010 - corr.).
9. Order on prohibiting public disclosure and transmission of false information related to the corona virus (Official Gazette of the Brčko District of BiH, No. 15/2020).



DISCIPLINARY PUNISHMENT OF CONVICTED PERSONS – CONCURRENCE OF NATIONAL AND INTERNATIONAL NORMATIVE STANDARDS –

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Abstract: The beginning of the execution of a prison sentence in a penitentiary institution for a convicted person means the application of special rules - the prison rules. Strict rules of conduct in prisons according to which convicted persons must behave are regulated in the Republic of Serbia by the Law on Execution of Criminal Sanctions and numerous bylaws. Failure to comply with prison regulations entails disciplinary liability of the convict. A convicted person may be punished for a disciplinary offense only if it was, in advance, prescribed as an offense. Disciplinary offenses are divided into two categories: serious and minor. If it is suspected that the convict has committed a disciplinary offense, disciplinary proceedings will be initiated in the penitentiary. Who will conduct the disciplinary procedure depends on whether the convict committed a serious or minor disciplinary offense. A convict who has committed a disciplinary offense will be punished by disciplinary measures, at the same time, other consequences may occur regarding his position in the penitentiary: classification in a group with smaller scope of rights compared to his previous position in the institution, i. e. disciplinary punishment may be an obstacle to conditional release. The aim of this paper is to present the disciplinary responsibility of convicted persons in the criminal executive law of the Republic of Serbia and to determine the concurrence of national standards for the protection of convicted persons in disciplinary proceedings in relation to the standards prescribed by basic international acts in this area, above all, Nelson Mandela Rules and European Prison Rules.

Keywords: convicted, prison, disciplinary liability of convicted person, disciplinary proceedings and measures

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INTRODUCTION

The procedure of referring a perpetrator of a criminal offense sentenced to imprisonment begins, as a rule, after the verdict becomes final and enforceable, and takes place according to the procedure and rules prescribed by the law (Law on Execution of Criminal Sanctions - ZIKS, Official Gazette RS 55/14 and 35/19) and bylaws. Although the verdict has become final, that does not mean that the convict will be sent to serve his prison sentence on the same day. The rules of referral differ primarily depending on whether the convict is in custody or awaiting a sentence to serve at liberty, but also on several other circumstances such as available places in prisons, the type of crime committed, the sentence, obsolescence of the execution of a sentence, form of guilt, residence, citizenship, etc., which is regulated in the Republic of Serbia by a special act (See: Rulebook on sending convicted, misdemeanor convicted and detained persons to penitentiaries, Official Gazette RS 31/15).

Serving a prison sentence, as well as a life imprisonment (Grujić, 2019: 1109), which was introduced into the Serbian system of criminal sanctions in 2019 by the amendments to the Criminal Code – KZ (Official Gazette RS 85/05, 88/05 - corr., 107/05 corr., 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 and 35/19), implies deprivation of liberty of a convicted person and stay in a penitentiary institution for the duration of the sentence, as well as deprivation and restriction of a significant corpus of rights of a convicted person. Unlike e.g. house arrest (Grujić, 2020; Grujić, 2017: 354), which basically implies prohibition or restriction of the convicted person's right of movement and minimal restriction of other basic rights of the convict, institutional serving of imprisonment and life imprisonment implies, in addition to complete deprivation of freedom, the deprivation of most of the basic rights that the convict had as a free person, i.e. the restriction of basic rights to the level prescribed by the Constitution, laws and bylaws in the field of execution of criminal sanctions.

NORMATIVE REGULATION OF BASIC RIGHTS AND OBLIGATIONS OF CONVICTED PERSONS

The introduction of imprisonment in the penitentiary system and the first prison institutions (Ignjatović, 2018: 172-174), as well as the development of the cellular system of execution of imprisonment (Konstantinović-Vilić, Kostić, 2011: 138-141), is characterized by complete deprivation (or high level of restrictions) of all convicts' rights. However, from the middle of the 19th century, the experiment in the form of a "mark system" applied by Alexander Maconichie, the introduction of a combined "progressive" system of execution of imprisonment, developed the idea of correlating the corps and the scope of rights of convicted persons in relation to his conduct and respect for prison rules.

Modern system of execution of prison sentence, developed on the principles of resocialization, individualization and humane treatment of convicted persons (Ignjatović, 2018: 178-181) is based on prescribing the rights and duties of convicted persons in a prison and is organized on the idea of individualization and progression in the execution. Respect for the prison rules and the realization of the program of treatment implies a higher level of rights of the convicted person and a more favourable position in the institution, up to the limits of conditional or early release to serve the remaining part of the sentence. On the contrary, non-compliance with prison rules and failure to implement the program of treatment implies degradation of the scope of the convict's rights and a less favourable position in the penitentiary institution.



Normative regulation of the basic (and extended) rights of convicted persons, as well as the obligations and responsibilities of convicts, certainly implies the existence of a national legal framework in the field of execution. In addition to the national, normative regulation of the position, the scope of basic rights and obligations, minimum standards in the field of treatment of persons deprived of their liberty has also been performed at the international level. The most important international acts in the field of rights and positions of persons deprived of their liberty, which establish minimum standards regarding the position of convicted persons in penitentiary institutions, are the Standard Minimum Rules of the United Nations on the treatment prisoners - Nelson Mandela's rules (United Nations General Assembly A/RES/70/175 adopted on 17 December 2015)³ and the European Prison Rules of the Council of Europe (Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules).⁴

Thus, by serving a prison sentence in a penitentiary, the convict is transferred to an artificial (prison) community, in which (in addition to informal) formal rules of conduct are strictly normatively regulated. During the serving of the sentence, convicted persons have a certain corpus of basic rights (which derive from the basic rights of a man and citizen) which cannot be taken away from him under any circumstances. In relation to the determined capacities of the convicted person, his needs, the degree of risk and individual program of actions, he is assigned to a certain department and group with a strictly defined scope of rights and possibilities of exercising special rights or benefits of the convict. Depending on the behaviour of the convict, respect for prison rules and the implementation of the program of individual treatment, the position of the convicted person may be changed. And progressively, by switching to a group with a larger scope of rights and regressively, by allocating to a group with a lower scope of rights and opportunities to exercise benefits (See: Articles 18, 19 and 20 of the Rulebook on the treatment, treatment program, classification and subsequent classification of convicted persons, Official Gazette RS 66/2015).

If the convicted person does not respect or does not behave according to strict formal prison rules, or if his behaviour endangers the security in the prison institution, his responsibility must be determined. In the event that the behaviour is previously defined as a (graver or minor) disciplinary offense, the convicted person may be disciplined in a special, disciplinary, procedure, and disciplinary measures shall be imposed. The imposition of disciplinary measures may degrade the level of realized rights or benefits of the convicted person, in other words, disciplinary responsibility significantly affects the position of the convicted person in the penitentiary institution. The authors devoted the paper to the issues of concurrence of the national normative framework in the field of disciplinary responsibility of convicts with international minimum standards in this field provided in the Nelson Mandela Rules and the European Prison Rules.

3 Originally adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, they constitute the universally acknowledged minimum standards for the management of prison facilities and the treatment of prisoners, and have been of tremendous value and influence in the development of prison laws, policies and practices in Member States all over the world. Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

4 Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies. First version of European Prison rules, Council of Europe Committee of Ministers Recommendation No. R(87)3, was adopted by Committee of Ministers on 12 February 1987 at the 404th meeting of the Ministers' Deputies.



The first problem: knowledge and availability of “prison regulations”

Bearing in mind that convicted persons must be governed by the so-called prison rules, there is a need to be acquainted with the applicable regulations in the field of execution immediately after serving the prison sentence. According to the ZIKS, upon entering the institution, the convict is acquainted with the rights and obligations he has while serving his sentence. Also, the text of the ZIKS and the rules of prison institution are available to the convict throughout the time of serving the sentence, in the language used in the institution, in accordance with the law governing the official use of language and script. Such a solution seems justified in view of the fact that the convict has the opportunity to read and become acquainted with the prison rules.

The legislator also provided for a special rule if the convict is illiterate, cannot read or is deaf or does not know the language, because, in that case, he will be informed about his rights and obligations orally or with the help of an interpreter or translator. In this way, it is significantly more difficult for convicted persons to get acquainted with the regulations, because, as a rule, they will have this right on the first day when they start serving their sentence or a few days after admission to the admission department. In other words, the convict will not have the opportunity to ask someone to acquaint him with the regulations every day, even in the part related to disciplinary punishment (Milić, Dimovski, 2016: 219-231; Drakić, Milić, 2016: 475-491).

Certainly, the knowledge of regulations of all categories of convicted persons, not only the provisions related to the rights in the institution but also the provisions related to the obligations and responsibilities of the convicts are the basis for determining disciplinary responsibility and applying disciplinary measures. Bearing in mind that not such a small number of convicts spend a large number of years serving a prison sentence, the knowledge of regulations concerning the rights and obligations of this category of convicts is not a problem, primarily in the part related to disciplinary punishment.

NON-COMPLIANCE WITH PRISON RULES: DISCIPLINARY RESPONSIBILITY AND DISCIPLINARY OFFENSES

In accordance with the principle of legality, a convicted person can be disciplined only if he has committed a disciplinary offense that was prescribed at the time of its commission. Disciplinary offenses are prescribed by the ZIKS, and not by lower legal acts. This solution is justified because disciplinary punishment is an important issue for convicted persons, which should be regulated by the National Assembly, and not by the competent minister or the director of the penitentiary. We emphasize this for the reason that earlier in the Republic of Serbia minor disciplinary offenses were prescribed by the rulebook on house rules issued by the minister of justice.

ZIKS prescribes a total of twenty-three graver disciplinary offenses.⁵ Although they are qualified as graver, this does not mean that there is no essential gradation in the severity of the injury between

⁵ Graver disciplinary offences shall be: 1) escape or attempted escape from a penitentiary institution; 2) instigating a mutiny or an escape; 3) preparation of a mutiny or an escape; 4) unauthorized leaving of a penitentiary institution;

5) violence against another person, physical or psychological harassment of another person; 6) manufacturing, possession or use of a dangerous object or a means for remote communication; 7) manufacturing or bringing into a penitentiary institution a means suitable for attack, escape or committing of a criminal offence; 8) prevention of access to any part of the penitentiary institution to an officer or a person duly authorized to be in the



them. It seems indisputable that the most serious disciplinary offense is escape from the penitentiary, which, at the same time, is a special criminal offense (Milić, 2017: 813-823).

On the other hand, ZIKS prescribes twenty-one minor disciplinary offenses.⁶ Also, among the minor disciplinary offenses, there is an essential (though not formal) gradation in terms of violation of regulations. It seems that the disciplinary offense is smoking outside the space that is determined to be the easiest.

Regarding the regulation of disciplinary offenses, it can be noticed that there is an inaccuracy in prescribing, because it is not clear what can be classified for a particular offense. Thus, it is problematic that as the act of the offense is not explicitly prescribed, so many actions can qualify if the offense. For example, “unruly, rude and aggressive behaviour that is obstructing life and work in the penitentiary institution” is envisaged as a minor disciplinary offense. “Everything and anything” can really be classified as such an offense. Such inaccuracy is especially problematic for the convict, because it is difficult for him to know what is forbidden in this case. It is also problematic for the one who decides whether to file a disciplinary report to interpret such a provision. Finally, the body conducting the disciplinary proceedings must make a final “judgment” on the matter.

Nelson Mandela’s Rules concerning disciplinary responsibility and offenses in Articles 36, 37 (a), 38.1 and 39.1 and 39.2 anticipate:

”36. Discipline and order shall be maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well ordered community life.

penitentiary institution; 9) jeopardizing, damaging or destruction of property of a larger scale; 10) refusal to carry out a legitimate order of an authorized person due to which a graver harmful consequence has occurred or could have occurred; 11) jeopardizing of another person’s health committed on purpose or through gross negligence; 12) manufacturing, possession or consumption of narcotic drugs or psychoactive substances; 13) gross negligence of personal hygiene unless where such gross negligence of personal hygiene has occurred due to a physical or mental illness; 14) pursuit of chance games; 15) resistance to a medical check-up or measures aimed at prevention of threat of contagion; 16) instigation of a person deprived of liberty to commit a graver disciplinary offense; 17) neglecting an obligation to work that has caused or could have caused a graver harmful consequence; 18) training on a method of committing a criminal offence based on the personal or other person’s experience; 19) a graver abuse of granted extended rights and privileges; 20) improper, violent or offensive behavior towards an employee; 21) illegal taking possession of other persons’ movable property; 22) repeating of at least three minor disciplinary offences over a period of three months; 23) refusal by a convicted person to undergo a test in case of reasonable doubt as to taking narcotic drugs or psychoactive substances.

6 Minor disciplinary offence shall be: 1) jeopardizing and interfering with carrying out of work and leisure activities by an-other convicted person; 2) leaving the premises of the penitentiary institution or the work site and workshop of the penitentiary institution without permission; 3) carrying the tools and other material means out of the workplace; 4) mutual buying and selling clothes, footwear, medicines and other objects; 5) gambling; 6) preparation of meals, beverages or food outside of the space intended for such purposes; 7) putting tattoos on and body piercing of own or another person’s body in the penitentiary institution; 8) jeopardizing and damaging of property; 9) impairing the appearance of the penitentiary institution; 10) unauthorized use of and entering in premises for official use; 11) minor abuse of the special rights granted; 12) possession of objects that a convicted person must not possess on them; 13) unruly, rude and aggressive behavior that is obstructing life and work in the penitentiary institution; 14) unauthorized manufacturing of objects; 15) smoking outside of the spaces designated for that purpose; 16) neglecting of obligation to work; 17) refusal to carry out a legitimate order of an authorized person; 18) unauthorized use of objects; 19) enabling access to the penitentiary institution space to the unauthorized persons; 20) offensive behavior towards another person on the grounds of any personal characteristic; 21) provision of false information on the facts of relevance for exercising of a right.



37. The following shall always be subject to authorization by law or by the regulation of the competent administrative authority: (a) Conduct constituting a disciplinary offence;

38.1. Prison administrations are encouraged to use, to the extent possible, conflict prevention, mediation or any other alternative dispute resolution mechanism to prevent disciplinary offences or to resolve conflicts.

39.1. No prisoner shall be sanctioned except in accordance with the terms of the law or regulation referred to in rule 37 and the principles of fairness and due process. A prisoner shall never be sanctioned twice for the same act or offence.

39.2. Prison administrations shall ensure proportionality between a disciplinary sanction and the offence for which it is established, and shall keep a proper record of all disciplinary sanctions imposed.”

Also, in a similar way, the European Prison Rules in Articles 56 and 57 prescribe:

”56.1 Disciplinary procedures shall be mechanisms of last resort.

56.2 Whenever possible, prison authorities shall use mechanisms of restoration and mediation to resolve disputes with and among prisoners.

57.1 Only conduct likely to constitute a threat to good order, safety or security may be defined as a disciplinary offence.

57.2 National law shall determine: a. the acts or omissions by prisoners that constitute disciplinary offences; b. the procedures to be followed at disciplinary hearings; c. the types and duration of punishment that may be imposed; d. the authority competent to impose such punishment; and e. access to and the authority of the appellate process.”

Having in mind the international regulations, it can be determined that the national regulations are in full compliance with international standards in the part that refers to the manner of prescribing and defining disciplinary offenses.

DISCIPLINARY PROCEDURE

A convicted person can be punished only if he is proven guilty of a disciplinary offense in a disciplinary procedure. Disciplinary proceedings are regulated by the ZIKS and the Rulebook on disciplinary proceedings against convicted persons (Official Gazette RS, 79/14).

In this part of the paper, we will mention only a few aspects of the disciplinary procedure. Namely, every employee in the institution is obliged to report a disciplinary offense committed by a convicted person immediately upon learning about it. A convicted person who has been harmed by a disciplinary offense may file a report in writing and orally in the minutes to the submitter of the proposal for initiating disciplinary proceedings. Second, the proposal for initiating disciplinary proceedings is submitted by the head of the organizational unit of the institution or a person designated by him, within 48 hours of learning of the committed crime. For more serious disciplinary offenses, a proposal to initiate proceedings may also be submitted by the director of the institution or a person designated by him. Thirdly, the procedure for serious disciplinary offenses is conducted by the disciplinary commission and for minor disciplinary offenses by the director of the institution or a person designated



by him, provided that the person or a member of the commission cannot be the submitter of the proposal for initiating disciplinary proceedings. And fourthly, the convict may file an appeal against the decision with the enforcement judge in charge of the seat of the institution within three days from the day of receipt of the decision.

Nelson Mandela's rules in Articles 37 (c) and 41 (1-4) provide:

"37. The following shall always be subject to authorization by law or by the regulation of the competent administrative authority: ... (c) The authority competent to impose such sanctions;

41.1. Any allegation of a disciplinary offence by a prisoner shall be reported promptly to the competent authority, which shall investigate it without undue delay.

41. 2. Prisoners shall be informed, without delay and in a language that they understand, of the nature of the accusations against them and shall be given adequate time and facilities for the preparation of their defence.

41.3. Prisoners shall be allowed to defend themselves in person, or through legal assistance when the interests of justice so require, particularly in cases involving serious disciplinary charges. If the prisoners do not understand or speak the language used at a disciplinary hearing, they shall be assisted by a competent interpreter free of charge.

41.4. Prisoners shall have an opportunity to seek judicial review of disciplinary sanctions imposed against them."

The European Prison Rules, in a similar way, in Articles 57.2 (b), 58 and 59 provide:

"57.2. National law shall determine: b. the procedures to be followed at disciplinary hearings;

58. Any allegation of infringement of the disciplinary rules by a prisoner shall be reported promptly to the competent authority, which shall investigate it without undue delay.

59. Prisoners charged with disciplinary offences shall: a. be informed promptly, in a language which they understand and in detail, of the nature of the accusations against them; b. have adequate time and facilities for the preparation of their defence; c. be allowed to defend themselves in person or through legal assistance when the interests of justice so require; d. be allowed to request the attendance of witnesses and to examine them or to have them examined on their behalf; and e. have the free assistance of an interpreter if they cannot understand or speak the language used at the hearing."

After the analysis of the international normative framework, it can be confirmed that the national regulations are in full compliance with international standards in the part related to the conduct of disciplinary proceedings against convicted persons.

DISCIPLINARY MEASURES

Disciplinary measures are repressive measures imposed on a convicted person. Although the ZIKS does not determine the purpose of imposing disciplinary measures, it can justifiably be said that it is primarily similar to the purpose of imposing criminal sanctions. We are of the opinion that it would be justified to regulate the purpose of punishment by the ZIKS. In accordance with the principle of legality, only those disciplinary measures prescribed by the ZIKS can be imposed on a convict.



Disciplinary measures are: 1) the reprimand; 2) restriction or prohibition of the receipt of packages for up to three months; 3) withdrawal of granted extended rights and privileges referred to in Article 129, paragraphs 1 and 2 of this Law for up to three months; 4) restriction or prohibition of the disposal of money in the penitentiary institution for up to three months; 5) referral to solitary confinement during free time or during the entire day and night.

If we look at the order in which they are prescribed, the mildest disciplinary measure is reprimand and the most severe solitary confinement. And indeed, it seems justified to accept that this is the view from the point of view of the majority of convicts. But there are certainly a number of exceptions. There are also convicts whose solitary confinement is not the most difficult disciplinary measure, because it is almost the only way when a convict can be alone - separated from other convicts. Namely, in the Republic, the right to "joint imprisonment" applies, with the exception that there are special categories of convicted persons (Milić, 2020: 330), and ZIKS does not determine how many convicts can be in one room, but only prescribes that the dormitory must be so spacious that each convict has at least eight cubic meters and four square meters of space.

According to the provisions of the ZIKS, the disciplinary measure of solitary confinement is imposed exceptionally, only for more serious disciplinary offenses and cannot last longer than 15 days, except for the acquisition of disciplinary offenses when it can last up to 30 days. The room in which the measure is executed must have at least four square meters and ten cubic meters of space, must be airy, lighted and equipped with a bed, bedding, a chair and a table, while access to water and sanitary facilities for the convicted person is unlimited. The convict has the right to stay outside the room in the fresh air for at least one hour a day. During the execution of the measure, the medical examination of the convict is obligatory every day for both the director and the educator at least once in seven days. If the doctor determines that the solitary confinement affects the worsening of the convict's health condition, the execution of the measure will be terminated and will continue after the cessation of health reasons. The law limits the total stay of a convict in a room where a disciplinary measure is carried out to six months during one calendar year.

Nelson Mandela's rules in the part relating to disciplinary measures and disciplinary punishment in Articles 37 (b, d), 39 (2), 43 (1) and 45 (1) prescribe:

"37. The following shall always be subject to authorization by law or by the regulation of the competent administrative authority: ... (b) The types and duration of sanctions that may be imposed; (d) Any form of involuntary separation from the general prison population, such as solitary confinement, isolation, segregation, special care units or restricted housing, whether as a disciplinary sanction or for the maintenance of order and security, including promulgating policies and procedures governing the use and review of, admission to and release from any form of involuntary separation.

39. 2. Prison administrations shall ensure proportionality between a disciplinary sanction and the offence for which it is established, and shall keep a proper record of all disciplinary sanctions imposed.

43. 1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited: (a) Indefinite solitary confinement; (b) Prolonged solitary confinement; (c) Placement of a prisoner in a dark or constantly lit cell; (d) Corporal punishment or the reduction of a prisoner's diet or drinking water; (e) Collective punishment.



45. 1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.

European Prison Rules, in a very similar way, in Articles 57.2 (c), 58 and 59 prescribe the manner of defining disciplinary measures and the manner of their execution:

"57.2 National law shall determine: ... c. the types and duration of punishment that may be imposed;

60.1 Any punishment imposed after conviction of a disciplinary offence shall be in accordance with national law.

60.2 The severity of any punishment shall be proportionate to the offence.

60.3 Collective punishments and corporal punishment, punishment by placing in a dark cell, and all other forms of inhuman or degrading punishment shall be prohibited.

60.4 Punishment shall not include a total prohibition on family contact.

60.5 Solitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible.

In the part related to disciplinary measures and the manner of their execution, it can be stated that there is an obvious harmonization of the domestic legal framework with the minimum international standards.

Consequences of imposing disciplinary measures and deletion from the records

A convict who has been disciplined is considered an undisciplined convict. This means that in addition to the disciplinary measure imposed on him, he can or must suffer other legal consequences, such as those related to his position in the penitentiary and the rights he could exercise according to the KZ. The convict is subsequently classified in the group with a lower degree of extended rights and benefits on the basis of the imposed disciplinary punishment for a more serious disciplinary offense. The convict may subsequently be classified in the group with a lower degree of extended rights and benefits on the basis of the imposed disciplinary punishment for a minor disciplinary offense. According to the Criminal Code, there is one unfavourable solution for convicts, and it concerns conditional release. Namely, the law stipulates that a convict who has been punished twice for serious disciplinary offenses while serving his sentence and whose benefits have been taken away cannot be released on parole. Such a solution can have a multiple negative impact on the behaviour of the convicted person after disciplinary punishment.

However, a disciplined convicted person cannot always be considered punished, as this can only be the case if he or she is entered in the records of disciplinary measures. A disciplinary measure shall be deleted from the records of disciplinary measures if a new disciplinary measure is not imposed on the convict within one year from the day of the imposed disciplinary measure for minor offenses, and within three years from the date of the imposed disciplinary measure for more serious disciplinary offenses. Such a decision is completely justified and it can be said that in a certain way it reminds of the rehabilitation of convicted persons, which refers to the deletion from the criminal records. In this case,



the convicts are deleted from the records of disciplinary measures *ex officio*, so there is no possibility that the convict himself requests to be deleted from it earlier.

CONCLUSION

The authors dedicated the paper to the issue of concurrence of the national normative framework of the Republic of Serbia with the international minimum standards contained in the Nelson Mandela's Rules and the European Prison Rules in the field of disciplinary responsibility of convicted persons. Based on the analysis of the national framework in the part related to the basic rights and duties of convicted persons, as well as determining their position in penitentiary institutions determined by the scope of fundamental rights and the possibility of using extended rights (benefits), the provisions of Serbian criminal executive law and minimum international standards relating to disciplinary liability, disciplinary offenses, disciplinary proceedings and disciplinary measures are comparatively analysed and presented. The application of the normative and comparative method established the undoubted harmonization of the national and international normative framework in this area, but due to the scope of this paper, the part related to the practice of disciplinary punishment of convicted persons in the Serbian penitentiary system was missing and will be part of the author's next analysis.

REFERENCES

1. Criminal Code, Official Gazette RS 85/05, 88/05 – corr., 107/05 corr., 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 and 35/19.
2. Drakić, D., Milić, I. (2016). Utvrđivanje istine u disciplinskom postupku koji se vodi protiv osuđenog za vreme izdržavanja kazne zatvora, Proceedings of the Faculty of Law in Novi Sad, no. 2/2016, pp. 475–491.
3. European Prison Rules, Council of Europe Committee of Ministers Recommendation No. R(87)3.
4. European Prison Rules, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies.
5. Grujić, Z. (2017). Effects of house arrest as an alternative to short-term imprisonment, International Scientific Conference "Archibald Reiss Days" Thematic Conference Proceeding of International Significance, Volume II, pp. 353-364. Belgrade: Academy of Criminalistic and Police Studies.
6. Grujić, Z. (2019). Life imprisonment as an answer to contemporary security challenges – (in)adequacy of the retributive approach, Teme, Vol. XLIII, No 4, pp. 1109-1124.
7. Grujić, Z. (2020). „Alternative kazni zatvora“. Kosovska Mitrovica: Pravni fakultet.
8. Ignjatović, Đ. (2018). Kriminologija. Beograd: Pravni fakultet.
9. Konstantinović-Vilić, S., Kostić, M. (2011). Penologija. Niš: Pravni fakultet.
10. Law on execution of criminal sanctions, Official Gazette RS, 55/14 and 35/19.
11. Milić, I., Dimovski, D. (2016). Kažnjavanje osuđenih lica – disciplinske mere, Proceedings of the Faculty of Law in Novi Sad, no. 1/2016. pp. 219–231;



12. Milić, I., Bekstvo iz zatvora – krivično delo ili disciplinski prestup, Proceedings of the Faculty of Law in Novi Sad, no. 3/2017. pp. 813–823
13. Milić, I. (2020). Committing the most dangerous convicts to serve prison sentences, Glasnik of the Bar Association of Vojvodina, Issue 3/2020. pp. 329–346.
14. Rulebook on disciplinary proceedings against convicted persons, Official Gazette of RS no. 79/14.
15. Rulebook on sending convicted, misdemeanor convicted and detained persons to penitentiaries, Official Gazette RS 31/15.
16. Rulebook on the treatment, treatment program, classification and subsequent classification of convicted persons, Official Gazette RS 66/2015.
17. United Nation Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.
18. United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules) United Nations General Assembly A/RES/70/175 adopted on 17 December 2015.





WILDLIFE TRAFFICKING AS CATALYST OF (COVID 19) PANDEMIC¹

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Abstract: The global problem of wildlife trafficking has once again been put in the center of attention during the ongoing Covid19 crisis. Regardless of the origin of the virus, whether coming from an animal or stemming from a laboratory accident, and regardless if we will ever be able to establish the facts on this question, the issue of illegal trade with animals, whether being alive or dead, whether their transport as live stock or only their selected body parts, has become topical. Even before the current pandemic, it was well known that SARS, Ebola, Bird Flu, and MERS were caused by pathogens that have spread from animals to humans (zoonotic diseases). At the same time, the wildlife market is one of the biggest black markets in the world. Here is the intersection with the criminal justice system.

Therefore, this paper will deal with wildlife trafficking as a crime in general, then put it in the context of pandemics, as well as analyze the most relevant and/or specific international and national legal solutions on this issue.

Keywords: wildlife, trafficking, pandemics, crime, CITES, Covid 19

INTRODUCTION – WILDLIFE TRAFFICKING IN GENERAL AND AS A CRIME

Humans relied on wildlife for various purposes (consumption, clothing, etc.) through history, so trade with it should not be regarded as a new phenomenon. What indeed is new is the scope of exploitation of species, leading to their endangerment or extinction.³ We are in fact facing the sixth big extinction

¹ This paper is the result of the research on the strategic project titled “Epidemics. Law. Society.” (*Epidemija. Pravo. Društvo*) for the year 2021, which is carried out by the Faculty of Law, University of Belgrade.

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³ The World Wildlife Foundation (WWF) states that the Earth is experiencing the biggest mass-extinction since the dinosaurs 65 million years ago. 58% of vertebrae populations have died since 1970, while about 75%



wave in geological history. What makes it distinct from the prior ones is that this is the first one where not natural disasters, but the activities of humans are causing it (FAZ 2020: March, 2). Deforestation, pollution and overexploitation, especially due to (human) overpopulation, have accelerated this process. Along with this development, wildlife trafficking has increased as well. It is not limited to remote regions or areas with high biodiversity and endemic species; it has become a ubiquitous activity with supply, transfer and demand effects (Wyatt 2013: 17). Likewise, the categories of demand are wide-ranging and include food, traditional medicines,⁴ processed commodities – clothing, accessories, furniture, cosmetics, collectors' items, including hunting trophies, exotic pets and zoos and cross-over objects that fall under more than one category (i.e. rhino horn, pangolin scales,⁵ turtle meat, ivory, etc).

The illegal trafficking of wildlife, along with poaching, is the central form of 'wildlife crime' when it comes to animals. Wildlife crime, as a broader term, can be defined as "taking, trading (supplying, selling or trafficking), importing, exporting, processing, possessing, obtaining and consumption of wild flora and fauna, including timber and other forest products, in contravention of national or international law."⁶ Wildlife and forest crime are in brief "the illegal exploitation of the world's wild flora and fauna."⁷ Yet, this is only one possible terminological determination. A universally accepted definition or even a comprehensive legal framework for its prohibition does not exist. Hence, the elements and scope of wildlife crime vary between jurisdictions.

This reflects the fragmented character of the legal protection of wildlife, which is divided between different sources: conservation or wildlife management laws, species protection law and criminal law (Ege & Howe 2020: 246). Further diversification takes place within specific statutes (in connection to protection of the environment, wildlife, forests, endangered species, biodiversity and conservation, protected areas) (Ege & Howe 2020: 247). The direct criminalization in penal codes remains an exception.

The absence or minimal and/or rare criminalization of wildlife trafficking reflects the anthropocentric approach, oriented towards human interests and positioning human beings as fundamentally superior to all non-human nature (Ege & Howe 2020: 248). Wildlife is seen as a natural resource (Waytt 2013: 106). Whether pursuing the harm principle or the principle of "legally protected interests" (*Rechtsgutstheorie*) (Hefendehl & von Hirsch & Wohlers 2003), the common feature with regard to this crime is the existence or threat of damage to a resource a person is entitled to (Ege & Howe 2020: 251). The illegal trade of animals is, hence, penalized only when it violates the interests of people. Victimization is reserved for human beings, meaning that wildlife crimes are generally considered to be victimless crimes (Ege & Howe 2020: 250). Low enforcement rates of these victimless crimes re-curb the incentives for wildlife trafficking (low risk) and diminish deterrent effects of criminalization.

Trafficking may occur before or after the illegal processing of wildlife (slaughtering; manufacturing products from them), and surely after poaching. In some cases, processing serves as a way of disguising the origin of the animal. Trafficking can be broadly defined as "illegal acts by a person for their own benefit or that of someone else that may involve dispatching, transporting, distributing, brokering, offering, keeping for offer, dealing, processing, purchasing, selling, supplying, or storing" (UN-

of land and 66% of ocean areas have been "significantly altered" and up to one million plant and animal species are facing extinction by human activity. Tollefson 2019: 171.

4 For example in China, this includes deer musk, snake bile, tiger bone wine, bear bile, etc.

5 Pangolins are considered to be the most trafficked mammals in the world.

6 UNODC, Wildlife and Forest Crime: Overview, <https://www.unodc.org/unodc/en/wildlife-and-forest-crime/overview.html>, August 21, 2021. In this paper we will focus on animals, as they are crucial in the pandemics context.

7 *Ibid.*



ODC 2018: 13). Illegal export and import (trafficking in a narrow sense) underline the trans-border component of the crime and can be further sub-divided into: export/import without authorization, proper documents or with fraudulent documents; export/import of illegally obtained wildlife and forest products; export/ import of protected species; false classification and labeling of exports and imports, as well as export and imports with illegally obtained documents (UNODC 2012: 41, 42; Ege & Howe 2020: 257).

What is equally or even more significant is the next phase in the trafficking process: the acquisition, possession and consumption of the trafficked animal or its parts/products. Should they be criminalized as well, then the main driver – the demand, would be tackled (UNODC 2012: 41, 42). Yet, countries hesitate to broaden the criminal zone and to include this phase of wildlife trafficking. In the context of pandemics and the problems over closing exchange platforms (wet markets, markets, etc.) and its monitoring, this has gained more significance. An additional challenge in this regard is the transition to digital communication and exchange mediums that can be even less controlled and traced than before (especially the dark web).

The interests/legal goods that are endangered or violated are usually of economic nature. Until the current Covid19 crisis, the problem of wildlife trafficking was primarily perceived as an economic one, because diseases from the traded animals could infect production animals (Spapens 2021: 205). Even when environmental aspects play a role, they are built upon negative effects the illegal activity has for the living conditions of humans (their surrounding, available resources and quality of life). What came into the center of attention due to the Covid19 crisis is particularly the aspect of danger to health (or formulated as legal good: the right to physical integrity/life and limb).

WILDLIFE TRAFFICKING IN THE CONTEXT OF (COVID19) PANDEMIC

The ongoing Covid19 pandemic has ubiquitously and very vividly illustrated that the excesses of globalization are almost impossible to localize and restrain to certain areas. The concepts of “local” (local outbreak of disease) and “global” (spread of the disease globally) have merged. The origin of the virus in this case was probably⁸ the wet market of Wuhan (Huanan seafood wholesale market), in the Chinese Province of Hubei. Bats, a natural reservoir for a range of SARS-like corona viruses, are regarded as the potential initial reservoir of the SARS-CoV-2 (Zhou et al. 2020: 270 – 273), which was then over another animal as an intermediary transmitted to humans.

Wet markets are locations where fresh meats, products, derivatives and live animals are frequently stored in close proximity, with little or no health safety precautions or sanitary measures, to be (legally or illegally) sold open-air (Aguirre et al. 2020: 258). Species that normally in nature do not come in contact with each other are transported and stored (jammed) together or close to each other in cages or nets on top of each other. Furthermore, rare animals that are in demand are often trafficked from remote areas and can carry viruses humans usually never come in contact with (Hemley 2020). In addition, panicking animals eject more viruses, are already physically debilitated and are more prone to infections. These circumstances combined facilitate the exposure and transference of diseases from

⁸ An investigative team was sent by the World Health Organization (WHO) to Wuhan from 14 January until 10 February 2021 to retrospectively determine what wildlife was sold in local wet markets in the region. Their findings were inconclusive. Xiao et. al. 2021: 168.



animal to animal and later to human, virus mutations included. Live meat markets have become “perfect laboratories for creating new viruses” (Nuwer 2020), with wildlife trafficking being their catalyst.

Out of 1.415 human pathogens, 61% are zoonotic (Taylor & Latham & Woolhouse 2001: 983 – 989). According to the World Health Organization, around 75 per cent of new or emerging infectious diseases that have affected humans over the past three decades originated in animals (UNODC 2020: 35). Ebola, Middle East respiratory syndrome (MERS), bird flu, severe acute respiratory syndrome (SARS), swine flu are examples of diseases that have in recent years transferred from animals to humans. It is estimated that there are at least over 1 billion direct and indirect contacts between animals, humans and domestic animals from wildlife trade every year (Karesh et al. 2005: 1000). Cross-species transmission is accelerated by intensified global trade, rapid transportation and markets that function rather as network hubs than as merely product endpoints. Hence, a rational approach would be to diminish the risk of disease transmission by decreasing the contact among species (Karesh et al. 2005: 1001). Decreasing the scope of wildlife trafficking as source/trade platform of products is one way to achieve that. It is more workable to regulate and/or criminalize wildlife trafficking than to prohibit consumption of such animals and their by-products, as this often has a cultural origin and needs more time and informal instruments to show effect.

WILDLIFE TRAFFICKING AND INTERNATIONAL LAW

The United Nations Office on Drugs and Crime (UNODC) has declared the trafficking of illegal wildlife, next to production and trafficking of narcotics, human trafficking, maritime piracy, and small arm trafficking as transnational organized crime; which is heading up since the early 2000s (World Bank Group 2020: 21, 26). As the UNODC defines wildlife and forest crimes as crimes that are related to any possession, consumption, trade, import, or export of fauna and flora in violation of national or international law,⁹ the United Nations Convention against Transnational Organized Crime (UNTOC) from 2000, the United Nations Convention against Corruption (UNCAC) from 2003, but above all the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) from 1975 are the most relevant international instruments for the suppression of this kind of illegal activity.

CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA

CITES was the result of a growing interest for a multilateral convention on the protection of endangered species. It was agreed upon in 1973 and came into force two years later. Its goal is to regulate and control a sustainable trade ensuring the preservation of today roughly 5.950 species of animals and 32.800 species of plants.¹⁰ They are enlisted in three separate Appendices of protected species, setting out control and reporting mechanisms (permit and certificate system) applicable for them. It has one of the largest memberships of conservation agreements, with now 183 Parties.¹¹

9 United Nations Office on Drugs and Crime, Wildlife and Forest Crime Overview, <https://www.unodc.org/unodc/en/wildlife-and-forest-crime/overview.html>, last accessed on July 1, 2021.

10 <https://cites.org/eng/disc/species.php#:~:text=Over%2038%2C700%20species%20%E2%80%93%20including%20roughly,over%2Dexploitation%20through%20international%20trade>, last accessed August 15, 2021.

11 <https://cites.org/eng/disc/parties/index.php>, last accessed on August 15, 2021.



In Article VIII – “Measures to Be Taken by the Parties”, it is stipulated that “the Parties shall take appropriate measures to enforce the provisions of the (...) Convention and to prohibit trade in specimens in violation thereof.” One of the measures mentioned is, beside confiscation and return to the State of export of such specimens (b), penalization of trade or possession of such specimens or both (a). CITES does not deal directly with illegal trade as such (and hence wildlife trafficking), but it does demand from the Parties to prohibit trade that contravenes its rules (Lelliott 2020: 133).

These measures, on the other hand, do not need to be in form of criminal offences. The wording “penalization” is a broader term, and can come along in different legal shapes (criminal, contractual, administrative). Also, it does not specifically address the risk of diseases. In other words, CITES lacks mechanisms to criminalize wildlife trafficking (Lelliott 2020: 126). Due to that, many Parties have not enacted specific legislation, but rely on general wildlife and forest laws, or on their customs or foreign trade legislations (UNODC 2012: 15). This further means that these laws do not necessarily comply with CITES requirements, especially when they were passed before CITES was enacted (UNODC 2012: 15).

Due to this absence of specific instruments that target wildlife trafficking, the next best thing(s) in addition to CITES are the United Nations Convention against Transnational Organized Crime (Palermo Convention) and the United Nations Convention against Corruption with the general frameworks they set up.

UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

With regard to organized crime, this has become topical itself as criminal organizations have deployed themselves in the illicit markets for wild flora and fauna, enticed by high profits and low risks. The framework UNTOC creates includes measures against transnational organized crime, including the formulation of domestic criminal offences, rules for extradition, mutual legal assistance and law enforcement cooperation.

UNTOC and its Protocols do not explicitly cover wildlife trafficking. However, the Convention does apply to all “serious crime” with a transnational organized criminal aspect. “Serious crime” is defined as a conduct that constitutes an offence punishable by a maximum deprivation of liberty of at least four years of imprisonment or a more serious penalty (Art. 2, para. b). Seriousness of crime refers to the penalty that is foreseen for the respective crime, meaning that if wildlife trafficking is punishable by at least four years of imprisonment, it falls under UNTOC. Given the characteristics and typology of wildlife crimes, they fall under the definition of an organized criminal group.¹² The transnational character of the crime will also be fulfilled, as both perpetration and effect of wildlife trafficking are cross-border by nature. The General Assembly of the United Nations has confirmed this orientation of UNTOC, affirming that it “constitutes an effective tool and the necessary legal framework for international cooperation in combating such criminal activities as the illegal trafficking of protected species

¹² “Organized criminal group” is defined in Art. 2(a) UNTOC as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.” See Strydom (2016): 265, 278.



of wild flora and fauna, in furtherance of the principle of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)”¹³

Besides, the particular set of offences UNTOC refers to (participation in an organized criminal group [Art. 5], money-laundering [Art. 6], corruption [Art. 8], and obstruction of justice [Art. 23]) can also become relevant, as they constitute typical offences related to wildlife trafficking (along with animal cruelty).

UNITED NATIONS CONVENTION AGAINST CORRUPTION

Corruption is a major enabler of wildlife crime (Nellemann et al. 2014: 23). It can occur at various points of the trafficking chain – bribes for the government official to overlook poaching, to ignore fraudulent paperwork or to forge CITES permits or certificates to enable illicit trade, etc. (Lelliott 2020: 141). Corruptive activities serve to allow wildlife trafficking or to proceed unchecked or unbalanced (Callister 1999: 8); ranging from low-ranking game wards to top level government officials (Schloenhardt 2020: 24). Hence, UNCAC requirement to criminalize certain activities (bribery of national public officials [Art. 15], bribery of foreign public officials and officials of public international organizations [Art. 16], embezzlement [Art. 17], money-laundering [Art. 23]) can contribute to combat wildlife trafficking (Lelliott 2020: 142).

Like UNTOC, UNCAC does not establish an explicit link between wildlife crime and corruption; it has to be deducted from the respective provisions and the overall aim of the Convention.¹⁴ The UNCAC framework on corruption is different from the available regime regarding wildlife trafficking, but it complements the international instruments on wildlife crime.

What is common for all of the mentioned international sources is that due to the complex nature and global occurrence of wildlife crime, as well as the need to implement them in national legislation, they always have to be seen in conjunction with national laws.

WILDLIFE TRAFFICKING IN NATIONAL LEGISLATIONS

The protection of wildlife is established either by imposing bans on poaching and trade or by regulating the trade in the form of catch-quotas (i.e. for lobsters and whales) (Pires & Moreto 2016). Wildlife trafficking is only of secondary importance for national criminal legislation. The focus lies on administrative laws and their system of permits and certificates (see CITES). Seldom are the national criminal legislations that prescribe this offence explicitly in their criminal codes, like Portugal (Art. 278 [2] Portuguese Criminal Code) or Mexico (Art. 420 Federal Penal Code); both countries being entry/transit points for the illicit trade.

¹³ United Nations General Assembly Resolution 55/25 of 15 November 2000.

¹⁴ Art. 1 UNCAC lists its purposes: (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; (c) To promote integrity, accountability and proper management of public affairs and public property.



AUSTRALIA

Due to the unique nature of the region and its close proximity to Southeast Asia (with major demand markets) and criminal networks, Australia is highly impacted by wildlife crimes (Wilson-Wilde 2010: 222). Over 80 percent of Australia's flora and fauna are endemic, with the country having the highest extinction rate in the world (Purtill 2020: 333).

On federal level, the most important source of law is the Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act (Amendment to EPBC) from 2001. Part 13A deals with the international movement of wildlife specimens. Sections 303 CC and 303 DD criminalize the unauthorized export of certain species out of Australia. The offense is committed if a person exports a specimen in a manner that is not authorized by the Act and if that specimen belongs to a CITES-listed species (303 CC) or is a regulated native specimen (303 DD). Criminalized is the unauthorized import of CITES specimens (303CD) and of regulated live specimen from outside of Australia (303 EK). All offences are punishable with up to 10 years of imprisonment and up to 1000 penalty units.¹⁵ Section 303GQ regulates imports of specimens contrary to the laws of a foreign country, where the export has to be founded on CITES and is depending on the request of the relevant CITES authority. Maximum penalty for this offense is imprisonment for five years.¹⁶

While the transnational movement of wildlife specimens and products is regulated on federal level, when it comes to movement within Australia, State and Territory offences become relevant. Out of numerous offences, noteworthy are illegal capture offences (mostly criminalizing unlawful acquisition of a listed or otherwise prohibited specimen) and illegal trade offences (prescribed as unauthorized buying, selling and dealing in listed wildlife).

It is criticized that criminal law protection was not given adequate attention by the Australian executive, that they are not implemented fully, while at the same time the legislative network was overly complex with conflicting laws in different jurisdictions (Purtill 2020: 333, 334). A country as large and ecologically diverse as Australia needs customized legislation, which retrospectively bears lack of uniformity (Purtill 2020: 345). At national level, the legislative framework is more satisfactory and functional, provided by the EPBC Act, including higher penalties. The downside at this level is the rare utilization of the available instruments by law enforcement and judiciary (Purtill 2020: 356).

CHINA

The Wildlife Protection Law (WPL) of the People's Republic of China divides the level of protection of all wildlife (harsher punishments, more barriers to obtain special license hunting, etc.), based on their risk of extinction into class I (approx. 100), class II (approx. 200) and species of terrestrial wildlife that are beneficial or of important economic or scientific value (approx. 1600), while in general following the CITES categorization. Besides, every province has a list of locally protected wildlife species.

Various activities are prescribed and sanctioned by WPL - trade in wildlife or the products thereof (Art. 44); illegal hunting or catching (Art. 45, 46); illegal breeding (Art. 47), illegal selling, purchasing, utilizing, transporting, carrying or mailing (Art. 48); illegal production or trade (Art. 49); advertising the illegal sale, purchase or utilization (Art. 50); providing a trading platform for the illegal sale,

¹⁵ The current value of one penalty unit is 210 AUD.

¹⁶ Additional offences are Contravening conditions of a permit (Section 303 GF), Contravening of illegally imported specimens (Section 303 GN), and cruelty (Section 303 GP).



purchase or utilization (Art. 51); illegal import or export (Art. 52); introducing non-native wildlife species from abroad (Art. 53); releasing wildlife introduced from abroad (Art. 54) and forging, modifying, selling, purchasing, transferring, borrowing or lending relevant certificates, special marking or other relevant permission document (Art. 55). Typical sanctions are fines between two and ten times the value of wildlife or the products thereof (if property is seized), confiscation, revocation of hunting licenses, fines with fixed ranges (between 2.000 and 200.000 yuan), if property is not seized.¹⁷ Where a crime is constituted, criminal responsibility is to be investigated in accordance with the law.

China's decision from February 24, 2020, a consequence of the emerging pandemic, was to ban the illegal trade and consumption of all wild animals protected under WPL (Koh, Li & Lee 2021). Yet, there are still several critical points. To begin with, the initial scope of protection of the WPL is not sufficient. It does not apply to about 1100 species that are not listed as rare or endangered, but which are in high demand (Huang et al. 2021). 62% of the mammalian species in China are left unprotected; including all bat species, the natural reservoirs of SARS-like corona viruses (Huang et al. 2021). The next issue is that commercial trade and utilization of endangered species are not prohibited for all purposes. Wildlife or products thereof can be sold, purchased or utilized for "scientific research, captive breeding, public exhibition or performances, heritage conservation or other special purposes" (Art. 27 [2] WPL). The range of exceptions is broad enough to allow potential (grey market) loopholes from the prohibition. Further, the commercial captive breeding of endangered species is still allowed. An example for both: bear farms that harvest bile from caged live animals are legal, while the products of poached and illegally trafficked black bears can be disguised as products of farmed bears (Huang et al. 2021). Also, "other special purposes" as a general clause can broaden the interpretation. Trafficking may decrease because of criminalization, but the risk for zoonotic disease transmission remains immanent, as the sources for exotic animals can simply be found locally or regionally, while the loss of biodiversity affects the resilience of wildlife and humans against infections (Keesing et al. 2010: 647 – 652). Lastly, the possession of illegally obtained wildlife and their products is not criminalized,¹⁸ which restricts the possibilities to combat illegal wildlife trade.

When it comes to the core penal law, relevant is Art. 341 of the Criminal Law of the People's Republic of China (CL), from Section 6 (Crimes of Undermining Protection of Environmental Resources). The crime from paragraph 1 commits "whoever illegally catches or kills the species of wildlife under special state protection which are rare or near extinction, or illegally purchases, transports or sells the species of wildlife under special state protection which are rare or near extinction and their products". The sanction for that is fixed-term imprisonment of not more than five years or criminal detention and concurrently a fine. If the circumstances are serious, the offender shall be sentenced to fixed-term imprisonment of not less than five years and not more than ten years and concurrently be sentenced to a fine. If the circumstances are especially serious, the offender shall be sentenced to fixed-term imprisonment of not less than ten years and concurrently be sentenced to a fine or confiscation of property.

Paragraph 2 contains a related, lighter offence, which exists when "whoever, in violation of the law or regulations on hunting, hunts wildlife in an area or during a season closed to hunting or uses prohibited hunting gear or methods for the purpose, thus damaging wildlife resources." If the circumstances are serious, the perpetrator shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or a fine.

¹⁷ This is between 263 € and 2.632 €.

¹⁸ Environmental Investigation Agency, "China's Wildlife Protections Law", <https://eia-international.org/wildlife/saving-tigers/tiger-farming/chinas-wildlife-protection-law/>, last accessed on August 29, 2021.



The CL, passed in 1979, and fully revised in 1997, has been further amended 10 times. The latest modification (Amendment XI to the PCR Criminal Law) was adopted on December 2020, and took effect on March 1, 2021. As a reaction to the ongoing pandemic, a third paragraph was added to Art. 341, namely that “violating regulations on the protection and management of wildlife by illegally hunting, purchasing, transporting, or sale of terrestrial wildlife bred and raised in the wild as provided for in the first paragraph for the purpose of eating, where the circumstances are serious, is to be punished” in line with the provisions of the preceding (second) paragraph.

With this amendment, the criminal legislation on wildlife trafficking was broadened, together with the changes to the WPL. Yet, also here, it focuses only on terrestrial wildlife bred and raised in the wild, and only for the purpose of consuming it as food. Captive-bred species (that also come in contact with other species they in the wild would not come to) are not included, as well as other purposes beyond eating. In addition, only land animals are covered by the provision.

SERBIA

Wildlife protection, including the ban of trafficking with certain species is regulated by various laws and offences. The Law on Environmental Protection (LEP, Official Gazette of RS, 135/2004) prescribes in Art. 28 (1) that transboundary movement and trade in specimens of wild flora and fauna (import, export, introduction, shipment, re-export) and their developing forms and parts, shall be carried out under the condition that the import, i.e. export is not prohibited, and that the quantity or number of wild flora and fauna specimens transported across the border will not endanger the survival of that species, as well as under other conditions prescribed by law. This transboundary movement and trade are based upon a permit and/or document issued by the relevant ministry (Art. 28 (2)). Violation of these provisions results in commercial offences for legal persons (Art. 116 lit. (4) (5)) with fines from 1.500.000 to 3.000.000 RSD or misdemeanour for entrepreneurs (Art. 117a lit. (4) (5)) with fines from 250.000 to 500.000 RSD or for natural persons (Art. 118 lit. (3) (4)) with fines from 5.000 to 50.000 RSD or imprisonment for up to 30 days.

The Law on Nature Protection (LNP, Official Gazette of RS, 36/2009) contains numerous provisions on wildlife protection and a separate Section V on Protection and Conservation of Wild Species. For wildlife trafficking particularly relevant are Art. 36 (defining strictly protected and protected wild species); Art. 90 (trade in strictly protected and protected wild animal species); Art. 94 (transboundary movement, trade and breeding of strictly protected, protected and allochthonous wild species) and Art. (notification system). Economic offences of legal entities are listed in Art. 125 (lit. 5a – 7) and are sanctioned with a fine from 1.500.000 to 3.000.000 RSD. The fine will be proportionate to the value of goods, the maximum amount not exceeding twentyfold amount of the value of goods (Art. 126 (2)). In addition to those specific offences, the penalty will mandatorily be accompanied by a protective action of permanent confiscation of the specimens stated in invalid permits and certificates, as well as of objects used or intended for or developed through commitment of the offense (Art. 126 (5)).

Criminal offences with regard to wildlife trafficking also exist. Aside from the connected offences relating to corruption, organized crime, etc.; the crime with its protected legal good being closest to the trafficking of wild species is the crime of Destroying, Damaging, Taking out of and into Serbia Protected Natural Assets from Art. 265 Criminal Code (CC, Official Gazette of RS, 85/2005). In the third paragraph of the Article, it is prescribed that the offence is committed by “whoever contrary to regulations exports or takes abroad a protected or specially protected plant or animal species, or imports



or brings into Serbia foreign plants or animals protected by international treaty or documents". The activities mentioned are conducted unlawfully, contrary to regulations. Here is Art. 28 ("Movement and trade in specimens of wild flora and fauna") LEP relevant. Beside living, dead animals should be regarded as objects of the crime as well. Processed animals (i.e. as food) are not included in this offence (Stojanović 2018: 840). It is questionable whether Art. 265 (3) CC is applicable to prepared animals. Art. 72 of the Law on Wild Animals and Hunting (LWAH, Official Gazette of RS, 18/2010) prohibits taking abroad trophies of wild animals. Although violation of this provision is prescribed as a misdemeanor, it should be regarded as a possible object of Destroying, Damaging, Taking out of and into Serbia Protected Natural Assets as well (Stojanović 2018: 840).

The sanction for this is imprisonment from three months to three years and a fine. Not meeting the threshold of four years of prison, it means that wildlife trafficking is not recognized as a serious crime¹⁹ in Serbia.

In accordance with the general provision on culpability for attempt (Art. 30 (1) CC), an explicit provision on the criminalization of the attempted offence was prescribed in the article (paragraph 4). The legislator has obviously identified the necessity to provide legal protection in the phase previous to the completed offence, increasing the risk for the offenders. In addition, protected or specially protected plants and animals which have been illegally exported, taken abroad or imported will be seized (paragraph 5).

CONCLUSION

Wildlife trafficking has been treated as a peripheral problem until the outbreak of the Covid19 pandemic. The reasons for that are manifold (anthropocentric approach, low risk, high profit, executive inactivity, legislative loopholes, complex jurisdictions, etc.).

CITES, as the most important international document, is widely accepted and implemented, yet does not constitute deterrent effects for the offenders with its permit system. In addition, it applies only on the listed endangered species and cannot be extended to every aspect of illegal trade. For example, the horseshoe bat, regarded as the possible origin of SARS-CoV-2, is not endangered. Also, CITES has no jurisdiction over domestic trade.

Another important legal document, UNTOC, becomes effective only if the respective crime is set as a serious crime, meeting the threshold of four years of imprisonment (i.e. not the case in Serbian CC). Organized criminal groups adapt quickly to changes and are expected to go even deeper underground (from surface web [publicly available information] to deep web [information that is access-controlled] to dark web [can be reached only with special software]; different methods of transportation) Corruption and its various forms, as related offences, are rarely prosecuted; even less when it comes to wildlife trafficking, as this is not prosecuted in the first place.²⁰

Although their effects might be disastrous, wildlife trafficking can be perfectly legal; it is regulated as a normal economic activity. Consequently, administrative agencies are the competent authorities for enforcement at first. They usually have limited powers of investigation, with low prison sentences and fines, though.²¹ Sanitary rules, for example, may be as extensive as possible; yet traffickers will circum-

19 According to UNTOC.

20 Schloenhardt, p. 24.

21 Spapens, p. 206.



vent health checks and transportation requirements.²² If the country is vast in size, has inadequately controlled borders and numerous species that are in demand, the issue becomes more complex. Apathetic law enforcement meets then a lucrative and low risk market.²³

This leads us to the field of criminal law, which indeed is the *ultima ratio* for combating wildlife trafficking. National legislation does not naturally entail criminal offences, as it is the case with other legal goods. If crimes exist, they are often prescribed in a narrow way (i.e. only endangered species). After the Covid19 outbreak, elements like increased danger for public health or similar, could be added to the respective offences.

What also has to be taken into account, is the swift adaptation to changed circumstances by the organized criminal groups that usually perform trafficking. Illicit markets could then go even deeper underground,²⁴ on the internet or in the dark web. Medium-term, this would shift the market and the transportation means, and deem necessary new adjustments of the legislative and the enforcement.

The overall legal protection of wildlife from trafficking is fragmented, inconsistent and mild. On the other hand, the silver lining of wildlife trafficking is that, compared to other global risks, this problem could be managed very fast. It could start with reducing the demand for contraband.

REFERENCES

1. Aguirre, A. A., Catherina, R., Frye, H., & Shelley, L. (2020). Illicit wildlife trade, wet markets, and COVID-19: preventing future pandemics. *World Medical & Health Policy*, 12(3), 256-265.
2. Callister, D. (1999). *Corrupt and Illegal Activities in the Forest Sector*. World Bank Discussion Paper.
3. CITES, *List of Parties to the Convention*, <https://cites.org/eng/disc/parties/index.php>, last accessed on August 15, 2021.
4. CITES, *The CITES species*, <https://cites.org/eng/disc/species.php#:~:text=Over%2038%2C700%20species%20%E2%80%93%20including%20roughly,over%20Dexploitation%20through%20international%20trade>, last accessed August 15, 2021.
5. Criminal Code, *Official Gazette of RS*, nos. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.
6. Ege, G., Howe, G. (2020). Criminalisation of Wildlife Trafficking. In: Ege, G., Schloenhardt, A., & Schwarzenegger, C. *Wildlife Trafficking: the illicit trade in wildlife, animal parts, and derivatives* (pp. 245 - 270). Berlin: Carl Grossmann Verlag.
7. Environmental Investigation Agency, "China's Wildlife Protections Law", <https://eia-international.org/wildlife/saving-tigers/tiger-farming/chinas-wildlife-protection-law/>, last accessed on August 29, 2021.
8. FAZ (2020, March 2). WWF: Größtes Artensterben seit Ende der Dinosaurier-zeit droht. Frankfurt. Accessed on August 1, 2021. <https://www.faz.net/aktuell/gesellschaft/tiere/150-arten-sterben-protag-aus-groesstes-artensterben-seit-ende-der-dinosaurier-zeit-droht-16660249.html>

²² Spapens, p. 205.

²³ Linzi Wilson-Wilde, p. 222.

²⁴ WWF, p. 35.



9. Hefendehl R., von Hirsch, A., Wohlers W. (2003). *Die Rechtsgutstheorie. Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?* Nomos: Baden-Baden.
10. Hemley, G. (2020). "People Want Wildlife Markets to Close—Governments Should Listen." *The Hill*. <https://thehill.com/opinion/energy-environment/494365-people-want-wildlife-markets-to-closegovernments-should-listen>, last accessed August 25, 2021.
11. Huang, Q., Wang, F., Yang, H., Valitutto, M., & Songer, M. (2021). Will the COVID-19 outbreak be a turning point for China's wildlife protection: New developments and challenges of wildlife conservation in China. *Biological Conservation*, 254, 108937.
12. Karesh, W. B., Cook, R. A., Bennett, E. L., & Newcomb, J. (2005). Wildlife trade and global disease emergence. *Emerging infectious diseases*, 11(7), 1000 – 1002.
13. Keesing, F., Belden, L. K., Daszak, P., Dobson, A., Harvell, C. D., Holt, R. D., Hudson, P., Jolles, A., Jones, K. E., Mitchell, Ch. E., Myers, S. S., Bogich T., & Ostfeld, R. S. (2010). Impacts of biodiversity on the emergence and transmission of infectious diseases. *Nature*, 468(7324), 647-652.
14. Koh, L. P., Li, Y., & Lee, J. S. H. (2021). The value of China's ban on wildlife trade and consumption. *Nature Sustainability*, 4(1), 2-4.
15. Law on Environmental Protection, *Official Gazette of RS*, nos. 135/2004, 36/2009, 36/2009, 72/2009, 43/2011, 14/2016, 76/2018, 95/2018 and 95/2018.
16. Law on Nature Protection, *Official Gazette of RS*, nos. 36/2009, 88/2010, 91/2010 - corr., 14/2016, 95/2018 and 71/2021.
17. Law on Wild Animals and Hunting, *Official Gazette of RS*, nos. 18/2010 and 95/2018.
18. Lelliott, J. (2020). International Law Relating to Wildlife Trafficking: An Overview. In: Ege, G., Schloenhardt, A., & Schwarzenegger, C. *Wildlife Trafficking: the illicit trade in wildlife, animal parts, and derivatives* (pp. 125 - 147). Berlin: Carl Grossmann Verlag.
19. Nellemann, C., Henriksen, R., Raxter, P., Ash, N., & Mrema, E. (2014). *The environmental crime crisis: threats to sustainable development from illegal exploitation and trade in wildlife and forest resources*. United Nations Environment Programme (UNEP).
20. Nuwer, R. (2020). "To Prevent Next Coronavirus, Stop the Wildlife Trade, Conservationists Say." *New York Times*. February 19. <https://www.nytimes.com/2020/02/19/health/coronavirus-animals-markets.html>, last accessed August 12, 2021.
21. Pires, S. F., & Moreto, W. D. (2016). *The illegal wildlife trade*. Oxford Handbooks Online. <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-161>, last accessed on August 20, 2021.
22. Purtill, J. (2020). Wildlife Trafficking in Australian Criminal Law. In: Ege, G., Schloenhardt, A., & Schwarzenegger, C. *Wildlife Trafficking: the illicit trade in wildlife, animal parts, and derivatives* (pp. 331 - 358). Berlin: Carl Grossmann Verlag.
23. Schloenhardt, A. (2020). Wildlife Trafficking: Causes, Characteristics, and Consequences. In: Ege, G., Schloenhardt, A., & Schwarzenegger, C. *Wildlife Trafficking: the illicit trade in wildlife, animal parts, and derivatives* (pp. 1 - 36). Berlin: Carl Grossmann Verlag.
24. Spapens, T. (2021). Is COVID-19 a Crime? A Criminological Perspective. In: Aarts E., Fleuren H., Sitskoorn M., Wilthagen T. (eds), *The New Common*. How the COVID-19 Pandemic is Transforming Society. Cham: Springer Nature.



25. Stojanović, Z. (2018). *Komentar Krivičnog zakonika*, 7. izdanje. Belgrade: Službeni glasnik.
26. Strydom, H. (2016). Transnational Organised Crime and the Illegal Trade in Endangered Species of Wild Fauna and Flora. In: P. Hauck & S. Peterke (eds), *International Law and Transnational Organised Crime* (pp. 264 – 286), Oxford: Oxford University Press.
27. Taylor, L. H., Latham, S. M., & Woolhouse, M. E. (2001). Risk factors for human disease emergence. *Philosophical Transactions of the Royal Society of London. Series B: Biological Sciences*, 356(1411), 983-989.
28. Tollefson, J. (2019). One million species face extinction. *Nature*, 569, 171.
29. *United Nations General Assembly Resolution 55/25* of 15 November 2000.
30. United Nations Office on Drugs and Crime, *Wildlife and Forest Crime Overview*, <https://www.unodc.org/unodc/en/wildlife-and-forest-crime/overview.html>, last accessed on July 1, 2021.
31. UNODC (2012). *Wildlife and Forest Crime Analytic Toolkit* (revised ed.), New York.
32. UNODC (2018). *Guide on Drafting Legislation to Combat Wildlife Crime*, Vienna.
33. UNODC (2020), *World Wildlife Crime Report: Trafficking in Protected Species*. Vienna.
34. Wilson-Wilde, L. (2010). Wildlife crime: a global problem. *Forensic science, medicine, and pathology*, 6(3), 221-222.
35. World Bank Group (2020). *Violence without Borders: The Internalization of Crime and Conflict*. Policy Research Report. Washington, D.C., <https://www.worldbank.org/en/research/publication/violence-without-borders>, last accessed on August 12, 2021.
36. Wyatt, T. (2013). *The Palgrave Macmillan Wildlife Trafficking. A Deconstruction of the Crime, the Victims and the Offenders*. New York: Palgrave Macmillan.
37. Xiao, L., Lu, Z., Li, X., Zhao, X., & Li, B. V. (2021). Why do we need a wildlife consumption ban in China? *Current Biology*, 31(4), R168-R172.
38. Zhou, P., et al. (2020). A pneumonia outbreak associated with a new coronavirus of probable bat origin. *Nature*, 579 (7798), 270-273.





THE PROHIBITION AGAINST TORTURE IN INTERNATIONAL LAW

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Abstract: In accordance with international law, torture and other forms of ill-treatment are absolutely prohibited everywhere and at all times. The prohibition of torture is considered a peremptory norm of international law (*jus cogens*). Numerous conventions in the field of international human rights law and international humanitarian law provide for the prohibition of torture as the most serious form of violation of the physical and mental integrity of an individual. International conventions stipulate the obligation of the contracting states to incriminate and punish the perpetrators of the crimes of torture on the principle of *aut dedere aut punire*. If torture was committed during the war, it is often attributed to other grave crimes such as war crimes and crimes against humanity. The study analyzes international legal standards on the prohibition of torture and provides appropriate explanations on the protection mechanisms for monitoring their application in international practice.

Keywords: Torture, international law, protection mechanisms

INTRODUCTION

The prohibition of torture in international law stems from the prohibition of ill-treatment, which is one of the oldest and most widespread forms of violation of basic human rights in relation to the protection of human physical and mental integrity and human dignity. In the past, torture was a legitimate part of the investigation process in which the competent state authorities, in order to obtain the confession of the defendants, applied measures to inflict physical and mental pain in order to obtain certain confessions that were used as key evidence in determining their criminal responsibility. In addition, torture was fully permitted in the execution of criminal sanctions. Until the 19th century, torture was fully recognized and accepted in state practice. This was especially the case in the practice of totalitarian states, which used torture en masse in order to discourage their opponents (political,

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religious, ethnic, etc.). Over time, international law has developed, and thus a body of rules on the protection of universal human rights, which prohibits abuse, as well as all its various forms - from torture to cruel, inhuman and degrading treatment and punishment (Brownlie, 2003: 537; Dimitrijević, Popović, Papić & Petrović, 2007:155-157). With the proclamation of torture as an international crime contrary to the interests of the international community (*hostis humani generis*), the process of suppressing this social phenomenon on a wider international level began. Today's international legal rules prohibiting torture confirm that the international community has meanwhile become fully aware of the importance of banning such behavior that violates the physical and mental integrity of the individual (Casese, 1993).

DETERMINATION OF TORTURE IN INTERNATIONAL LAW

In international law, torture is generally considered to be the most serious form of violation of the integrity and dignity of a person whose execution requires mandatory incrimination by states. Since torture is prohibited by conventional and customary norms, as well as the general principles of international law, this prohibition is considered a peremptory rule of international law from which there is no derogation. The peremptory nature of this rule indicates that torture cannot be justified by any exceptional circumstance, including a state of war or the danger of war, political instability or other state of emergency (Degan, Pavšić & Beširović, 2011: 209; Etinski, Đajić, 2014: 439). International protection against torture therefore implies an imperative legal norm (*jus cogens*), whose obligatory character includes all states which on the basis of it have an obligation towards the entire international community (*obligatio erga omnes*). The establishment of this norm was originally related to the codification and progressive development of international humanitarian law. As this branch of international law with the rules of warfare (*jus in bello*) developed fastest, it elaborated to some extent the rules prohibiting the abuse and torture of certain categories of protected persons. From a historical perspective, the first significant international legal act that contained the prohibition of torture was passed in 1907, at the Hague Peace Conference. Thus, in the so-called *the Hague Regulation* annexed to the *IV Hague Convention on the Laws and Customs of War on Land*, the provision of Articles 4 and 13 prescribes the obligation of humane treatment of prisoners of war and persons who have been granted such status (Schindler & Toman, 1988:69). From this rule, a common norm has developed that prohibits torture of prisoners of war on the basis of reciprocity. Articles 44 and 50 of the *Hague Regulations* further prohibit the extortion of information from the civilian population regarding their armed forces, as well as their punishment for acts for which that population cannot be collectively responsible. Significant progressive development of the rules prohibiting torture in international humanitarian law occurred immediately after World War II with the adoption of the four *Geneva Conventions* under the auspices of the Geneva Red Cross in 1949, supplemented by two *Additional Protocols* in 1977. The *Geneva Conventions* contain the most important international rules that limit the barbarism of war and that protect people who do not take part in the fighting (civilians, medics, humanitarian workers), as well as those who can no longer fight (wounded, sick and shipwrecked, prisoners of war). Thus, all four *Geneva Conventions* provide for the prohibition of torture in the provision of Article 3 in situations that do not cover exclusively international armed conflicts but also internal conflicts (the so-called *the rule of humane treatment*). Conventions I and II in Article 12 prescribe the obligation of humane treatment of the wounded and sick soldiers and wounded, sick and shipwrecked members of the armed forces at sea. Article 13, 17 and 87 of the Geneva Convention III prohibit physical or mental torture and any other form of cruelty to prisoners of war. Convention IV contains a general prohibition of coercive measures against civilians in times of armed conflict in Article 31, while Article 32 extends the prohi-



bition of torture to different categories of protected persons. In the subsequently *Additional Protocol I* of 1977 to the Geneva Conventions which relating to the protection of victims of international armed conflicts, Article 75(2) (a) (ii) extends the prohibition of torture “at any time and in any place”. The prohibition of torture applies to all perpetrators - civilians, military personnel and state agents. *Additional Protocol II* adopted in 1977, which relating to the protection of victims of non-international armed conflicts in the provision of Article 4(2) (a) confirms the absolute character of the prohibition of torture. In other words, the contracting parties may not derogate from this prohibition either in time of war or in peacetime (Bothe, Partch, Solf, 1982:638).

The evolution of rules prohibiting torture in international humanitarian law in general, has been linked to the development of rules in other branches of international law. Thus, in response to war crimes and crimes committed during World War II, rules prohibiting torture in the field of international human rights law crystallized in the post-war period. The prohibition of torture is first contained in Article 5 of the *Universal Declaration of Human Rights* of 1948. According to this general provision, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. This rule was later elaborated in a series of universal and regional acts of international human rights law such as the *UN International Covenant on Civil and Political Rights* of 1966, the *European Convention on Human Rights* of 1950, the *American Convention on Human Rights* of 1969 and in the *African Charter on Human and Peoples’ Rights* of 1981, the *UN Convention on the Rights of the Child* of 1989 and the *UN Convention on the Rights of Persons with Disabilities* of 2006. It should be noted that the *UN International Covenant on Civil and Political Rights* of 1966 was the first universal instrument of international law that explicitly reaffirmed the prohibition of torture and other cruel, inhuman or degrading treatment, aimed at protecting dignity and physical and mental integrity of the individual. Although it does not contain a description and qualification of prohibited acts, the Covenant in the provision of Article 7 provides in general terms that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”. Then, in the provision of Article 10 it further elaborates this obligation of the contracting parties to act “with humanity and with respect for the inherent dignity of the human person” towards all persons deprived of their liberty. The provision states that “detainees could not be subjected to any difficulties or restrictions other than those resulting from deprivation of liberty”. Respect for the dignity of such persons should be guaranteed under the same conditions as free persons. Consequently, this solution covers forms of treatment that would not be serious enough to legally qualify as cruel, inhuman or degrading in accordance with the provisions of Article 7 (Nowak, 2005:250; Šurlan, 2017:6).

The most important international legal act of international human rights law prohibiting torture is the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The Convention drafted by the Commission on Human Rights was adopted by the UN General Assembly on December 10, 1987 (Steiner, Alston & Goodman, 2008:226-227). The Convention entered into force on 26 July 1987 and is binding on most countries in the world (currently 112) to take appropriate legislative, administrative and judicial measures to prevent torture in their territory. This international treaty of a universal character is based on the principles contained in the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* adopted by the General Assembly in 1975. In this sense, the Declaration served as a very reliable support in defining torture in the Convention. According to the Declaration, torture is presented in the context of criminal law as “(...) any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.



It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners". According to the Declaration, torture also constitutes "(...) an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". Similar to the above definition, the provision of Article 1 of the Convention defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". From the conventional formulation, it follows that torture does not involve pain or suffering arising solely from sanctions applied under the law. Also, the definition of torture does not contain clear criteria for distinguishing torture from cruel, inhuman or degrading treatment or punishment. In this regard, the Convention allows states to define more closely the concept of torture in their domestic law in accordance with the elements contained in the conventional definition. In determining the prohibited act, states generally rely on the objective elements of the crime of torture defined in the Convention, which includes any act that intentionally inflicts great physical and mental suffering. These sufferings and pains are inflicted on the basis of an explicit order or consent of an official or some other person acting *ex officio* and do not arise exclusively, nor are they inseparable and inevitable consequences of legal sanctions. In determining the subjective element of the crime of torture, the states start from the assumption that the infliction of great physical and mental suffering and pains is done with the intent of the perpetrator (*dolus*). Hence, the act of execution of this act consists exclusively in an action aimed at obtaining recognition or some other information, punishment or intimidation. The legal qualification of torture also depends on the degree of intensity of intentionally inflicted suffering and pain, which is the main criterion that separates torture from other forms of abuse. In addition to the freedom to incriminate the scope of torture in its domestic law, states also have the obligation to sanction attempts or other forms of complicity in the execution of torture. According to the Convention, states are obliged to establish jurisdiction to conduct criminal proceedings against perpetrators of torture. They are obliged to prosecute and punish perpetrators first on the ground of universal principle which became binding for state parties under Article 5 of the Convention. If states do not want to prosecute the perpetrators of these crimes, they are obliged to extradite them to another state (*aut dedere aut judicare*). States are also expected to provide adequate protection to victims of torture, as well as to guarantee fair and adequate compensation. Expulsion, return and extradition of persons to a country where persons would be subjected to torture are not permitted (*non-refoulement*). In order to achieve general prevention, states are required to implement training programs for civilian, military, medical personnel and civil servants, as well as for other categories of persons involved in the detention, interrogation of arrested, detained or imprisoned persons. States have a duty to adopt rules and guidelines concerning the rights or authorizations of these persons and to systematically control their application. They are obliged to ensure that the competent authorities enter into an impartial investigation as soon as possible whenever there are reasonable grounds to believe that an act of torture has been committed in the territory under their jurisdiction. States are also obliged to ensure that all persons who claim to have been subjected to torture have the right to lodge a complaint with the competent authorities. Finally, states are obliged to criminalize all acts which constitute cruel, inhuman or degrading treatment or punishment which do not constitute torture as defined in Article 1 of the Convention, and when such acts are committed by officials or other persons acting *ex officio* or when such acts are committed with the express or tacit persuasion or consent of those persons (Paunović, Krivokapić & Krstić, 2007:171; Milenković, 2001:40-43).



In the field of international criminal law, torture is more precisely defined by the provision of Article 7(2) of the *Rome Statute* of the International Criminal Court adopted on 17 July 1998. Torture under the Statute means: “(...) the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”. From the above, there is no possibility to determine the relative intensity of pain or suffering in torture in relation to other forms of abuse. The provision of Article 7 (1) (f) of the Rome Statute covers torture as a material element (*actus reus*) of crimes against humanity, while the provision of Article 8 (2) (ii) and 8 (2) (c) (i) covers torture in the context of serious violations of the Geneva Conventions, i.e. war crimes in international and internal armed conflict (Kreća, 2020: 654-659; Schabas, 2004:41). Similar to the definition contained in the sources of international human rights law, it is understood that no special purpose is required for this crime, nor does the definition of a crime finally specify the status of the perpetrator as an official. In other words, torture is not limited to acts originating from state authorities. In fact, that solution stems from the *Draft Code of Crimes against Peace and Security of Mankind* prepared by the ILC in 1996, which served the Preparatory Committee for the drafting of the Rome Statute of the International Criminal Court. Article 18 (c) stipulates that torture also constitutes torture crime against humanity when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group. In this sense, this Draft is not limited to acts committed exclusively in official capacity or with official connivance. Extensive interpretation of the mentioned solutions has found a place in the *Statutes of the International Criminal Tribunals* for the former Yugoslavia and Rwanda. The provisions of Articles 5 and 3 of these Statutes also provide for a solution according to which torture is sanctioned within the framework of crimes against humanity. Bearing in mind that in any armed conflict, acts of violence against members of the enemy armed forces or civilians are undertaken in order to achieve certain objectives and that these objectives are as a rule discriminatory, the practice of these Tribunals has shown that torture is often equated with ill-treatment which exists in general international law (Lee, 2001; Kaseze, 2005, 134-137).

Following the determination of the concept of torture in international law, it could be concluded that its various definitions and legal qualifications contained in international legal acts arise from the specifics of each of the branches of international law that deal with this crime. Despite the existing differences and the limitations of their scope, which remained within the limits of the prohibition of torture present in customary international law, it cannot be concluded that these instruments did not contribute to the progressive development of international law. This is all the more so because they have established mechanisms for monitoring their application, which have significantly contributed to the further elaboration of the concept of torture in contemporary international practice.

UNITED NATIONS PROTECTION MECHANISMS

The Committee against Torture

The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* established a mechanism for protection against torture in the form of a Committee against Torture. This Committee consists of ten experts in the field of human rights, elected according to the equitable geographical criterion, who act in the Committee in their personal capacity. The main function of the Committee is to monitor the implementation of the Convention by states. States parties to the Convention are required to submit, through the Secretary-General of the United Nations, period-



ic reports on the measures they have taken to fulfill their obligations under the Convention. These periodic reports, which are submitted every four years after the submission of the initial report, are considered by the Committee to determine the compliance of state practice with the provisions of the Convention. After consideration in accordance with the Rules of Procedure, the Committee draws up general comments and recommendations, which it forward to the state concerned. These comments and recommendations aim to promote the implementation of the Convention and the fulfillment of international obligations by the States. The Rules of Procedure stipulates the appointment of a Special Rapporteur in charge of supervising the implementation of recommendations and general comments. When the Committee receives information on the systematic practice of torture in one of the States, it shall initiate an investigation. Pursuant to Article 20 of the Convention, the Committee may *ex officio*, in accordance with the confidentiality of this investigation, take certain actions in the territory of the offending state. Thereafter, the Committee may make certain findings and recommendations on how the State should overcome the current situation. The Committee is also responsible for interstate petitions if states explicitly agree. In this case, the Committee shall take measures in its capacity as a mediator to remedy the unlawful practice of the state party. In order to overcome any dispute between states, the Committee may offer solutions through the establishment of a Conciliation Commission. Its formation also requires the consent of the parties to the dispute. If the amicable settlement of the dispute does not result in a satisfactory outcome, the dispute may be referred to the International Court of Justice in accordance with the provisions of Article 30 of the Convention. In addition to this, it is worth mentioning that the Committee may also be responsible for individual petitions. This situation is possible when States accept the competence of the Committee. Thus, if a state party accepts and recognizes the competence to submit individual petitions, the Committee shall become competent to consider them in accordance with the Rules of Procedure. In that sense, the Committee may make a decision on the merits and in situations when it is necessary to avoid irreparable damage, the Committee has the right to issue temporary measures. Their execution is supervised by a Special Rapporteur. Finally, there is an obligation on the Committee itself to inform the UN General Assembly and the member states of its current activities in its annual reports (Andrysek, 2000:871-872; Šurlan, 2014:107-112).

The Subcommittee on the Prevention of Torture

The Subcommittee on the Prevention of Torture was established on the basis of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which was adopted in 2002 and entered into force in 2006 (Šurlan, 2014: 113-116). The Subcommittee is a separate and independent treaty body that performs its mandate on the prevention of torture and ill-treatment within the UN system in the field of human rights protection. The Subcommittee is composed of 25 members, human rights experts who serve in their personal capacity and have professional experience in the field of justice and police administration, and who are selected according to the equitable geographical representation and from different civilizations and legal systems. Cooperation with the Committee against Torture is reflected in the submission of reports on measures taken to prevent torture in states parties to the Convention. The Subcommittee has a mandate to undertake visits to states parties, during the course of which it may visit any place where persons may be deprived of their liberty. The rule is that States Parties shall be notified in advance of announced visits by representatives of the Subcommittee. After reviewing the situation, the Subcommittee provides recommendations, instructions and advice to states regarding the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment. In addition, the Subcommittee assists states in building preventive mechanisms, maintains contacts with these mechanisms,



and provides the advice and recommendations necessary to strengthen their capacities and mandates. In addition, the Subcommittee cooperates with relevant UN bodies as well as with other international and regional organizations and bodies in order to strengthen prevention mechanisms. States Parties have the obligation to assist the work of the Subcommittee by providing access to its representatives, by providing relevant information that the Subcommittee may request, and by providing appropriate support in the establishment and operation of national bodies and mechanisms for the prevention of torture. Improving cooperation also presupposes upgrading the legal system of states in accordance with the international legal standards.

The Human Rights Committee

The Human Rights Committee was established by Part IV of the *International Covenant on Civil and Political Rights*. States Parties to the Covenant accepted the mandatory competence of the Committee. The competence of the Committee extends to the provisions of the Optional Protocol, which was adopted at the same time as the Covenant. The Committee is basically an expert body, and its members act in a personal capacity. The selection criteria are the same as for the aforementioned contractual oversight bodies (fair geographical distribution and representation of representatives of different civilizations and legal systems are taken into account). The independence and impartiality of the members of the Committee are its basic characteristics. The Committee's competence under the Covenant is twofold: the Committee first examines the reports that States Parties are required to submit and that relate to the implementation of the Covenant, and then the Committee provides good services in resolving disputes when states report to it that other States Parties have violated obligations from the Pact. In the first case, the Committee has the opportunity to give general comments and recommendations, while in the second case it submits a report stating what has been achieved in the process of providing good services, whether a solution has been reached between the parties or not. In that sense, it can use the possibility of forming an *ad hoc* Conciliation Commission. If the disputed situation regarding the violation of human rights provisions (including the violation of the prohibition of torture) has not been reached, states may seek solutions by other peaceful means (including initiating proceedings before the International Court of Justice). The Optional Protocol introduced a third type of competence of the Committee, which refers to the possibility of considering individual petitions. The submission of individual petitions is conditioned by the exhaustion of all remedies in the legal system of the state in which the provisions of the Covenant have been violated. After the petition is submitted to the Committee, the Committee considers it and adopts a reasoned position with instructions for resolving the disputed situation. Disputes concerning the application of the provision of article 7 of the Covenant concerning the prohibition of torture have thus been resolved before the Committee in many cases. When the Committee determined responsibility for the violation of this prohibition, the injured party was entitled to appropriate compensation for the damage caused. The Committee's practice since 1982 relies on the so-called General Comments emphasizing the obligation of states that, in addition to legislative solutions harmonized with the provisions of the Covenant, states must ensure their effective implementation through the implementation of certain protective measures and the establishment of control mechanisms. Although the Committee has meanwhile increased the efficiency of its work, its work has not been fully effective, which is why it has been suggested that the entire protection system at the United Nations level must be improved. To this end, the United Nations established the Voluntary Fund for the Victims of Torture in 1982 and appointed the Special Rapporteur on Questions Relevant to Torture in 1985, whose mandate is based on the UN Charter and ECOSOC resolutions (Andrysek, 2000:873-874).



EUROPEAN PROTECTION MECHANISM

The European Committee for the Prevention of Torture

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was set up in 1987 under the *European Convention for the Prevention of Torture* and functions on the principles of cooperation and confidentiality. The Convention provides that the Committee shall be composed of one representative from each State elected by the Committee of Ministers of the Council of Europe. The Committee performs the most advanced preventive oversight ever designed and has the opportunity to visit and examine *ex officio*, the treatment of persons deprived of their liberty with a view to strengthening the protection of such persons from torture and from inhuman or degrading treatment or punishment. The Committee independently plans and organizes visits to the states. He has extraordinary powers that include unrestricted access to any places within his jurisdiction where persons are deprived of their liberty by public authorities. Also, the Committee has the right to a private interview with any detainee and free communication with anyone believed to be able to provide information. After the visit, the Committee gives certain findings with recommendations to the states. On some occasions, the Committee did not hesitate to issue public statements regarding non-compliance with human rights standards. However, the Committee has no right to deal with legal issues within the jurisdiction of the European Commission, or to resolve legal disputes within the jurisdiction of the European Court of Human Rights under the provisions of the European Convention on Human Rights (Nowak & Suntinger, 1993:145-168; Andrysek, 2000:876; O'Connell, Aizpurua &, Rogan: 2021:2).

CONCLUSIONS

The subject study provides an analysis of the most important international legal sources governing torture and other forms of ill-treatment. Although torture is prohibited everywhere and at all times, different regulations of its concept in various branches of international law do not contribute to greater legal certainty and the effectiveness of its prohibition in the international community. Despite these differences, the legal determination of torture as the most severe form of ill-treatment, moves within the framework of the imperative norm (*jus cogens*) whose scope under general international law obliges all states, regardless of whether they are parties to international conventions or are obliged on other legal grounds to implement the prohibition of torture in their legal systems. Otherwise, if there is no clear incrimination of torture the position of victims of torture is much more difficult, which has negative effects on the rule of law, as well as on the position of the state in international relations. Given that these situations pose a certain security risk, states have a special interest in incriminating and punishing the perpetrators of torture on the principle of *aut dedere aut punire*, which is many times proven in international practice. In that sense, most states have banned torture, criminalizing it as a separate crime or as part of war crimes and crimes against humanity. However, the incrimination of this act at the national level should not go beyond the elements contained in the international legal acts of torture. This is all the more so because these international legal acts adopted under the auspices of the UN and other international organizations prescribe obligations and measures of cooperation between states in the prevention and punishment of torture. Therefore, the existing differences in its regulations remain within the limits of prohibition present in customary international law, which do not exclude the possibility of unifying and increasing the efficiency of state practice through protection mechanisms established to monitor the application of international conventions prohibiting torture and other forms of ill-treatment.



REFERENCES

1. Andrysek, O. (2000). "Torture", in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam: Elsevier, 4, 871-872.
2. Bothe, M., Partch, K.J, Solf, W.A. (1982). *New Rules for Victims of Armed Conflicts*, Hague: Martinus Nijhoff.
3. Brownlie, I. (2003). *Principles of Public International Law*, University Press: Oxford.
4. Cassese, A. (1993). "Prohibition of Torture and Inhuman or Degrading Treatment or Punishment", in: R.St.J. Macdonald, F. Matscher & H. Petzold (eds), *The European System for the Protection of Human Rights*, Dordrecht/Boston: Martinus Nijhoff.
5. Degan, V. Đ., Pavšić, B., Beširević, V. (2011). *Međunarodno i transnacionalno krivično pravo*, Pravni fakultet Univerzitet Union, Beograd: Službeni glasnik.
6. Dimitrijević, V., Popović, D., Papić, T., Petrović, V. (2007). *Međunarodno pravo ljudskih prava*, Beograd: Beogradski centar za ljudska prava.
7. Etinski, R., Đajić, S. (2014). *Međunarodno javno pravo*, Novi Sad: Pravni fakultet.
8. Kaseze, A. (2005). *Međunarodno krivično pravo*, Beograd: Beogradski centar za ljudska prava.
9. Kreća, M. (2020). *Međunarodno javno pravo*, Beograd: Pravni fakultet.
10. Lee, R.S. (2001). *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, New York: Ardsley.
11. Milenković, D. (2001). "Ujedinjene nacije – dokumenti i mehanizmi borbe protiv torture": Dejan Milenković (ur.), *Tortura, instrument protiv demokratije, međunarodni dokumenti, zakonodavstvo, slučajevi*, Beograd: Jugoslovenski komitet pravnika za ljudska prava.
12. Nowak, M, Suntinger, W. (1993). "International Mechanisms for the prevention of torture", in: A. Bloed, L.Leicht, M.Nowak & A. Rosas (eds), *Monitoring Human Rights in Europe*, Hague: Martinus Nijhoff.
13. Nowak, M. (2005). *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Strasbourg: NP Engel.
14. O'Connell, Aizpurua, E., Rogan, M. (2021). "The European committee for the prevention of torture and the gendered experience of imprisonment", *Crime, Law and Social Change*, 75, 445-468.
15. Paunović, M., Krivokapić, B., Krstić, I. (2007). *Osnovi međunarodnih ljudskih prava*, Beograd: Megatrend univerzitet.
16. Schabas, W. A. (2004). *International Criminal Court*, Cambridge: University Press.
17. Schindler, D., Toman, J. (1998). *The Laws of Armed Conflicts*, Hague: Martinus Nijhoff.
18. Steiner, H.J., Alston, P., Goodman, R. (2008). *International Human Rights in Context Law, Politics, Morals*, Oxford: University Press.
19. Šurlan, T. (2014). *Univerzalna međunarodna ljudska prava, mehanizmi zaštite*, Beograd: Kriminalističko-policijska akademija.
20. Šurlan, T. (2016). "Prohibition of torture: absolute or relative?" *Bezbednost*, (3), 5-21.





BRAIN FINGERPRINTING AS A LIE DETECTION TECHNIQUE

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Abstract: According to some researchers, the brain fingerprinting technique is suitable for lie detection. Others see concerns about the method, and they doubt the applicability of brain fingerprinting. The technique is based on electroencephalography (EEG). The experts examine the electrical activity of the brain with it. Electrodes are placed on the scalp and connected to an electrically neutral area of the head (e.g., the earlobe). The technique also includes a screen on which the subject sees images. With this method the experts examine how the brain responds to the pictures shown one by one. The paper presents the experiments related to the brain fingerprinting technique. We search how the technique works and analyzes criminal cases in the United States in which brain fingerprinting has been used. We describe the brain fingerprinting examination process and methodology and examine whether the technique is suitable for lie detection. We also answer the question of whether the procedure is ideal for use in criminal cases.

Keywords: lie detection, brain fingerprinting, P300, electroencephalography, testimony.

INTRODUCTION

Larry Farwell has developed a lie-detecting technique that directly examines the brain. The brain fingerprinting detects whether specific information is stored in the human brain or not (Moenssens, 2002). The examinee is shown photographs flashed on a computer screen, amongst which some critical crime-related visual images appear. Should the brain react to the picture or word relevant to a crime, giving a so-called 'ah' signal (Farwell, 2012), the examiners consequently indicate that they are testing the perpetrator. In fact, the 'ah' or 'yeah' signal is 'MERMER' response, namely, Farwell has discovered a 'MERMER' signal in the brain, which is the larger brain frequency component known as P300 (Póczos, 2006). EEG (electroencephalogram) sensors are used in the analysis to detect the

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electric brain functions of the subject generated by various external stimuli. In case of a MERMER response the examiner concludes that the information connected to the effect is stored in the subject's memory. On the contrary, the irrelevant stimulus does not result in a MERMER response (Stoller – Wolpe, 2007).

Rosenfeld and colleagues (Rosenfeld et al. 1987; Rosenfeld et al., 2013) concluded that the P300 brain-wave might be suitable for revealing concealed information stored in memory. Even the subject denies that this information (e.g., a particular object, environment, or person) is known. However, the appearance of the P300 potential alone does not indicate a lie but only the recognition of information. Verbal denial of this may mean direct misrepresentation. The technique measurably shows whether the concealed information is present in the subject's consciousness (Littlefield, 2009). The detection of "concealed" memory traces in the brain, the possibility provided by the P300, was recognized by another research group in the United States (Farwell - Donchin, 1986) simultaneously as Rosenfeld and colleagues.

In their study, similar to Rosenfeld and colleagues, the CIT paradigm was applied. Farwell and his team tested the P300 brainwave-based technique both under laboratory conditions and on actual perpetrators. As for the detection of concealed information during the P300-based procedure, Farwell's team reported good results in this early study and subsequent studies. Specificity and sensitivity values generally exceeded 90% (Farwell - Donchin 1991). The name "brain fingerprinting" is also due to this working group. Brain fingerprinting was used in several criminal cases in the United States in the early 2000s. The techniques considered suitable to orient the investigation. According to some researchers, the expert can use the method to answer whether the subject's brain responds to a photo or text related to the crime. If he does not respond, it is presumed that he did not commit the crime. The expert shows pictures such as the gun with which the perpetrator committed the crime. The expert shows the subject several guns and watches which gun triggers the P300 brainwave. Brain fingerprinting is a non-invasive yet safe and painless technique (Fox, 2008). Although it has already been used in three criminal cases in the United States, there are doubts as to its suitability for lie detection. Questions need to be answered as to whether the human brain can recall the details of the crime from a multi-year perspective. Does the passage of years affect the P300 brainwave? Could it be, for example, that a knife seen in a movie triggers a P300 MERMER response and not the crime that happened? Does the brain fingerprinting technique have a place in criminal cases? Is it a limitation if the authority does not have a decent photo in the criminal case?

P300 MERMER RESPONSE

The basis of the operation of the technique is the P300 MERMER response. If the photo is familiar, the brain gives a P300 MERMER response. The P300 brain wave is a group of cerebral bioelectrical signals. It can be examined by electroencephalography (EEG) methods used in medical practice, among others. The EEG signal - i.e., the electroencephalogram - is a continuously changing voltage fluctuation over time, which is the sum of the electrical activities from billions of brain neurons. The EEG signal can be measured by the potential difference between a sensing electrode placed on the scalp ("scalp") and an electrically neutral point on the head (such as the earlobe). EEG is no longer registered from the scalp by scientific research and clinical trials using not one, but usually many, possibly hundreds, sensors so that the activity of each brain area can be monitored with high spatial accuracy. The P300 brain wave, which is important for brain fingerprinting, is an essential class of event-evoked potentials. Sutton and colleagues first described the P300 brainwave in 1965 (Sutton et al., 1965). In



their experiment, subjects were presented with high and low tones in a ratio of 8:2 in random order. Participants had to count the infrequent sounds. As a result of their study, they found that the P300 brain wave was always “triggered” by rare sounds, regardless of whether the high or low sound was the rare stimulus. Depending on which stimuli different in some respects from the series are used, this test situation is called the “oddball” paradigm. The name P300 comes from the fact that after the stimulus is presented, it appears with a delay of about 300 milliseconds (hence 300) (typically lasts for hundreds of milliseconds), and the brainwave has a positive amplitude (therefore P) (Budaházi et al., 2021). As a result of further studies, they described that the amplitude of the P300 wave is most significant in the midline parietal, central, and frontal brain areas. It grows in proportion to the “rarity” of the stimulus and the subjective meaning and the “meaning” of the stimulus. “Meaning in itself” can be certain stimuli, such as information about ourselves, name, birthday, phone number, or information about the crime. In other cases, a particular stimulus can be made “meaningful” to the subject by augmenting it with a task (e.g., in a study to detect concealed information, pressing the appropriate response button after a particular image flashes) (Budaházi et al., 2021).

BRAIN FINGERPRINTING IN CRIMINAL CASES

In 1977, Terry Harrington, who was 17 at the time, was accused of the murder of John Schweer, a retired police captain. The victim worked as a security guard at a car dealership, where the offense took place (Hurd, 2012). In the criminal procedure, Harrington had alleged that he had been at rock concert with friends in another town on the evening of the crime. Several witnesses corroborated the defendant’s alibi. However, Kevin Hughes, a primary prosecution witness who was 16 at the time, testified in contradiction to the defendant’s plea, upon which Harrington was found guilty and sentenced to life without parole. In 1997, Harrington petitioned the Iowa District Court for post-conviction relief for a new trial, and in March 2000, he amended his petition to include the results of Farwell’s brain fingerprinting testing. The applicant alleged that the brain fingerprinting results enhance new evidence unknown to the first decree court and upon which the defendant should have been acquitted. Farwell concluded that Harrington’s brain did not store critical details of the crime subject to his conviction; for example, his brain did not recognize the crime scene.

On the other hand, with regards to critical details on the alibi (he had been at a concert on the evening of the crime), Farwell concluded that Harrington’s brain stored such information. When confronted with the brain fingerprinting test results, Kevin Hughes, the key prosecution witness, recanted his testimony and admitted that he had lied in the original trial, falsely accusing Harrington. Hughes explained that he had lied, fearing that he might have been charged with murder himself if he was telling the truth (Farwell 2021b).

In November 2000, the Iowa District Court held a hearing on the petition for post-conviction relief. Farwell has testified as an expert on the new method. Furthermore, two acknowledged professors, William Iacono of the University of Minnesota and Emanuel Donchin of the University of Illinois, have confirmed the efficiency of the Farwell research and stated that brain fingerprinting – as a scientific method – can recall any information stored in the human brain with a 99.9% accuracy. It enhances the technique to meet the legal standards for admissibility for the authorities proceeding in criminal cases as reliable evidence (Farwell 2021b).

After an eight-hour session, the court ruled that brain fingerprinting testing met the legal standards for admissibility in court as unquestionable scientific evidence. It constituted new evidence in the case



that could be the ground of a new trial opened upon the post-conviction petition. However, the court also ruled that along with other newly discovered evidence in the case it would probably not have resulted in the jury arriving at a different verdict than at the original trial, and therefore it denied the petition for a new trial. In August 2001, Harrington filed an appeal on the Iowa District Court's decision to deny a new trial, resulting in the Iowa Supreme Court ordered a new trial (*Harrington v. State*, 659. N.W.2nd 509 (Iowa 2003, No.96-1232.)). Although the Iowa Supreme Court has undoubtedly acknowledged Farwell's expert opinion on brain fingerprinting testing, the good closure of the case to Harrington was based on the injury of the Brady rule. Thus, the defendant was not confronted with the key prosecution witness since he recanted his testimony when confronted with the brain fingerprinting test results. In the light of the new evidence and the fact that the key prosecution witness of the original case recanted his testimony, the base of the conviction, in 2003 Harrington was released and his conviction was reversed. He has received the compensation of USD 12 million for the years he had spent in jail (Farwell 2021b). In connection with the Harrington case, Rosenfeld criticizes the fact that the concealed information was not found in the convict's mind more than twenty years after the crime was committed, so he believes the naive conclusion that Harrington did not commit the crime was not there (Rosenfeld 2005. p. 29). The suggestion is valid, and it is also questionable when the image of the concert serving as an alibi may have entered his brain. On the day the crime happened or at another time? Also, what photo did Farwell have of the concert? When was it made? Did it trigger a P300 brainwave because Harrington was actually there at the concert seen in the picture on July 22, 1977, or was it just his brain that responded to a photo taken of a concert?

THE JAMES B. GRINDER CASE

James B. Grinder has been the prime suspect of the murder of 25-year-old Julie Helton, despite the defence's conviction that the evidence was insufficient to indict him and convict him in first-degree murder. In January 1984, the abduction of Julie Helton was reported in Macon, Missouri. The victim's body was found three days after near a railroad track outside Macon. The coroner discovered signs of rape and physical abuse on the body and also found a stab wound on the neck. During the 15-year long criminal procedure, Grinder gave several different testimonies. He soon recanted his first testimony confessing his involvement and denied the offense. Some of his testimonies referred to other perpetrators of the crime. However, the testimonies were invariably contradictory to the available material evidence and to the testimony of an alleged witness of the defence. Even DNA tests did not bring favourable results since the blood samples taken at the crime scene were rather old. In 1999, Macon County Sheriff Robert Dawson – after approximately 10.000 man-hours of unsuccessful investigation – turned to brain fingerprinting testing to decide whether Grinder had committed the crime or not. Grinder, who had spent several years in prison before, agreed to the test. The Sheriff gave all significant information gathered during the investigation to Farwell, and Farwell completed the test with the cooperation of an FBI agent. He completed the examination at the correction institute where Grinder was held. During the analysis, he showed Grinder the murder weapon, specific methods of killing the victim, the object the perpetrator used to bind the victim's hands, the crime scene, and the victim's belongings found not far from the location of the offense after discovering the criminal act. Farwell concluded that all the critical information was stored and present in Grinder's brain. Following the principles of the method, the conclusion was that Grinder did commit the offense. Otherwise, his brain would not have enhanced MERMER responses to relevant information.

However, Grinder concluded a plea deal, pled guilty to rape and murder of the victim and in exchange - instead of the death penalty - he agreed to a life sentence without parole. Uniquely, in this



case, Grinder did not only confess to murdering victim Julie Helton, but after the brain fingerprinting examination, he gave a detailed confession to the murder of three more young girls. He first raped and then stabbed or beat his victims to death (Farwell 2021b). As for now, there are two final and binding orders in a conviction of Grinder. Another procedure is still pending. Brain fingerprinting was essential both for confession and for the fact that Grinder committed a crime 15 years before. The method could be used to detect that critical information was in Grinder's brain. The Grinder case dampens Rosenfeld's criticism of the Harrington case that years passed could remove concealed information from the brain.

THE JIMMY RAY SLAUGHTER CASE

In 2004, Jimmy Ray Slaughter, a death row inmate, had pleaded for a new trial referring to negative test results of brain fingerprinting (information not stored in the brain) and other evidence at the Court (of Criminal Appeals) of Oklahoma. The appellant referred to the favourable results of brain fingerprinting and referred to the exempting results of DNA analysis and further evidence proving his innocence (Farwell, 2012).

Slaughter was condemned to death for the July 2, 1991 murder of his former girlfriend, the 29-year-old Melody Wuertz, and their child, the 11-month-old Jessica Rae Wuertz (Lumpkin, 2021). He committed the killing actions in the victims' Edmond home. According to the ruling, Slaughter has shot both his victims in the head. In addition, he has hit his ex-girlfriend in the neck.

Moreover, he had stabbed the victim several times and then mutilated her body (Clark, 2021) Slaughter claimed innocent of the crime all along, although investigation proved that he had a somewhat stormy relationship with his ex-girlfriend, and they had numerous fights and furious quarrels over unpaid child support. In the end, Slaughter was executed. Denying the petition for a new trial, the court has also referred to brain fingerprinting. He stated the court did not recognize the results because the court did not receive a comprehensive and detailed method — neither on nature nor the application or the results of the technique. The brain fingerprinting 'evidence' would not have changed the balance of the scales before the jury – ruled the court (Slaughter v. State, Oklahoma 2005, No. PCD-2005-77.). The Slaughter case also exemplifies that the result of brain fingerprinting alone is not sufficient to order a retrial, because it is not the weight of evidence that would affect the judgment of the retrial court. Although the court justified disregarding the result of brain fingerprinting by not receiving information about the method, in our view, if Farwell had provided sufficient information about brain fingerprinting, the court would probably not have made any decision other than to dismiss the renewal request.

CONCERNS AND LIMITATIONS

The main problem with brain fingerprinting is the lack of proper validation of the method. Although experimental results are available, further validation experiments are needed to verify the reliability of the technique. Simplifying the method can also help to make brain fingerprinting testing more widespread.

Limitations of brain fingerprinting include the need for a photograph to be available about the case; no more than words can be projected onto the subject if there is no photograph. The availability of pic-



tures presupposes that the authority is beyond a practical inspection or research where, for example, a knife, or a corpse, etc., used to commit a crime has been found. Photos can already be taken, but the possibility of applying the method is reduced if neither a picture of the victim, nor a knife is available, nor it is not possible to know exactly where the crime was committed. For example, the polygraph may yield results, but the use of brain fingerprinting seems to be ruled out. Proper timing also plays an important role in the use of the method. On the one hand, this can be done when suitable photos are already available, and on the other hand, the photos should be taken as soon as possible to avoid, for example, a change in the crime scene (not the same picture in winter or summer, etc.).

It is essential whether the brain responds to the image seen on the monitor with the P300 because the person committed the crime or only saw the pistol in the photo on TV. Recent EEG research to eliminate the contrast used in the concealed information test promises a significant turnaround. In one study, Japanese researchers convincingly demonstrated that not only the display of information intended to be concealed could be linked to a specific brain response (the P300 brainwave), but also the process of concealment itself. They concluded that the relevant stimuli elicited a higher amplitude P300 potential than the irrelevant stimuli. They analyzed how the amplitude of the slow frontal wave varies depending on whether the memory content sought is “absent” or “present” in the subject’s brain; and, if present, if the subject intends to conceal or reveal it. The results showed that selective correct hemisphere activation during the slow frontal wave was specifically observed when subjects tried to hide the recognition of the critical relevant stimulus (Matsuda - Nittono 2018). These experimental results suggest that it is possible to determine from the activity of the hemispheres whether P300 can be detected because the subject committed the crime. However, this was only one experiment, and more experiments are needed.

A major, often unacknowledged, problem with brain fingerprinting is the suspect’s possible lack of memory for details due to the passage of time since the crime and/or drug and alcohol use. Additionally, an investigator needs to determine what the suspect will remember (Wilcoxson et al., 2020).

Brain fingerprinting detects information-processing brain responses that reveal what information is stored in the subject’s brain. It does not notice how that information got there, be it a witness or a perpetrator. Brain fingerprinting does not detect lies. It simply detects information. No questions are asked or answered during a brain fingerprinting test. The subject neither lies nor tells the truth during a brain fingerprinting test, and the outcome of the test is unaffected by whether he has lied or told the truth at any other time. The outcome of “information present” or “information absent” depends on whether the relevant information is stored in the brain, and not on what the subject says about it (Dhiraj Ahuja & Bharat Singh, 2012).

CONCLUSIONS

The brain fingerprinting technique, which is also considered suitable for lying, is characterized by the fact that its operation and validity are uncertain, although it has been used in criminal cases. In our view, the method should not have been used before proper validation. They have a high stake in criminal cases, and human destinies may depend on the endless, invalidated technique that should not be used, even if it “only” served the orientation of the investigation and was not taken into account by the court as evidence. Even the misorientation of the investigation no longer led a criminal case astray, which could even result in a “*justizmord*” (judicial murder). Brain fingerprinting needs further



testing, experimentation, and development. It is primarily due to the lack of validation and scientific validation related to the operation of the method that it is rarely used.

REFERENCES

1. Ahuja, D. & Singh B. (2012): Brain fingerprinting. *Journal of Engineering and Technology Research*, 4(6), 98-103.
2. Budaházi, Á., Fantoly, Zs., Kakuszi, B., Bitter I. & Czobor P. (2021). *A műszeres vallomásellenőrzés fejlődési irányai. Budapest: Ludovika Egyetemi Kiadó*
3. Clark County Prosecuting Attorney (2021): *Jimmie Ray Slaughter*. Downloaded July 20, 2021 www.clarkprosecutor.org/html/death/US/slaughter955.htm
4. Farwell Brain Fingerprinting (2021a): *Helps to Free an Innocent Man*, Downloaded July 20, 2021 www.larryfarwell.com/Harrington-Summary-dr-larry-farwell-brain-fingerprinting-dr-lawrence-farwell.html
5. Farwell Brain Fingerprinting (2021b): *Catches a Serial Killer*, Downloaded July 20, 2021 www.larryfarwell.com/Grinder-Summary-dr-larry-farwell-brain-fingerprinting-dr-lawrence-farwell.html
6. Farwell, L. A. – Richardson, D. C. – Richardson, G. M. (2014): Brain fingerprinting field studies comparing P300-MERMER and P300 brainwave responses in the detection of concealed information. *Cognitive Neurodynamics*, 7(4), 263–299. <https://doi.org/10.1007/s11571-012-9230-0>
7. Farwell, L. A. & Donchin, E. (1991): The Truth Will Out: Interrogative Polygraphy (“Lie Detection”) with event-related brain potentials, *Psychophysiology*, 28(5), 531–547. DOI: <https://doi.org/10.1111/j.1469-8986.1991.tb01990.x>
8. Farwell, L. A. & Donchin, Emanuel (1986): The „brain detector”: P300 in the detection of deception, *Psychophysiology*, 23(4). 434–450.
9. Farwell, L. A. (2012): Brain fingerprinting: a comprehensive tutorial review of detection of concealed information with event-related brain potentials, *Cognitive Neurodynamics*, Vol. 6, No. 2. 115–154.
10. Fox, Dov (2008): Brain Imaging and the Bill of Rights: Memory Detection Technologies and American Criminal Justice, *The American Journal of Bioethics*, 8(1), 34–36. DOI: <https://doi.org/10.1080/15265160701828451>
11. Hurd, A. J. (2012): Reaching Past Fingertips with Forensic Neuroimaging – Non-Testimonial Evidence Exceeding the Fifth Amendment’s Grasp, *Loyola Law Review*, Vol. 58, No. 1. 213.
12. Littlefield, M. (2009): Constructing the Organ of Deceit: The Rhetoric of fMRI and Brain Fingerprinting in Post-9/11 America, *Science Technology, & Human Values*, 34(3), 365-392.
13. Lumpkin, J. (2021): *Slaughter v. State – Opinion*, Downloaded July 20, 2021 <https://law.justia.com/cases/oklahoma/court-of-appeals-criminal/1997/60429.html>
14. Matsuda, I. – Nittono, H. (2018): A concealment-specific frontal negative slow wave is generated from the right prefrontal cortex in the Concealed Information Test, *Biological Psychology*, 135 (May), 194–203. DOI: <https://doi.org/10.1016/j.biopsycho.2018.04.002>
15. Moenssens, A. A. (2002): Brain Fingerprinting – Can It Be Used to Detect the Innocence of Persons Charged with a Crime? *UMKC Law Review*, 70, 891–920.



16. Póczos, E. (2006): A hazugságvizsgálat jövőképe, *Belügyi Szemle*, 54(5), 100–109.
17. Rosenfeld, J. P. – Hu, X. – Labkovsky, E. – Meixner, J. & Winograd, M. R. (2013): Review of recent studies and issues regarding the P300-based complex trial protocol for detection of concealed information. *International Journal of Psychophysiology*, 90(2) 118–134. DOI: <https://doi.org/10.1016/j.ijpsycho.2013.08.012>
18. Rosenfeld, J. P. – Nasman, V. T. – Whalen, R. – Cantwell, B. & Mazzeri, L. (1987): Late Vertex Positivity in Event-Related Potentials as a Guilty Knowledge Indicator: A New Method of Lie Detection, *International Journal of Neuroscience*, 34(1–2), 125–129. DOI: <https://doi.org/10.3109/00207458708985947>
19. Rosenfeld, J. Peter (2005): ‘Brain Fingerprinting’: A Critical Analysis. *The Scientific Review of Mental Health Practice*, 4(1), 20–37.
20. Stoller, S. E. & Wolpe, P. R. (2007): Emerging Neurotechnologies for Lie Detection and the Fifth Amendment, *American Journal of Law & Medicine*, 33(2–3), 359–375. DOI: <https://doi.org/10.1177/009885880703300210>
21. Sutton, S. – Braren, M. – Zubin, J. & John, E. R. (1965): Evoked potential correlates of stimulus uncertainty. *Science*, 150(3700), 1187–1188.
22. Wilcoxson, R., Brooks, N., Duckett, P. & Browne M. (2020): Brain Fingerprinting: A Warning Against Early Implementation, Downloaded July 20, 2021 https://www.researchgate.net/publication/344526903_Brain_Fingerprinting_A_Warning_Against_Early_Implementation

MORAL AND ETHICAL ISSUES OF USING TECHNOLOGY IN CORRECTIONS

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Abstract: By definition, prisons and jails are places full of unethical people who have made poor choices. They are also places of power where officers have authority over inmates and must choose not to abuse that power. Therefore, in order for an agency to run effectively, it must not only acknowledge the role of ethics in corrections, but also to encourage ethical behaviour by all of those within its walls.

It is common knowledge now to admit that information is present everywhere in human activities, and information and communications technology – from PCs to the internet network and from mobile phones to world communications networks – is at the height of its development and it transforms our lives, our relations and the organisation of society. Technology may be used for institutional corrections or for community corrections. It may equally protect the lives of officers and inmates and may improve the efficiency and the effectiveness of correctional practices.

Keywords: prison, detention conditions, technology, ethics.

INTRODUCTION

An individual's public or private life has become more and more governed and governable due to the exponential growth of information technology. This brings about a set of ethical considerations. Being aware of these issues may be an important part of our development as citizens and it may help us be a little more vigilant and more willing to give up a bit of our privacy and assume a constraint which limits our comfort and a digital indulgence.

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Technology is a help in many ways, but also a hindrance for the corrections field. The challenges are numerous, and technology sometimes evolves faster than people can keep up with it. Therefore, we can say that challenges coming from the use of computers and the internet, cell phones and their applications, body cameras, biometrics and facial recognition, surveillance drones, electronic monitoring and GPS systems, X-rays and scanners are the big trends in corrections technology.

Among others, technology may help detect smuggling in prisons, get information under cover, monitor behaviour and it may alert the staff in case of crisis situations in prisons. Moreover, it may be a viable and less expensive alternative to incarceration for those offenders who committed less serious crimes, provided that their monitoring is efficient.

Mobile phones are one of the biggest concerns for the prison management. There are concerns, on one hand, related to the use of mobile phones in prisons, to phone smuggling, and on the other hand, the use of mobile phones as aids after release from prison.

In 2013, a study was conducted in the United States to determine to what extent the mobile phone technology is helpful in the recovery management after release². Therefore, the study revealed that the Background Mobile technology promised to help people with behaviour disorders due to the use of prohibited substances in the management of their rehabilitation. Incarcerated women had the highest risk. According to the study, women were questioned about the possession of a mobile phone and whether they frequently used text messages, social networks or internet browsing. The survey showed that 83% of the respondents possessed mobile phones, 30% even smartphones, 77% used their mobile phones to keep in touch with friends or family, and they were acquainted to the use of cell phone technology (although most of them had prepay phone cards and not subscriptions), accessing applications or using social networks also on their mobile phones. This led to the conclusion that the large-scale use of cell phone technology by ex- female prisoners was a guarantee of the support they might receive after being released from prison.

As to the use of mobile phones in prisons, there are various issues, from surveillance and intercepting the smuggling or the illegal use of mobile phones to the possibility of permitting their use, hence the ethical issues raised by the matter itself. Mobile phones in prisons are used by some inmates to communicate outside their directions on crimes to be committed by group members who were not incarcerated, to order criminal actions by members of incarcerated groups, to send threats, to bully other prisoners or prison officers or their families, to get prohibited substances or objects inside, etc.

In 2016, a prison in South Carolina³ implemented a monitoring and interference system of smuggling mobile phones after a prison officer narrowly escaped death from an execution action right in front of his house, which was ordered by mobile phone by an inmate.

There have been reports that old methods like metal detectors and sniffer dogs are no longer sufficient today to detect mobile phones in prisons. A modern alternative exploiting the possibilities of technology could be the use of transmitters that interfere with the cell phone signal, however this matter raises several questions of an ethical nature concerning the protection of health for people who are incarcerated, considering their long exposure to electromagnetic radiations.

2 <https://nicic.gov/technology-corrections>

3 <https://www.correctionsone.com/products/communications/articles/222726187-SC-prisons-get-green-light-for-anti-cellphone-tech/>



ROMANIAN CONTEXT

In Romania, according to Law 374/2013 on the use of systems designed to block and interrupt radiocommunications within the perimeters of settings subordinated to the National Administration of Prisons⁴, “blocking and interrupting radiocommunications are only for preventing unauthorised use by people who have been deprived of their liberty, inside the prison, of devices capable to send or receive images, sounds and information, including mobile phones.”⁵

Ethical issues which might be raised in connection with the implementation of the mentioned rules cannot be taken into consideration at the time being, given that their enforcement has encountered challenges related to legislation and logistics. Therefore, Law 254/2013 on the execution of punishments and measures with deprivation of liberty ordered by judicial bodies in the course of a criminal trial, in Article 15 paragraph 3, refers to a regulation approved by an Order of the Justice Minister on the safety of detention facilities subordinated to the National Administration of Prisons, a regulation which is also mentioned in the Implementation Regulation of Law 254/2013, in Article 13 paragraph 2, but which is still a draft at the moment⁶. Consequently, commenting on how the measures necessary for the safety of detention facilities are implemented and their effects, as well as on setups, devices, their staff and endowment, technical means for surveillance and control of perimeters, indoor areas and access ways, becomes an insignificant endeavour given the lack of required regulations.

The same is valid for the existing Deontological Code of Staff in the Prison Administration System⁷, meaning it is not anchored in the immediate actuality considering the amendment of the legislation in the matter, the current needs of technology advances, as well as the implementation of the solutions they provide. Knowing the admissible limits of a prison officer’s behaviour in relation to the limits of the morals accepted by society at a particular moment is very important for appraising the ethics of actions, especially in crisis situations, and also for handling the applications concerning the exercise of rights by convicted people.

With regard to the technology used in corrections, we can also discuss the video surveillance of different places inside a prison. Video surveillance systems are vital for ensuring effective security in prisons and facilitating some particular corrections in custody. Incidents involving violence between prisoners, drug use and inappropriate behaviour of officers are only a few examples of unfortunate acts that may happen within the walls of a prison. The advances in the video surveillance technology make it possible for these facilities to update their systems to ensure comprehensive monitoring and a higher level of safety for prisoners and workers.

There are many benefits related to the use of video surveillance equipment. So, it helps to:

- Better cover the monitored area, given its size. While guards and officers cannot be everywhere at the same time, security cameras may provide continuous coverage of a whole facility.
- Constantly monitor a prisoner’s activity – the steady presence of surveillance cameras helps officers detect a prisoner’s suspicious activity and may prevent the escalation of incidents in prisons.

4 Published in the Official Gazette of Romania No. 825 of December 23, 2013.

5 Article 2 paragraph 1. Paragraph 4: “The system is composed of a specific combination of several types of appliances and, as appropriate, of other devices which are assembled, installed and designed for a permanent use to block and interrupt radiocommunications within the perimeters of settings subordinated to the National Administration of Prisons.”

6 <http://www.just.ro/proiectul-de-ordin-al-ministrului-justitiei-pentru-aprobarea-regulamentului-privind-siguranta-locurilor-de-detinere-din-subordinea-administratiei-nationale-a-penitenciarelor/>

7 Order no. 2794/2004 on the approval of the Deontological Code of Staff in the Prison Administration System, published in the Official Gazette of Romania No. 1098 of November 25, 2004.



- Provide visual evidence – archived recordings of security cameras are a very valuable resource for the investigation of incidents inside prisons.
- Maintain order in common areas – locations where large groups of prisoners are brought together, like dining or leisure areas, need strict surveillance from several security cameras.
- Lower the frequency of attacks – tension is high in prisons, and fights are inevitable. Security cameras may discourage such behaviours and they also help analyse violent incidents.
- Prevent drug smuggling – video surveillance systems help to prevent prisoners from smuggling drugs coming from outside.
- Monitor the behaviour of officers – using images to investigate situations where guards or prison officers acted abusively.
- Make moving around safer – security cameras mounted on hallways and in all cells blocks provide an increased level of safety when prisoners are escorted inside the prison.
- Remote video monitoring – with a network digital surveillance system, users may access images remotely on the internet. Authorised users are able to view several camera streams from their PCs instead of a lonely monitoring camera in the prison.

At the same time, there are collateral risks, such as: inmates manipulating (tampering with) the equipment, and in this case backup security plans should be provided; overdependence, which involves relying too much on this kind of equipment, which may break or have signal interruptions and therefore it should be only a part of the security effort together with appropriate security and surveillance staff, alarm systems and safety measures; violation of privacy – it is a much debated topic, if the cell is a private area, and there are correction systems which acknowledge this status, as well as systems which permit the surveillance of cells in which convicts are detained. Hence the discussion on the ethics of using such surveillance systems.

The Romanian legislation does not provide for any interdiction related to the use of video surveillance equipment in correction facilities. The surveillance of perimeters inside prisons involving common areas, like hallways, entrances or confinement walls is widely used. The law neither prohibits, nor does it stipulate or justify the situations when areas in prisons may be subject to video monitoring. An analysis of the content of the right to privacy has, in my view, with regard to the video monitoring of prisoners, much relevance. Therefore, monitoring the activities of a prisoner within the prison area, as long as the prisoner is in the state's custody and the state is liable for any fact which could affect a prisoner's rights, is justified by a need for authorities' intervention so as to ensure a safety climate in prison, concerning both a particular prisoner, and the other prisoners, generally, or the officers inside the premises. The only limit where the monitoring activity exceeds the general interest is the toilet area, as well as the place where prisoners meet their attorneys, where the confidentiality of the meeting must be ensured.

However, our national legislation provides for the possibility of using remote electronic surveillance systems⁸, and the situations when such systems may be used are stipulated by the Implementation Regulation of Law 254/2013 in Article 32. It specifies that these systems may be used only if they meet the requirements of safe use, respect human dignity and are not a hazard for prisoners' health or physical integrity. Such systems have not been implemented in our country, although the legislation allows this

8 Article 27 of Law 254/2013 on the execution of punishments and measures with deprivation of liberty ordered by judicial bodies in the course of a criminal trial.



and provides for such means, for financial considerations and less for reasons related to a non-compliance with legal requirements. These systems would have been a very efficient means for monitoring people on parole or would have contributed to avoid overcrowding in prisons, as a postponement in the enforcement of a punishment, under electronic surveillance, is preferable to incarceration.

NEW TECHNOLOGICAL CHALLENGES

Electronic surveillance tags have not been spared of criticism. They are tools meant to discourage, and not guarantee that people won't commit any more crimes. In the context of the corrections system, electronic monitoring refers to monitoring a person as a form of surveillance, usually in the form of an ankle tag, with the help of GPS. Practices vary widely between jurisdictions, even within a state (as in Australia or USA). Moreover, the application of monitoring differs even between offenders, where specific motives are used for every person, depending on relapse, status or procedural stage, or on offences.

As concerns this surveillance method, there are both appreciations and criticism. Therefore, it may be efficient in assuming the offenders' liability, protecting victims and improving the safety of the community and preventing crimes. All these come with important cost savings, especially when offenders may be securely monitored in the community instead of a prison, or as a mechanism of early release from prison.

Failures came from offenders being able to tamper with the devices and there may be zones without GPS coverage, especially in vast geographic areas. Moreover, human errors in the use of systems may be involved, such as inappropriate monitoring or making unreasonable decisions after an alert.

However, most of research underlines that electronic monitoring may be an efficient tool to discourage relapse. The most efficient practices for the surveillance of offenders in a community are those which identify and reduce the risks of continuing a criminal behaviour. Electronic surveillance is such a practice if, beyond offering offenders a long list of rules for what they should not do, helps them redesign their daily routine diverting it from inclinations for risky activities towards attitudes with much higher positive influences.

Generally, it is imperative that correctional authorities offer rehabilitation solutions which take into account the factors underlying an individual's criminal behaviour. The most efficient approaches employ cognitive-behavioural techniques to provide offenders with skills in making good decisions. Nevertheless, electronic monitoring cannot "repair" the impulsiveness of an offender, their lack of empathy or any other characteristic conducive to crime. Therefore, a technological aid should not be mistaken for a significant treatment.

The same applies to video monitoring in case of the execution of house arrest or home detention⁹. According to a project proposed by the Law School of Swinburne University in Melbourne, Australia, called the Technological Incarceration Project, the intention is to test some advanced form of home detection with the use of artificial intelligence, automatic learning algorithms and electronic motion sensors for the permanent monitoring of convicted offenders. Therefore, they could wear an electronic tag or a tag capable of issuing shocks in case that an algorithm detects an antisocial behaviour or a violation of the rules set for a convict. This assessment would be carried out through a combination of

9 According to a project of Swinburne University's Law School, Melbourne, presented at the Conference "Global Technology in Corrections", Lisbon, 2019, <https://icpa.org/correctionstech2019/>



biometric factors, such as voice recognition or facial recognition. This leads to a shift in the burden of costs related to the incarceration of prisoners from the state to the convict. The virtual prison would also allow offenders to stay with their family and so, it gives some hope that they could be more easily reintegrated into society than if they were isolated in an unnatural living setting¹⁰.

Technology is increasingly playing a role in encouraging prisoners to attain their educational goals and adhere to their counselling programmes on mental health and substance abuse. Beyond these main objectives, technology has also become an integral part of helping prisoners deal with their release, gain technical certifications and acquire new skills to help them qualify for jobs. In this context, there is an issue related to their access to computers and the internet. The fears of imprisonment authorities concerning the inmates' access to the internet are in connection with the possibility of using this means to harass victims, witnesses or to keep in touch with members of criminal groups in order to commit new crimes. Therefore, the recognition of this right to internet access is weighed against limiting or even completely denying online access. Which one will take precedence over the other: the possibility of a prisoner's personal, educational, professional or civic development by keeping them in contact with the progress of the society they have been isolated from or the strict measures blocking any contact of a prisoner, difficult to control, with the outside world? It will be a difficult choice. Any variant has its risks and its subsidiary shortcomings. When weighed, the majority interest will probably come first, but it only can be found out by trying new methods, like the one of slightly loosening restrictions on the use of computers and the internet by inmates. At present, there are several projects in progress in a few states from the United States and in Australia, especially in the area of juvenile delinquency, where access to computer technology was introduced in the educational area for minors in custody, who can use tablets with applications installed to help them learn easier, which are also used for the well-known "video visiting & calling", standing out as a very good remedy for inmates' depressive moods.

An issue has been raised concerning the relations with the new generations of minor delinquents, who are extremely familiar with the information technology and have, due to the massive digitalisation of life, a different approach to all aspects of personal life. In detention centres for minors, there are several categories of expertise in the field of school or digital instruction. Therefore, for common law offenders, school attainment is extremely low (school dropout or multiple school dropout), although, most of them have user skills for IT devices (mobile phones, tablets), and the delinquents who committed technology-related crimes are highly trained (many of them by self-learning) in the IT field. Modern psychological-pedagogical methods consider the possibility of using technologies for learning techniques. The use of information and communications technology in education by rethinking how educational contents are delivered may lead to an improvement of student performance without excessive costs and in a way that is familiar and attractive to them. There are also risks associated with this modern instruction process, as the excessive use of computers may lead to a loss of practical skills in computation and investigation of reality and to a deterioration of human relations. Also, the excessive individualisation of learning leads to a denial of the student-teacher dialogue and the isolation of learning in its psychological and social context. Nevertheless, introducing ICT¹¹-based learning methods in a minor's detention environment in connection with their educational process will help them deal confidently with the changes in the labour market, as they are trained for the new types of occupations anticipated in the labour market. Moreover, offenders with IT expertise may be valorised by involving them in the training of their detention mates in their area of expertise.

10 <https://www.techdirt.com/articles/20170817/05530038015/welcome-to-technological-incarceration-project-where-prison-walls-are-replaced-sensors-algorithms-ai.shtml>

11 Information and Communication Technology.



In countries where projects on the use of ICT have been implemented in detention centres for minors, the outcomes were that, for example, the use of audiobooks helped young people with learning difficulties related to reading and concentration, promoting positive emotions and efficient memorising, led to a familiarisation with technology, having the capability of creating a positive influence and a new social paradigm by focusing on inter-activity.

Using information and communications technology in prisoners' learning was also discussed with regard to adults. So, German correction institutions were interested in the use of an eLearning platform, initially designed for immigrants, which combines Avallain software architecture with high quality learning, and the contents which have been created use Avallain Author as an eLearning tool¹². This makes it possible to install the software on individual computers or on intranet in a prison, offering easy access for inmates, even if the rollout of updates takes a little longer due to the limited connectivity to the internet of computers in a prison. This measure has led to the development of some useful skills in the inmates' social reintegration process, and also to a better management of their time in prison or a successful communication with the prison staff.

Not lastly, another area where the information technology captured the attention of correction institutions is telemedicine¹³. Today, due to satellite technology, high speed digital connections are available, so that patients may receive a diagnosis and specialist help even in areas far away from civilisation or in the middle of the ocean. Doctors may monitor vital functions, communicate through video transmission with rescue teams and give instructions. The scope of telemedicine also includes medical counselling of patients via the internet or the exchange of documentation and medical records between doctors who are in different places or even in different countries.

The states who opted for this interaction method between prisoners and doctors intended to cut down on costs, improve health or diminish risks resulting from keeping them in hospital. Most states resorted to telemedicine to some extent for treating prisoners who most of times found themselves in remote areas¹⁴. This allowed the correction officers to keep potentially dangerous prisoners behind bars for treatment rather than bearing the cost and the security risk of taking them to hospitals¹⁵.

There are voices that criticize the excessive use of telemedicine when instead of being used as a supplement for the medical staff in hospitals or medical offices in prisons it becomes its substitute, and sometimes it is necessary, for a precise diagnosis, that the doctor examines the inmate directly.

In Romania, a telemedicine system in the public health system has been implemented for emergency medicine and a project is prepared for primary assistance in order to help family physicians, especially those in rural areas. The first telemedicine network for epilepsy in Romania was inaugurated in Cluj-Napoca. The implementation of the telemedicine system in prisons involves some substantial investment in specific technology, which initially raises a major issue of financial resources.

The issue of using technology in our lives has come with concerns regarding the protection of personal data.

12 <https://www.checkpoint-elearning.com/node/17987>

13 Telemedicine is the use of telecommunications and technology to provide remote medical assistance. Telemedicine helps to remove barriers related to distance and may improve access to medical services, which, otherwise, would not be available in some communities.

14 Florida and Texas were the first states that implemented telemedicine as early as in the 1980s.

15 <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/01/21/state-prisons-turn-to-telemedicine-to-improve>



In the implementation of solutions provided by artificial intelligence or information and communications technology in the corrections system, the protection of personal data should also be considered, and national laws in the area should provide protection and observe the related rights.

The national laws regarding the protection that have been adopted so far in other countries provide for some individual rights, such as:

- the right to automatically receive particular information, irrespective of where it is collected from;
- the right of access to data, generally, and, particularly, to stored personal data and an individual's right to require, closely in accordance with reality, the correction of stored data concerning them directly;
- the right to object to some particular data processing or data communication.

These laws require that institutions processing data have good experience, ensure efficient and safe management and comply with some obligations.

CONCLUSIONS

Our laws concerning the execution of punishments or educative/preventive or safety measures leave for the Implementation Regulation only one law in the field of execution, that is Law 254/2013, to regulate the issue of personal data protection. It is also true that artificial intelligence in the area of correction in Romania is not so used as to create a legislative basis for the protection of related rights.

According to the Regulation, the National Administration of Prisons may use or create computerised applications for the management of data referring to the purpose of punishment, as well as of data referring to related or auxiliary activities. Moreover, taking photographs and audio-visual recording of prison activities are allowed only with the permission of the detention director. But neither the law, nor the regulation specifies what rights are protected in connection with personal information, such as informing the prisoner about their surveillance within the walking perimeter or when a request is made for information of public interest included in documents containing personal data of a prisoner.

According to a decision of the High Cassation and Justice Court, in case of requests for free access to information of public interest based on the provisions of Law 544/2001, when the information of public interest and the information concerning personal data is included in the same document, irrespective of its support or form or the manner in which it is expressed, the access to information of public interest is provided with the anonymisation of information regarding personal data. A denial of access to information of public interest, when the information concerning personal data is anonymised, is unjustifiable¹⁶.

Considering, probably, the dynamics of innovation in the field of information and communications technology, the implementation of a solution in this field encounters many times people's incapacity to quickly process these solutions, to integrate and sustain them in legislative and financial terms or with appropriate human resources. Public services have many times significant difficulties in taking over state-of-the-art solutions from the fields of science and technique, bureaucracy being most times the cause. The correctional system is not an exception.

16 Decision of the High Cassation and Justice Court No. 29/2015, published in the Official Gazette of Romania, No. 51 of January 25, 2016.



REFERENCES

1. Law. 254/2013 on the execution of punishments and measures with deprivation of liberty ordered by judicial bodies in the course of a criminal trial, published in the Official Gazette of Romania No. 514 of August 14, 2013.
2. Law 374/2013 on the use of systems designed to block and interrupt radiocommunications within the perimeters of settings subordinated to the National Administration of Prisons, published in the Official Gazette of Romania No. 825 of December 23, 2013.
3. Regulation for the application of Law 254/2013 on the execution of punishments and measures with deprivation of liberty ordered by judicial bodies in the course of a criminal trial.
4. Order No. 2794/2004 on the approval of the Deontological Code of Staff in the Prison Administration System, published in the Official Gazette of Romania No. 1098 of November 25, 2004.
5. Decision of the High Cassation and Justice Court No. 29/2015, published in the Official Gazette of Romania No. 51 of January 25, 2016.
6. <https://nicic.gov/technology-corrections>
7. <https://www.correctionsone.com/products/communications/articles/222726187-SC-prisons-get-green-light-for-anti-cellphone-tech>
8. <http://www.just.ro/proiectul-de-ordin-al-ministrului-justitiei-pentru-aprobarea-regulamentului-privind-siguranta-locurilor-de-detinere-din-subordinea-administratiei-nationale-a-penitenciarelor/>
9. <https://icpa.org/correctionstech2019/>
10. <https://www.techdirt.com/articles/20170817/05530038015/welcome-to-technological-incarceration-project-where-prison-walls-are-replaced-sensors-algorithms-ai.shtml>
11. <https://www.checkpoint-elearning.com/node/17987>
12. <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/01/21/state-prisons-turn-to-telemedicine-to-improve>





INSTITUTES FOR THE IMPLEMENTATION OF COOPERATION IN CRIMINAL MATTERS WITHIN CRIMINAL LAW OF THE EUROPEAN UNION

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Abstract: The criminal law of the European Union in its development primarily aims to protect the financial interests of the European Union. Given that this is a single area and a single legal order, within which member states still retain clearly defined competences, and in order to effectively protect the interests of the Union, it was necessary to introduce certain institutes that allow or facilitate a greater degree of cooperation and cohesion among the member states in the fight against crime, which in this case also has a cross-border element. The intention was to improve the existing mechanisms of cooperation between the states within the framework of international criminal law in such a way that they become faster and more efficient. The paper presents the characteristics and the manner of application of each of the aforementioned institutes, with a brief overview of other forms of cooperation.

Keywords: criminal law, European Union, Interpol, cooperation.

INTRODUCTION

Traditional cooperation between states in criminal matters implies interstate relationship in which one sovereign state sends a request to another sovereign state, which then decides whether to act upon the request. It is a system that is slow and complex and no longer corresponds to the reality of today's European space. Faced with such a situation, modern states have begun to realize that a criminal phenomenon on a global scale requires joint and coordinated action. In this context, the European Union offers one of the most developed systems of international cooperation in criminal matters (An-

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agnostopoulos, 2014: 9-24). This system is based on certain principles, of which the most important are undoubtedly the recognition and mutual trust between the states. In this regard, since 2002, a number of framework decisions and directives have been adopted, which together form a comprehensive mechanism for international cooperation in this area. The aim is to create a single space in which the decisions of one state would have the same legal force on the territory of any other member state (Stojanovski, 2009). Of all the decisions and directives, the most important is the one concerning the European arrest warrant (Reljanović, 2009: 71-89).

EUROPEAN ARREST WARRANT

The European Arrest Warrant (EAW) is the first, real and concrete legal (legislative) mechanism in the field of criminal justice cooperation within the European Union (Ivanović, Totić, 2017: 127; Hagenmüller, 2012: 95-106; Fichera, 2011: 547-551). It is based on the principle of mutual recognition of court decisions of member states, which can be considered the "cornerstone" of judicial cooperation between the EU member states (Pajčić, 2017: 554; Lukić, 2011: 542; Đorđević, 2011: 1).

The introduction of the European warrant has made progress primarily in interstate cooperation, which means that now there is no possibility of rejecting requests for differently defined criminal offenses. In addition, the possibility of extraditing a domestic citizen to another member state was introduced (Racsmany, Blekxtoon, 2004; Ivanović, Ivanović, 2015: 202; Ostroploski, 2014: 167-169).

The Framework Decision lists the criminal offenses for which a European arrest warrant may be issued, with the possibility of expanding the list. This warrant can also be issued for crimes that fall under the jurisdiction of the International Criminal Court - ICC. The decision also envisages the possibility of confiscating property in case that the requesting Member State has explicitly stated this in the arrest warrant (Simović, Blagojević, Simović, 2013: 551).

The framework decision does not require absolute mutual recognition, but even prescribes the reasons for which the warrant shall not be executed (Spencer, 2010: 474-482). The reasons are divided into two groups: the reasons why they will not necessarily be recognized and the reasons why they do not have to be recognized (Burić, 2007: 228).

Article 3 of the Framework Decision lists the grounds on which the Member State to which the European warrant is addressed must refuse to execute it (Burić, 2007: 229; Pajčić, 2017: 566-567). Article 4 prescribes relative reasons for refusing to execute a warrant. In addition to these obstacles, the obstacles for the execution of European warrant are also the privileges and immunities enjoyed by a certain person (Burić, 2007: 224).

The Framework Decision guarantees certain rights to a person arrested on the basis of a European warrant, which follows from the Charter of Fundamental Rights of the European Union itself. The states are obliged to incorporate all these rights into their national legislation (Burić, 2007: 237; Der Mei, 2017: 888).

The issue of which judicial body is competent to issue or execute an arrest warrant is regulated by national law (Filipović, 2012: 188-203). However, given the way in which the Framework Decision defines a European arrest warrant, i.e. as a court decision, it is clear that this must be a body with the powers of a court, as explained above.

If the requested person is located within the territory of the requested State, it is its obligation to arrest the person without any delay. This is followed by the standard police procedure of verification and

determination of the identity of a person deprived of liberty, with the exercise of universal rights of a person deprived of liberty. Then, a preliminary hearing takes place in which the person is informed about his rights, i.e. the content of the European arrest warrant.

The main hearing takes place before a competent judge, and is scheduled within a reasonable time from the moment of arrest. There is a right of appeal against the decision of the competent judge. The deadline within which the competent judicial authority must make a decision on whether to deliver the arrested person to the requesting state is 60 days, and it is calculated from the day when the person was arrested.

If the location of the requested person is known, the judicial authority issuing the European arrest warrant may send that warrant directly to the enforcement authority in the Member State of enforcement. It is possible that the judicial authority issuing the arrest warrant is not aware of the competent judicial enforcement authority. In such a situation, it will request the necessary information through the contact points within the European Judicial Network (EJN) in order to obtain this information from the enforcement Member State.

In order to reduce the risk of the requested person fleeing, the judicial authority issuing the European arrest warrant may send that warrant to its national SIRENE² bureau for transmission to the other Member states via the Schengen Information System (SIS).

The indirect way of executing the European arrest warrant is much more common. In such a situation, the European arrest warrant is sent to all Member states via the SIS. In case of certain doubts, possible legal dilemmas, gaps or other interpretations, the requesting state may request assistance from the European Judicial Network.

SCHENGEN INFORMATION SYSTEM

The Schengen Information System (SIS) is one of the most important compensatory measures for the abolition of internal border controls.³ The main role of the SIS is to preserve internal security in the Schengen countries due to the absence of controls at internal borders. It is in fact an information body that provides support to external border control and police cooperation in the Schengen countries. Specialized national SIRENE bureaux serve to exchange additional information and coordinate SIS alert activities.

Three legal instruments strictly define the scope of the work of SIS: European Commission Regulation 1987/200635 (border police cooperation), Council's Decision 2007/533/PUP36 (police cooperation) and European Commission Regulation 1986/200637 (vehicle registration cooperation).

The SIS became operational on 25 March 1995 for seven member states of the European Union, and the next day, 26 March, those states abolished their internal state borders. After that, it experienced an upgrade in the form of SIS 1, and then SIS 1+. This was followed by SISone4ALL, and finally SIS II, which started operating on 9 April 2013 - simultaneously in all beneficiary countries of the previous system.

Today, SIS II is operational in all countries of the European Union that are members of the Schengen area and in the associated countries that are members of the Schengen area. There are special conditions for the European Union countries that are not members of the Schengen area.

2 Supplementary Information Request at the National Entries, see more at: https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/sirene-cooperation_en; 11 November 2019.

3 S. Pejaković-Đipić, „Schengenski informacijski sustav – „čuvar“ schengenskog područja“; 139. file:///C:/Users/User/Downloads/ZPR_br_2_2018_ZB_12032019_29_55.pdf; 22 December 2019.



INTERPOL

Interpol (*International Criminal Police Organization*) is an intergovernmental organization consisting of 194 member states. It was formed in 1923 for the purpose of international criminal-police cooperation. It is currently the second largest organization in the world (after the United Nations), and is funded by annual contributions from member states. Due to its politically neutral role, the Statute of Interpol,⁴ which is its basic legal act, does not allow participation in intrastate criminal actions, and the resolution of political, military, religious or racial crimes. Interpol's work focuses on public safety, anti-terrorism, the fight against organized crime, smuggling, human trafficking, money laundering, child pornography, financial, high-tech crime, and corruption.

The highest governing body is the General Assembly, which consists of the delegates from the Member states. They meet annually and make all important decisions related to the organization's policies, resources, working methods, finances, activities and programs. The other governing body is the Executive Board headed by the president of the organization.

Interpol is a key partner of the European Union in the field of external security, irregular migration, anti-terrorism and organized crime. In its work, Interpol cooperates with European Union agencies (Europol, Eurojust, Frontex,⁵ CEPOL,⁶ EU-LISA⁷) on joint projects to increase the access to databases, training and capacity building programs of Interpol and on other initiatives.

EUROPEAN EVIDENCE ORDER

Mutual assistance between the member states of the European Union in terms of obtaining or submitting evidence, documents, and data necessary in criminal proceedings is regulated by a European evidence order. The procedures and guarantees for the Member states, on the basis of which the European evidence order should be issued and executed, are governed by Council Framework Decision 2008/978/PUP of 18 December 2008 on the European Evidence Order for the purpose of obtaining the case, documents and data for use in criminal proceedings.⁸ This form of criminal justice cooperation is an upgrade to the European arrest warrant, and the introduction of the European evidence order has completed criminal justice cooperation between the member states.

The Framework Decision on the European Evidence Order complements the Framework Decision on the freezing of assets and evidence by applying the principle of mutual recognition of warrants with specific aim of obtaining objects, documents and data that can be used in criminal proceedings (Klimek, 2012). European evidence order is issued by an authorized body of a Member State: a competent judge or court, a competent investigative body or a public prosecutor, or any other judicial body designated for an individual and specific case by the issuing State. Police authorities or other admin-

4 Adopted at the 25th Session of the General Assembly in Vienna, in June 1956, and entered into force on 13 June of the same year.

5 European Border and Coast Guard Agency based in Warsaw, <https://frontex.europa.eu/>; 12 January 2020.

6 European Union Legislative Training Agency based in Budapest, <https://www.cepola.europa.eu/>; 12 January 2020.

7 European Agency for the Operational Management of Extensive Information Systems in the Area of Freedom, Security and Justice (eu-LISA), based in Tallin, <https://www.eulisa.europa.eu/>; 12 January 2020.

8 Council Framework Decision 2008/978/PUP of 18 December 2008 on European Evidence Order in terms of obtaining cases, documents, and data for use in criminal proceedings, "Official Journal of the European Union", L 350/72, 18 December 2008, available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32008F0978&from=HR>; 10 November 2019.



istrative authorities, however, are not authorized to issue this order and may only propose issuance to another competent issuing authority.⁹

The types of criminal proceedings for which a European evidence order may be issued are set out in Article 5 of the Framework Decision. The situations in which the executing State may refuse to execute a European evidence order, within 30 days of its receipt, are also prescribed under the Framework Decision.

EUROPEAN CRIMINAL RECORD

The European Criminal Record or European Criminal Records Information System (ECRIS) is a computerized database that allows the member states of the European Union to exchange data from criminal records for their citizens (Simović, Blagojević, Simović, 2013: 553). The main purpose of the ECRIS is to provide prosecution authorities, as well as some other competent authorities, with information on facts and circumstances that are important for the prosecution of a particular person.

The ECRIS program collects and contains information on the member states of the European Union. For the data of citizens of non-member states, the states still have to turn to each other (Turudić, Borzić, Bujas, 2015: 1057-1098).

The new decentralized system of the European Criminal Records Information System for Third-Country Nationals (ECRIS-TCN) provides an easier way for the authorities of one Member State to collect the data from third-country nationals convicted in another Member State.¹⁰ However, after 2016, when new rules on the beliefs of citizens of countries that are not members of the European Union were presented, it became clear that the decentralized system would still create certain problems, especially on the issue of certain finger samples. Therefore, in June 2017, the European Commission presented the Regulation on the Centralized ECRIS-TCN System.

ECRIS-TCN consists of a centralized database that will be managed by the so-called EU-LISA - European Union Agency for Large IT Systems. The centralized database will contain identification data such as fingerprints, and in some cases photographs.

After the system became operational in 2012, the information that can be obtained through the system can be used in criminal proceedings (then the provision of information is mandatory) or in other cases, except for criminal proceedings (in which situations information can only be obtained if permitted by the national law of both Member states involved in the exchange of information). Information on any changes in criminal records must also be provided to the state from which the citizen in question is (Jones, 2019, 53). Three European Union agencies will have access to this system, and these are: Europol, Eurojust and the European Public Prosecutor.

ORDER FOR CONFISCATION OF PROPERTY OR ITEMS

A framework decision on freezing and confiscation of proceeds of crime was made in 2001.¹¹ The purpose of this decision was to ensure a common approach to solving criminal offenses for which it is necessary to provide for a confiscation of property.

11 Council Framework Decision of 26 June 2001 on money laundering, identification, monitoring, freezing, seizure and confiscation of property and proceeds of crime, "Official Journal of the European Communities" L



The 2005 Framework Decision on Confiscation seeks to ensure even greater approximation of legislation of Member states in the field of confiscation of proceeds of crime.¹² The Framework Decision on the mutual recognition of confiscation orders lays down the rules under which the judicial authorities of one Member State shall recognize and enforce a confiscation order in their territory issued by the competent judicial authority of another Member State.¹³

A confiscation order is often preceded by a freeze on the property. In order to allow the competent judicial authorities to seize property at the request of judicial authorities of another Member State, in 2003 a Framework Decision on the freezing of property and the provision of evidence was adopted.¹⁴

A directive to facilitate confiscation of proceeds of serious and organized crime by the Member states of the European Union was adopted in 2014. The Directive seeks to simplify the existing rules and eliminate important shortcomings exploited by organized criminal groups (Galiot, 2017: 553-554).

RECOGNITION AND ENFORCEMENT OF FINE DECISIONS

European Union law, in particular Framework Decision 2005/214/PUP,¹⁵ applies the principle of mutual recognition to fines, which allows a judicial or administrative authority to deliver a fine directly to an authority in another EU country and to recognize and enforce that penalty without further formalities (Vuletić, 2016: 83; Hržina, 2019; Turudić, Borzić, Bujas, 2015: 1080-1084). The principle applies to all offenses for which fines may be imposed, and double criminality checks are abolished for 39 offenses (e. g. participation in criminal organizations, terrorism, trafficking in human beings, rape, theft, traffic offenses). Penalties must be imposed by judicial or administrative authorities of the Member State and this decision must be final, i. e. there must be no possibility of appeal.

The State to which the decision has been delivered may refuse to enforce the decision only in a limited number of cases. The enforcement of the decision is regulated by the law of the enforcing State. In this way, in the event of an uncollected fine, imprisonment or other penalties provided for by national law may be imposed. The funds obtained from the enforcement of decisions shall belong to the enforcing State, unless otherwise agreed by the Member states concerned.¹⁶

182/1, 5 July 2001, available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:32001F0500&qid=1434704882469&from=EN>; 18 December 2019.

12 Council Framework Decision 2005/212/PUP of 24 February 2005 on Confiscation of Proceeds, Funds and Assets from Crime, "Official Journal of the European Union" L 68/49, 15 March 2005, available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:32005F0212&qid=1434705529437&from=HR>; 18.12.2019.

13 Council Framework Decision 2006/783/PUP of 6 October 2006 on Application of Principle of Mutual Recognition of Confiscation Order "Official Journal of European Union", L 328/59, 24 November 2006, available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:32006F0783&qid=1434705734143&from=EN>; 18 December 2019.

14 Council Framework Decision 2003/577/PUP of 22 July 2003 on Enforcement of Decisions on the Freezing of Property and the Provision of Evidence "Official Journal of the European Union" L 196/45, 22 July 2003, available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32003F0577&from=HR>; 18. December 2019.

15 Council Framework Decision 2005/215/PUP of 24 February 2005 on Application of the Principle of Mutual Recognition to Fines "Official Journal of European Union" L 076/16, available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32005F0214&from=HR>; 17 December 2019.

16 https://e-justice.europa.eu/content_payment_of_fines-388-hr.do; 21 December 2019.



RECOGNITION AND ENFORCEMENT OF JUDGMENT IMPOSING SENTENCE OF IMPRISONMENT OR A MEASURE INVOLVING DEPRIVATION OF LIBERTY

This issue is regulated in Council Framework Decision 2008/909 PUP of 27 November 2008 on the application of the principle of mutual recognition of judgments in criminal matters imposing sentences of imprisonment or measures involving deprivation of liberty with the aim of enforcing them in the European Union.¹⁷ The implementation deadline was 5 December 2011 (Krbec, 2014: 417). For the implementation of judicial cooperation concerning the recognition and enforcement of a court judgment imposing sentence of imprisonment or a measure involving deprivation of liberty, whereabouts of the convicted person during the initiation of this type of proceedings is of no importance.

RECOGNITION AND ENFORCEMENT OF JUDGMENTS AND DECISIONS IMPOSING PROBATION MEASURES AND ALTERNATIVE SANCTIONS

The issue of recognition and enforcement of judgments and decisions imposing probation measures and alternative sanctions is regulated by Council Framework Decision 2008/947/PUP of 27 November 2008 on the application of the principle of mutual recognition of judgments and probation decisions having the aim to monitor probation measures and alternative sanctions.¹⁸ The aim of the Framework Decision is to facilitate social rehabilitation of convicted persons, to improve protection of victims and public, and to apply the appropriate probation measures and alternative sanctions in case of perpetrators of criminal offenses who do not live in the Member State where the sentence was imposed.

The existing instrument until then was the Council of Europe Convention of 30 November 1964 on the Supervision of Conditionally Convicted or Conditionally Released Offenders. However, this Convention has been ratified by only 12 Member states with, in some cases, numerous reservations, making it ineffective legal instrument.

CONCLUSION

The institutes presented in the paper have the aim to enable faster and more efficient implementation of cooperation between Member states in criminal matters. The basic intention is to create a system within a unique legal order of the European Union, in which the interests of the Union will be equally protected and the criminal justice systems of the Member states will reach such a level of cooperation that they themselves function as a single system - from arresting and handing over a suspect/accused/convict, to transferring evidence, but also of all the necessary data not only for the purpose of preventing the commission of criminal offenses, but also for easier finding and identification of perpetrators of criminal offenses. In the traditional way of cooperation between the States in criminal matters, there were often obstructions, non-fulfillment of obligations under international agreements, refusal to extradite perpetrators of criminal offenses, etc. and it would be naive to expect that, in no time, these institutes will achieve the goals for which they were introduced. Therefore, the criminal

17 "Official Journal of European Union" L 81/08, 27 November 2008.

18 "Official Journal of European Union" L 337/102 of 16 December 2008.



law of the European Union is developing gradually and fragmentarily, where the bodies of the Union, adopting new regulations, much more prefer regulation rather than directive as the legal basis and the reason are its characteristics, which make it the most suitable source of criminal law of the Union, if primary sources of law are excluded. In any case, it is not to be expected that the Union will abandon its intention, but on the contrary, spreading the scope of action, the adoption of new regulations and the establishment of a Euro-comfortable interpretation of regulations - wherever possible.

REFERENCES

1. Đorđević, S. (2011). *Evropski nalog za hapšenje-deset pitanja deset odgovora*. Beogradski centar za bezbjedonosnu politiku, Beograd.
2. Fichera, M. (2011). *The implementation of the European Arrest Warrant in the European Union. Cambrige-Antwerp-Portland: Law, Policy and Practice*. Antwerp, Intersentia, <https://doi.org/10.1111/hojo.12105> (accessed March 15 2021).
3. Hržina D. (2019). *Međunarodna pravna pomoć i pravosudna suradnja u kaznenim stvarima - teorijski i praktični aspekti*. Pravosudna akademija, Zagreb.
4. Racsmany D. & Blekxtoon Z.R. (2004). *The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-)Surrender of Nationals and Dual Criminality under the European Arrest Warrant*. Asser Institute, the Hague, the Netherlands, 2004.
5. Simović M.N., Blagojević M. & Simović V.M (2013). *Međunarodno krivično pravo*, 2. izd. Pravni fakultet Univerziteta u Istočnom Sarajevu, Istočno Sarajevo.
6. Anagnostopoulos, I. (2014). "Criminal justice cooperation in the European Union after the first few steps, a defence view". *ERA Forum Journal of the Academy of European Law*, vol. XV, 1, 9-24, <https://doi.org/10.1007/s12027-014-0337-0> (accessed December 15 2020).
7. Burić Z. (2007). „Europski uhiđbeni nalog“. *Hrvatski ljetopis za kazneno pravo i praksu*. vol.14, (1), broj 1, Zagreb, 217-266.
8. Filipović H. (2012). „Implementacija Evropskog naloga za hapšenje u pravni poredak RH“. *Policija i sigurnost*, godina 21, (1), Zagreb, 188-203.
9. Haggemüller, S. (2012). "The Principle of Proportionality and the European Arrest Warrant", *Oñati Socio-Legal Series*, 3(1), 95–106.
10. Ivanović A.R. & Ivanović A.B. (2015). „Evropski dokazni nalog i Evropski nalog za istragu u krivičnim stvarima“. *Pravne teme*, Naučni časopis Departmana za pravne nauke Univerziteta u Novom Pazaru, broj 5, Novi Pazar, 199-217.
11. Ivanović A.R. & Totić M. (2017). „Evropski nalog za hapšenje kao instrument borbe protiv organizovanog kriminala na teritoriji Evropske unije“. *Strani pravni život*, Beograd, 127-145.
12. Jones C. (2019). *Data Protection, Immigration Enforcement and Fundamental Rights: What the EU's Regulations on Interoperability Mean for People with Irregular Status*. Platform for International Cooperation on Undocumented Migrants, Centre for European Policy Studies and European Migration Law, Statewatch Analysis Volume 21, Number 9.
13. Klimek L. (2012). "Free Movement of Evidence in Criminal Matters in the EU". *The Lawyer Quarterly*, vol. 2, no. 4, 250-290.



14. Krbec I. (2014). „Priznanje i izvršenje stranih odluka prema zakonu o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije“. *Hrvatski ljetopis za kazneno pravo i praksu*, vol. 21, broj 2, Zagreb, 401-438.
15. Lukić T. (2011). „Borba protiv organizovanog kriminala i terorizma na međunarodnom nivou“. *Pravni život*, broj 12, Kopaonička škola prirodnog prava - Slobodan Perović, Beograd, 542.
16. Ostroploski, T. (2014). “The principle of proportionality under the european arrest warrant, with an excursus on Poland”. *New Journal of Criminal law*, vol. V, nr. 2, 167-191, <https://doi.org/10.1177/203228441400500204> (accessed March 1 2021).
17. Pajčić M. (2017). „Europski uhidbeni nalog u praksi Vrhovnog suda Republike Hrvatske“, *Hrvatski ljetopis za kaznene znanosti i praksu*, vol. 24, broj 2, Zagreb, 553-581.
18. Reljanović, M. (2009). “Evropski nalog za hapšenje”, *Zbornik radova Pravo i politika Evropske unije iz perspektive domaćih autora*, Centar za unapređenje pravnih studija (CUPS), Beograd, 71-89.
19. Spencer, J. (2010). “Proportionality and the European arrest warrant”. *Criminal Law Review*, no. 6, 474-482.
20. Stojanovski V., „The European evidence warrant“, *Dny prava – 2009 – Days of Law: The Conference Proceedings*, 1. Edition. Masaryk University; https://www.law.muni.cz/sborniky/dny_prava_2009/... · PDF file,
21. Turudić I., Borzić T.P. & Bujas I. (2015). „Odnos načela uzajamnog priznavanja - povjerenja i provjere dvostruke kažnjivosti“. *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 1991, v. 36, broj 2, Rijeka, 1075-1098.
22. Van der Mei A.P. (2017). „The European Arrest Warrant system: Recent developments in the case law of the Court of Justice“. *Maastricht Journal of European and Comparative Law*, Vol. 24(6), 882-904, <https://doi.org/10.1177/1023263X17745804> (accessed January 9, 2021).
23. Vuletić, I. (2016). „Pravo EU u kaznenom i kaznenom procesnom pravu“. *Procesnopravni aspekti prava EU*, Pravni fakultet Sveučilišta Josipa Jurja Strossmayera u Osijeku, Pravos, 66-87.



GENDER APPROACH TO PENAL JUSTICE¹

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Abstract: Passing of the Law on Gender Equality on 20 May 2021 raised a lot of issues in the local public about the application of the Law, especially the part concerning the usage of gender-sensitive language to some extent by neglecting other also important segments related to the improvement of the status of women and men in our country. Article 3 of the Law clearly states what gender equality means. Among other things, it means “equal rights, responsibilities and opportunities, (...), equal participation and balanced representation of women and men in all fields of social life, equal opportunities for exercising the rights and freedoms”. Highlighting equal opportunities for exercising the rights and freedoms of women and men, the authors of this paper have tried to draw the scientific community’s attention to the status of women and men in penal justice. Application of the historical legal and normative method will be complemented by a positivist approach to the main research problem.

Keywords: gender equality; justice; female convicts; restorative justice.

INTRODUCTION

Today, at the end of the first fifth of the 21st century, facing a growing collective, thus, within the humanity of planet Earth, a growing fear of a global pandemic and undesired spread of infection, scientific and expert discussions related to the issue of gender discrimination can sometimes be put aside, or even declared a marginalised issue as opposed to survival. Nevertheless, it seems that going back to marginalised issues again, vice versa, is the way the normalcy of everyday life is actually maintained. Passing of the Law on Gender Equality in the Republic of Serbia on 20 May 2021 raised a lot

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of issues in the local public about the application of the Law, especially the part related to the use of gender-sensitive language, to some extent by neglecting other also important segments related to the improvement of the status of women and men in our country. Article 3 of the Law clearly states what gender equality means. Among other things, it means “equal rights, responsibilities and opportunities, (...), equal participation and balanced representation of women and men in all fields of social life, equal opportunities for exercising the rights and freedoms”.

A repeated raising of the issue of discrimination, from the viewpoint of gender-sensitive discourse seems to swing the pendulum of change disproportionately to both sides, thus creating by visual experience and even more so by superficial observance of daily media reports a dilemma formulated by the question: “Is there a need for a ‘patchwork’ approach to discrimination and misogyny in different areas of social life?” (Blagojević, 2002: 21).⁴

Certain issues may be raised from the viewpoint of the relationship between social justice and criminal justice: in social justice - what is necessary for a society to be fairly constituted; in criminal justice - about the basics of fair punishment (Kostić, 2007: 5). What is in favour of social justice usually includes an assumption that society may be fair only when it has taken steps to ensure a fair distribution (redistribution) of access to social wealth, and if there is no equal access, then there ought to be at least the necessity to satisfy the basic needs of the members of such society. On the other hand, the assumption that punishment can be fair only if it is based on clear retribution principles is to the advantage of criminal justice (Heffernan & Kleinig, 2000: 1).

The redistributive concept of social justice and retributive concept of criminal justice are the two basic and often connected starting points of their conditionality. One connection is of empirical and the other of normative nature.

The empirical basis lies in the fact that a certain form of redistributive justice is essential to reducing the amount of crime in advanced industrial societies. Inequality of the distribution of income has a direct impact on the level of crime. In other words, the greater the disparity of wealth between the higher and lower strata of society in a community, the greater crime rate. The rate may be even higher in the societies in which the part of the population from the lower strata living below the necessary minimum of income for satisfying their basic sustenance needs is bigger.

The normative basis lies in the fact that criminal sanctions prescribed by law, when pronounced and enforced, are flawed when handed down to the persons who did not even have access to social justice before a committed crime, hence the claim that “retributive justice is possible only in the context of redistributive social justice” (Heffernan & Kleinig, 2000: 1).

As the basis of communication among people, modern countries tend to build tolerance towards diversities, regardless of whether they are ethical, racial or economic. Diversities should be perceived without objection. Activists like Z. Mršević point out simple explanations, in our case understandable to our citizens in the explanation of the necessity to accept diversity. She points out: “All of us, both women and men believe that based on common sense and everyday experience ‘know everything’ about the relationship between the sexes, about what they are and how problems emerge in those relationships and what is actually recognised as a problematic situation.” Unfortunately, this common-sense approach, which emerged in a traditional society, carries a huge burden of prejudice about gender roles, “the natural givens of such roles” (Mršević, 2021:3). Given that since 1945, with the vic-

4 According to the author M. Blagojević, patchwork is a handicraft technique, a craft even, typically a women’s craft, where women using old textiles or patches of those textiles create new usable items, thus “forming a new reality that has its aesthetic, financial, emotional and use value” (Blagojević, 2002: 21).



tory in the Second World War the Marxist ideology became dominant in the Federal People's Republic of Yugoslavia, the women's issues were not a subject of specific interest in scientific research because both the Marxism and feminism had the same goal - emancipation of women and their liberation from social slavery. That is how the status of women and fight against discrimination actually became illusory because that was what the Marxist ideology implied. Thus, by the irony of something that was implied and not brought into question, one actually arrived at the "loss of specificity of the women's issues" (Jorgić, 2018: 1).

Crimes committed by women are in the majority of cases related to the women's difficult economic status, when they commit property and economic crimes. Economic dependence upon their husbands, fathers or some other members of their family, brings women to commit crimes against life or limb. Murder due to long-term abuse by a family member is linked to low educational and social status, which decreases their capabilities and realistic possibilities for seeking legal ways out from an economic, social or family situation in which they find themselves. This clearly implies that criminal behaviour of women should be prevented in the future by primarily acting in terms of those factors. Today, the majority of crimes by women are committed by uneducated women who were dependent on others. The process of resocialisation in prison is very important for such women. The reality is completely different. Instead of being trained and mentally empowered for an independent life when released, they are taught dependent roles, with help of the already existing dependence, in order to be held under it further, under the excuse of protection. That is how fertile ground is created for further criminalisation. That way, a woman serving a sentence for a property crime will continue to disobey the law after release because she was unable to provide for herself and her children, if she leaves the prison unable to find work in a lawful manner or does not have an opportunity to use social benefits. The woman who is imprisoned for killing her husband after long-term violence committed against her, who can be said to be a situational offender, if she is not capable of living free, may easily become a victim or offender again after release. It has been known that such women, having no alternative, repeatedly connect with primitive and abusive partners and thus enter a vicious circle from which the only way out is to commit crime again.

The authors pose the basic research question about the necessity of integrating gender equality and gender perspective into the judicial system and vice versa; they try to observe the way in which the judicial system may improve gender equality and integrate the gender perspective. The researchers' attention will also be dedicated to the issues related to the gender perspective in the prosecution of male and female perpetrators of punishable acts, female convicts and the gender approach to safety.

INTERNATIONAL STANDARDS ON HUMAN RIGHTS OF WOMEN IN PRISONS

On the international scene, specificity of the status of women sentenced to imprisonment is rarely discussed. The documents regulating women's rights, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Beijing Declaration and Platform for Action do not contain any provisions on women in prisons. The status of convicts, regardless of gender, is regulated by the UN Universal Declaration of Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, European Prison Rules and Standard Minimum Rules for the Treatment of Prisoners. All these documents stress the need for the protec-



tion of reputation and honour of women prisoners, as well as the protection from all acts constituting torture, humiliation or additional punishment.

On the basis of the International Covenant on Civil and Political Rights, the Human Rights Committee recommended that guards at women's prisons, especially those coming into direct contact with women prisoners or doing supervision overnight, must be women, and that male guards must not take part in the measures including physical contact, such as search. The medical staff for women prisoners should also be women. Women prisoners must be ensured medical care of a gynaecologist and must also be ensured personal hygiene and supplied with special sanitary products.

There is a certain number of international documents with special provisions on women in penitentiaries. Those documents are the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Congress Resolution of 1980, and the Resolution on the Treatment of Women Offenders of 1985.

According to the UN Standard Minimum Rules for the Treatment of Prisoners, men and women should be detained in separate institutions, and if they are detained in the same institution, the whole of the premises allocated to women should be entirely separate. In women's penal institutions, there have to be special devices required for the medical treatment of pregnant women, as well as the women recovering from labour or an illness. If a child is born in prison, such circumstances are not mentioned in the birth certificate. If new mothers prisoners are allowed to keep their newborn, all measures have to be taken to set up special rooms with qualified staff for the recovery of babies.

The UN resolution was adopted in Caracas in 1980. It refers to the treatment of women prisoners. It foresees that during trial, detention or serving a sentence, women should be treated fairly, respecting the principle of equality. The resolution specifically underlines the attention that should be paid to pregnant women and their babies.

The Resolution on the Treatment of Women Prisoners was adopted at the UN Congress in Milan in 1985. It contains several recommendations. It points out that there should be services in prisons that will take care of the special needs of women and girls offenders. The resolution demands that alternatives to imprisonment be examined in each stage of the procedure and ensure adequate determination and pronouncement of sentences, proportionate to the gravity of the crime. It also stresses the need to work out a strategy to ensure correct treatment of women offenders and encourage cooperation with medical and social protection services.

The UN Office on Drugs and Crime (UNODC) adopted the Handbook on Women and Imprisonment in 2008. This document highlights the special needs of female convicts with the emphasis on the rights of female convicts with children. In addition, the Handbook stresses the need to provide access to female convicts to all activities accessible to male prisoners. Penitentiary authorities have the duty to invest adequate efforts in organising women prisoners' contact with their families.

In the regional context, a document of the Council of Europe of crucial importance for establishing the standards for the protection of human rights is the European Prison Rules. The document firstly establishes the standard of separation of convicted persons by gender (Rule 18.8). Rule 19.7 regulates the requirement for ensuring special conditions for women's hygiene. The European Prison Rules also stresses the requirement to respect physical, psychological and social needs of female convicts (Rule 34.1). The same rule (34.2) imposes the duty to provide help and support to the victims of all forms of abuse in a penitentiary. For children born in prison, authorities have the duty to provide all the necessary conditions. Infants may stay with their mother in prison only when it is in the best interest of the infant concerned (Rule 36.1). Apart from that, special accommodation in special rooms is required for the stay of children while with their mothers in prison.



The majority of countries have adopted the Standard Minimum Rules and European Prison Rules and incorporated the provisions concerning women prisoners in their laws. However, the implementation of legal provisions in practice depends on an array of circumstances, primarily on financial capability, as well as the level of the respect of women's human rights and freedoms of female convicts. The Law on the Execution of Criminal Sanctions of 2014 implements the achieved international standards in the protection of basic rights of convicted persons, and deals with special needs of female convicts in several provisions, which will be analysed in the following sections.

PHENOMENOLOGICAL AND AETIOLOGICAL CHARACTERISTICS OF WOMEN'S CRIME

Only passing references are made to women's crime in writings on crime as it is usually men who commit crimes. The rate of women's crime varies in some countries and ranges between 5% and 25%. In Serbia, the percentage is 8-9%. The majority of crimes committed by women are minor crimes committed without the use of violence. In the majority of cases, women commit property crimes with an aim to acquire material gain. Few women commit professional crimes. Apart from property crime, women often commit minor criminal offences and drug-related offences. Women commit several times less crimes of murder in comparison to men. It often happens that women kill after long-term violence they endure from their spouses or other family members. Not rarely does it happen that a newborn is murdered upon birth (infanticide), most often caused by postpartum depression as well as other factors, such as bad family or economic situation. Over the past few decades, changes have been noticed around the world in the structure and dynamics of the crimes committed by women. Generally speaking, crimes committed by women are on the rise, not just in transition economies but also in the most powerful countries in the world. In the United States, the number of women committing crime is rising and is higher than that of men who commit crime. During the 1980s alone, crimes committed by women in the United States grew by 200%, and a 400% rise has been recorded since. Such crime dynamics is explained by the strictness of the law on drugs, resulting in a staggering increase in drug-related crimes. The number of crimes committed with the use of violence, as well as the number of female gangs has also risen. Of the total number of women criminals in the US, Afro-American population is in the majority in comparison to Caucasian women (as much as eight times higher). Theory also warns of the increasing number of women committing acts of terrorism. It is believed that almost the same number of women as men take part in terrorist groups and that they often have a leading role in them. In Serbia, crimes committed by women include offences against property, against honour and reputation, against life and limb (predominantly murders and minor and major bodily injuries), as well as economic crimes and abuse of office. Among female criminals, the majority are unemployed, uneducated, often illiterate women, who usually come from families with social pathology. They were usually victims of abuse in childhood or at a later age in their primary or secondary family. Women's motives to commit crime do not differ from men's, except for spousal homicide. The recidivism rate is considerably lower in relation to men and stands at around 10%. The type of crime changes in relation to age. Younger women tend to commit violent crimes, while older women commit property crimes, with the exception of murder at this age.

First papers on the aetiology of crimes committed by women appeared in the early 20th century. Cesare Lombroso in his *The Female Offender* from 1895 advocates a theory that women criminals are much more dangerous than men and that they often commit crimes out of revenge or jealousy. Thomas explains crimes committed by women by a huge amount of sexual energy which accumulates



due to restrictions that a woman faces in marriage. Such energy is released through the commission of crimes. Biological theories justify the lower rate of crime committed by women as opposed to men by their weaker built, hormonal stages in women, such as menstruation, pregnancy and menopause, lower levels of androgen and the lack of the Y chromosome. The link between menstruation and crime has not been proved, whereas pregnancy and the period immediately after and prior to giving birth may be accompanied by a state of depression. In that period, a woman may commit the crime of killing her baby at birth. Likewise, a woman may experience physical, mental and social changes during menopause which may lead to depression or suicidal tendencies. Among the psychological factors, criminologists include the sense of dependence and helplessness, low self-esteem, higher emotionality, timidity and passivity. All these characteristics act as an inhibitor on the commission of criminal offences by women. Psychoanalysts explain crimes committed by women by specificities that are generated during puberty, whereas Freud believes that women commit crimes due to the sense of inferiority, and the lack of the male sex organ. Among the sociological concepts, one should point out the labelling theory. According to this concept, crimes committed by women are viewed as a social reaction to the phenomenon. The rise in crimes committed by women is explained by the higher number of women engaged in the previously typically male occupations. Anomie theory explains the lower percentage of crimes committed by women in the total amount of crime by women's focus on marriage and motherhood, producing a lower level of stress and frustration. Feminist authors posit that the rise in crimes committed by women correlates with emancipation and increase in economic opportunities. They also cite oppression in a patriarchal society as one of the major factors of crimes committed by women. Even though there are many concepts about crimes committed by women, it is still an insufficiently researched phenomenon influenced by a lot of factors, biological, psychological and sociological.

MAIN FEATURES OF PRISON FOR WOMEN

According to valid regulations, women in prison, just like during a criminal procedure, have the same rights as the convicted men, but in practice they do not have equal access to such rights, nor do the legal norms applied to detained persons consider the specific needs of women prisoners. The gender-specific needs of women in prison include diet, better access to hygiene, health care, especially in the case of chronic illness, HIV, hepatitis, other infections and sexually transmitted diseases, psychological support and therapy if they experienced violence, posttraumatic stress, alcohol and drug abuse, risk of suicide and self-harm, reproductive rights and children's rights.

The issue of female convicts having contact with children is regulated in various ways. Very few countries allow infants to stay with their mothers in prison. In the US prisons only in exceptional cases allow a baby, born by a prisoner while serving her sentence, to stay with mother for some time. On the other hand, the majority of European laws allow for such possibility. In Serbia, a baby born while its mother is serving a prison sentence can stay with mother until it reaches the age of two (Law on the Execution of Criminal Sanctions (LECS) (Article 119, paragraph 1). Compared to a previous legal solution, according to this amendment, the infant stays with mother for one year upon birth. For the sake of comparison, in Croatia an infant can stay with mother until it is three years of age. In terms of the time during which a baby can stay with mother who is a prisoner, the issue of justification of the baby living under prison conditions is raised on one hand, and the possibility of staying with its mother on the other. According to psychologists, it is best for a child to be with mother until the need occurs for his/her socialisation. From that moment on, it is more purposeful for the child to grow up outside the penitentiary, or to make sure that the child stays in the kindergarten for the better part of



the day, outside prison. Since the beginning of socialisation occurs after the child reaches the age of two, the new legal solution in the new LECS seems justified.

According to LECS, pregnant women, new mothers and mothers nurturing a baby are housed separately from other female prisoners (LECS, Article 78). The premises in which women with children and pregnant female convicts stay must comply with the standards of child protection institutions (LECS, Article 120, paragraph 2). In Požarevac Prison, women, pregnant women and new mothers are housed in a separate part colloquially called “Maternity Ward”. Babies are provided resources for hygiene, toys and food from the budget of the Republic of Serbia, which is a standard stipulated by LECS that giving birth, care and accommodation to female convicts with children are free of charge. New mothers are provided medical care 24/7. Given the possibility of postpartum depression in women, particularly under specific conditions in penitentiaries, it is of major significance to ensure the support of a psychologist. A convicted woman who is nurturing a child is entitled to the support of expert staff under the provisions of LECS. In addition, pregnant women, new mothers and mothers nurturing a child are entitled to absence from work, according to the legislation regulating labour rights (LECS, Article 110). For visits by children after the age of two, the same rules apply as for spouses. There is a possibility of organising visits in special premises of the prison, not longer than three hours once every two months. Some countries allow a stay of two to three days in small family apartments where the female convict and her family prepare meals, have fun, and watch television on their own. Given that after turning two, a child is separated from his/her convicted mother, mechanisms need to be provided for gradual separation in the best interest of the child. In addition to these standards for mothers with children, there is a possibility to delay the serving of a sentence when the convicted woman is six months into her pregnancy or when she has a child under one year of age. This possibility exists until the child turns three. The possibility of delaying the serving of a sentence exists also in the case of stillborn, or death of an infant after birth.

In the majority of women’s prisons, prisoners are housed in sleeping rooms with several other prisoners. Penitentiaries where a prisoner has a room to herself are very rare. Unfortunately, the same goes for women in Požarevac Prison. Prison overcrowding in this part of Europe has not bypassed Serbia either. Požarevac Prison has a 260-bed capacity for women. In the past years, the number of female convicts has been much higher. Nevertheless, since 2013 the number of female prisoners has been around the prison capacity or a little higher. Given that the prison for women in Požarevac is the only institution of such type in Serbia, it houses women sentenced to prison, sentenced to jail in a misdemeanours case, or handed down a sentence in juvenile prison. Being placed in the same institution, the contexts of convicts with families is rendered difficult, whereas the principle of housing close to her place of residence is brought into question.

Characteristics of the treatment of women, as opposed to men, is not recognised in case of detention measures. Bylaws do not offer any specific provisions related to female convicts either. It is a huge shortcoming given that regulations and rulebooks put in operation the legal provisions on the treatment of women prisoners. Specificities of this category of prison population requires separate regulations respecting the women’s needs.



CONCLUSION

By raising the issue, this paper opens the perspective for examining the sources instead of offering answers. The general benefit in a human community means that everyone has the duty to contribute to the development of general good of society in the interest of justice, as well as to seeking solutions to social issues in a social community. This is exactly what the main criticism of retributive justice is based on. Namely, a retributive criminal justice system focuses on punishing offenders, particularly by handing down sentences of institutional character. Institutions where sentences are served are often described as “an insult to human dignity... and poison in a nation’s bloodstream”. Such a system has not had an impact on the prevention of crime because it does not deal with resolving the causes of criminal behaviour. Those causes are usually found in offenders’ closest social environment, in a community they usually go back to upon the expiry of their sentences.

The vision of restorative justice, in the context of general good, focuses on achieving peace in a social community by rectifying the relationships in society, including all members of the community. The essence of implementing restorative justice is ‘curing’ each person connected to crime by rectifying instead of by punishing. The whole process should be based on apology, forgiveness and strong connection between people within the community.

The public policy domain is necessarily studied in observing the application of the principle of gender equality and fight against discrimination against women, as a decision-making system in the public sector. Public policies are part of the public administration management concerning the relationships and processes and the area of public administration activity. To be more to the point, this means that public policy entails the process of decision making in the public, not the private interest (Dimitrijević & Vučetić, 2021: 51). On the other hand, it is founded upon the value judgement of its actors, and that is why it represents a choice of values implemented in order to achieve the goal set by the political authorities. A public policy (action, programme, measures) is characterised by its objectives, resources used, achievements (results), its consequences, its implementation and socioeconomic and institutional environment (Dimitrijević & Vučetić, 2021: 52).

The quality of public sector services is also assessed by the political nature of the public administration, where equality and democracy play an important role. In not-so-extensive literature on public policies and public policy management in our parts, like the book by P. Dimitrijević and D. Vučetić, interestingly enough, the issue of gender equality has not been addressed. In fact, the mention of *woman - special situation* is the only thing that could indicate the examination of the participation, or more precisely, the status of women in public policies, whether as office holders or as public administration service users. Selective life situations, episodes, like looking for a job, receiving social support, registering the birth of a baby, owning personal IDs, filing reports with the police (domestic violence), etc., are the subject of interest of policies during the evaluation of the quality of public administration operations, which is ultimately the result of decisions applied from public policies, which were again guided by value judgements, personal or political ones.

In foreign writings, one can easily notice several segments in women’s participation in public policies, women and cultural changes in public policies, education policy, health protection, reproductive policy, employment policy, economic equality, family law, child care, and criminal justice system (Conway, Ahern & Steuernagel, 2005).



Legal regulations in this field are not lacking in the Republic of Serbia. Interestingly, the National Strategy for Gender Equality was adopted for the period 2016-2020 with the Action Plan for 2016-2018⁵ and the document describes in detail all the issues related to gender equality in public policies, beginning with the explanation of the notion, stipulating that: "Gender equality in public policies means that gender equality becomes a part of planning, creation and implementation of public policies, laws, programmes and measures; needs, priorities and specific status of women and men, including vulnerable groups, are systemically incorporated in public policies and their effects on the status of women and men, including vulnerable groups, are actively considered in all stages (planning, creation, implementation, supervision and evaluation) and at all levels, with equal participation of women and men in these processes," where the "gender perspective" means acknowledging gender diversity in the relevant public policy area." A particularly important matter is gender budgeting. The best achievement is raising public awareness of the presence of legal obligation for local self-government units to deal with gender equality issues. Given the complex impact of the discrimination against women, gender stereotypes and patriarchal heritage both on the status of women, and on the well-being and development of the family, society and state, the parties with an interest in the implementation of the public policy defined by this strategy are all male and female citizens of the Republic of Serbia, particularly the female members of vulnerable groups. Gender equality concerns all women and men, therefore society as a whole. Achieving *de jure* and *de facto* gender equality is a key issue for the development of society and improvement of social relations.

In the period from 2016 until 2020, the public policy will focus/focuses on achieving the following strategic objectives: change gender patterns and improve gender equality culture; increase the capacities and knowledge of male/female managers and people working for public authorities about gender equality; provide gender-sensitive formal education; develop knowledge and visibility of academic results in gender studies; build awareness of the importance of gender equality, increase women's safety from gender-based domestic violence and intimate partner violence. Then, make available better equality of women and men by applying the policies and measure of equal opportunities, such as equal participation by women and men in parenting and care economy; women and men equally deciding in public and political life; improved economic status of women and status of women in the labour market; women's improved role in the security system; women and men in rural areas actively and equally contributing to the development and having equal access to development results; improved status of discriminated and vulnerable women groups; women's improved health and equal access to health services. The Strategy also highlights a systemic introduction of the gender perspective into the adoption, implementation and monitoring of public policies, so as to set up functioning mechanisms for gender equality at all levels, where it is necessary to incorporate the gender perspective in all strategic documents. To that end, it is necessary to establish a gender analysis of policies, programmes and measures; gender-sensitive statistics and records; gender-responsive budgeting; monitor the established mechanisms of cooperation with associations and the progress in the established international and regional cooperation and sharing of good practices.

The area of security is viewed in respect of the women who are victims of various types of violence. It is interesting that pointing out rape of women usually draws attention to the prevention of false reports and condemnation of male perpetrators rather than drawing attention to women victims (Conway, Ahern & Steuernagel, 2005: 218). Certain positive progress has been noticed since the 1970s and 80s, when the spread of victimology as a specific scientific discipline emerged, and when more women started working as legal professionals in the justice system. Activities within the women's rights movement, taking of certain major political positions, as well as women's expectations outside the political

5 National Strategy for Gender Equality 2016-2020 and Action Plan 2016-2018, Official Gazette RS, 4/2016



discourse to have their rights respected had an impact on changes in the justice system, as well as law enforcement agencies - police, prosecutor's offices, legal representatives, and specifically judges in making decisions about women victims and perpetrators of crimes (Conway, Ahern & Steuernagel, 2005: 218).

Changing the gender patterns, as well as incorporating gender equality into public policies requires continuous production and promotion of valid, academically verified knowledge. That is why it is not only necessary to increase the visibility of gender studies in order to improve human resources in the field of gender equality, but also to work on upgrading the conditions for the generation of academic knowledge and its promotion through academic community.

REFERENCES

1. Blagojević, M. (2002). O projektu: sinergija pačvorka [About the project: Patchwork Synergy]. In: Blagojević, M (Ed.), *Mapiranje mizoginije u Srbiji: diskursi i prakse* [Mapping Misogyny in Serbia: Discourses and Practices] (2nd ed., pp. 19-30), Belgrade: Asocijacija za žensku inicijativu.
2. Conway, M., Ahern D. & Steuernagel, G. (2005). *Women & Public Policy*. Washington, DC.
3. Dimitrijević, D. & Vučetić, D. (2021). *Menadžment javne uprave* [Public Administration Management]. Belgrade-Niš: Dosije studio, University in Niš, SeCons – Development Initiative Group.
4. Heffernan, W. & Kleinig, J. Introduction. In: *From Social Justice to Criminal Justice, Poverty and Administration of Criminal Law*, (ed. by Heffernan, W. & Kleinig, J.), 2000, Philopsohy. 1-24. Accessed on July 5, 2021. <https://www.amazon.com/Social-Justice-Criminal-AdministrationProfessional/dp/0195129857?asin=0195129857&revisionId=&format=4&depth=1>.
5. Jorgić, K. (2018). Pitanje ženske emancipacije između marksizma-lenjinizma i prakse KPJ [The Issue of Female Emancipation between Marxism-Leninism and the Communist Party of Yugoslavia's Practice]. *GENERO* 22: (2018) 1-20. Accessed on July 5, 2021. <https://scindeks-clanci.ceon.rs/data/pdf/1451-2203/2018/1451-22031822001J.pdf>
6. Kostić, M. (2007). Uspostavljanje standarda za restorativnu pravdu [Establishing Standards for Restorative Justice]. *Temida*, 1 (10), 5-14.
7. Mršević, Z. (2021, May 23). Oštre kazne za diskriminaciju žena [Severe Punishments for Discrimination against Women]. *Politika: Magazin*, Belgrade, 3-5.
8. *Nacionalna strategiju za rodnu ravnopravnost za period od 2016. do 2020. godine sa Akcionim planom za period od 2016. do 2018. godine*, [National Strategy for Gender Equality 2016-2020 and Action Plan 2016-2018], Sl. glasnik RS [Official Gazette RS], 4/2016.

RESPONDING TO TERRORISM IN BOSNIA AND HERZEGOVINA – LEGAL PERSPECTIVES

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Abstract: Terrorism in Bosnia and Herzegovina (BiH) poses a significant security threat. The terrorist attacks which have been carried out or prevented, BiH citizens who travel to Syria to join terrorist groups, their return home and prosecution, all give rise to numerous questions regarding the efficiency of the criminal justice system when dealing with terrorist threats. Response to terrorism is complex and encompasses various measures at the international and national levels. A key precondition for an effective fight against terrorism at the national level is the criminal law framework. This paper addresses substantive criminal law and criminal procedure law in BiH with regard to terrorism offenses and terrorism-related offenses and analyzes the specificities of criminalization in the BiH Criminal Code, the entity criminal codes (Republic of Srpska and the Federation of BiH), and the Brčko District of BiH. Finally, the solutions contained in the criminal procedure laws regarding the application of special investigative actions are presented, followed by a critical review of specific legal solutions.

Keywords: terrorism, Bosnia and Herzegovina, national security, criminal legislation, special investigative actions.

INTRODUCTION

Terrorism is a global, transnational security threat that many countries, including Bosnia and Herzegovina, are faced with. Various measures have been used to combat terrorism at the global, regional and national levels. They can be proactive or reactive and carried out by security agencies, the police or armed forces (Roberts, 2002; Gaćinović, 2006; Bayley & Weisburd, 2009; De Graaf, 2011; Crelinsten,

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2013). Additionally, diplomatic, political, economic, and educational measures play a significant role in the prevention of terrorism (Peterson, 2002; Krueger & Malečková, 2003; Thomas, 2016). However, an effective fight against terrorism, both at the international and national levels, requires an appropriate legal framework (Beckman, 2007; Ramraj, Hor & Roach, 2009). How domestic legislation addresses the issue of terrorism represents a particular challenge.

Difficulties in defining terrorism in the criminal law, and thus different solutions in domestic legislation, arise due to the lack of consensus on what terrorism is, both at the theoretical and practical levels (Ganor, 2002; Young, 2006). Terrorism is primarily a form of political violence which is immanent to the phenomenon. Its political dimension is the result of different political interests and interpretations pertaining to the nature and content of this notion. The absence of a generally accepted definition of terrorism at the international level results in different interpretations and practices in domestic legislation, and consequently the security services' activities.

This paper addresses the criminal law framework for countering terrorism in Bosnia and Herzegovina. Certain specifics of substantive criminal law and criminal procedure law are analyzed. The significance and topicality of the subject lies in two facts. First, Bosnia and Herzegovina is a post-conflict country with a complex political and legal system. Additionally, in accordance with the constitutional order, Bosnia and Herzegovina has a complex and uncoordinated security system. The second fact points to a threat posed by terrorism to Bosnia and Herzegovina, primarily that inspired by Islamic fundamentalism (Azinović, 2013). Committed terrorist attacks, the radicalization of one part of the population, citizens of Bosnia and Herzegovina who travel to Syria to join terrorist organizations, their return and prosecution, etc. are important issues to be considered in countering terrorism in Bosnia and Herzegovina. The aim of this paper is to analyze the existing criminal law framework and to give a critical review of the existing legal solutions pertaining to countering terrorism in Bosnia and Herzegovina.

TERRORISM AS A TRANSNATIONAL AND INTERNATIONAL CRIME

A transnational crime could be defined as any crime that has an element of foreignness, for example, the perpetrator is not a citizen of the state in whose territory a criminal offense has been committed. The United Nations has used this term in order to identify certain criminal activities transcending national frontiers (Boister, 2003). Terrorism is a transnational crime, as conventions dealing with terrorism prescribe international cooperation of states in the fight against terrorism (Cryer, Freeman, Robinson & Wilmhurst, 2010). In fact, terrorism is neither an ordinary transnational crime based on international treaties nor an international crime, because there is not a generally accepted international convention that defines and criminalizes it (Ambos, 2014).

A crime is considered to be an international crime if material and formal criteria are met. The material criterion means that the criminal offense has significance for the entire international community and the values protected must be universal, while the formal criterion means that a specific international crime is defined by a specific international legal norm. An international legal norm represents a formally accepted obligation by sovereign states to prescribe certain criminal offenses in their domestic legislation (Škulić, 2006). The list of international crimes is contained in the Rome Statute; however, terrorism is not included in this list for political reasons and the perpetrators of terrorist acts are prosecuted at the national level (Dimitrijević, 2018).



In international criminal law, we can find qualifications regarding terrorism as a separate international crime in peacetime. This definition has evolved and is considered to be an international customary rule. The reason for the lack of a general definition of terrorism is considerable disagreement about the definition of terrorism in armed conflicts in terms of whether the so-called freedom fighters should be encompassed by this definition (Cassese, 2006). If international conventions force states to arrest and prosecute individuals accused of terrorism in accordance with the principle of universal jurisdiction, it would be understandable to accept the thesis that terrorism is an international crime (Londras, 2010). However, if states are unwilling to prosecute or incapable of prosecuting perpetrators of terrorism due to the lack of evidence, they are obligated to act in accordance with the so-called imperative principle of international criminal law *aut dedere aut judicare*, which would support the thesis that terrorism can be regarded as an international crime.

THE CRIMINAL OFFENSE OF TERRORISM IN THE CRIMINAL CODES OF BOSNIA AND HERZEGOVINA

In Bosnia and Herzegovina, the criminal offense of terrorism falls into the category of criminal offenses against humanity and values protected by international law under the Criminal Code of Bosnia and Herzegovina, while the entity codes and the Criminal Code of the Brčko District of Bosnia and Herzegovina define terrorist acts in a separate chapter. The difference between the definitions of the criminal offense of terrorism in the entity criminal codes and the Criminal Code of the Brčko District and the criminal offense of terrorism in the Criminal Code of Bosnia and Herzegovina lies in targets of intimidation or coercion, that is, an international element of this crime. The target of intimidation or coercion under the Criminal Code of Bosnia and Herzegovina may be not only government bodies but also government of another state or the international community. However, under the entity criminal codes and the Criminal Code of the Brčko District, the aim of terrorism is to intimidate the citizens or compel the entities' authorities to do or to abstain from doing any act with the intention of destabilizing or destroying the constitutional, political, economic or social structures of the two entities. According to the entity criminal codes and the Criminal Code of the Brčko District, the criminal offense of terrorism is exclusively focused on the constitutional order and security of some federal units in Bosnia and Herzegovina. Under the Criminal Code of Bosnia and Herzegovina, the criminal offense of terrorism falls into the category of crimes against humanity and values protected by international law in order to depoliticize terrorist acts and enable the extradition of the perpetrators of terrorism offenses. Additionally, one of the reasons for the narrower definition of terrorism at the entity level is the fact that the two entities neither have the status of a state nor do they enjoy legal personality.

Terrorist acts are listed in a casuistic manner in the Criminal Code of Bosnia and Herzegovina (Stojanović & Delić, 2019), which are set heterogeneously, meaning that some acts are preparatory in nature, they were not defined as perpetration acts, or some acts would be regarded as the perpetration of other crimes (Kolarić, 2013). The purpose of a terrorist act is to achieve one of the three goals: to intimidate a population, to compel the Bosnia and Herzegovina authorities, government of another state or international organization to do or to abstain from doing any act, or to seriously destabilize or destroy the fundamental constitutional, political, economic or social structures of Bosnia and Herzegovina, of another state or international organization. In the case of other terrorist acts which are criminalized and defined as independent terrorist acts, the existence of the specific intent and the element of premeditation is required in relation to, for example, recruitment for terrorist activities which is undertaken to incite others to perpetrate an act, participate in the perpetration of an act or



join a terrorist group to perpetrate any of the terrorism offenses. The subjective component of terrorist offenses requires the cumulative existence of premeditation as a subjective element of any of the terrorism offenses, including the specific intent to perpetrate a terrorist act.

The Criminal Code of Bosnia and Herzegovina criminalizes not only terrorist activities but also all preparatory actions or accomplices in terrorist acts in order to meet the requirements of the principle of legality, meaning that a person who publicly incites the commission of terrorist acts is aware that it is a criminal offense and is aware of the sentence prescribed for this criminal offense (Criminal Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, 2003). According to the principle of legality, a person must know that a certain offence is punishable and the type of punishment prescribed for that offense. The following elements constitute the principle of legality: criminal offenses and penalties must be prescribed only by law, the law must be specific and clear, the law must not be operated retroactively, and the use of analogy is prohibited. In order to satisfy all these elements of the principle of legality, recruitment for terrorist activities, training to carry out terrorist activities, organizing and training groups to join foreign terrorist organizations, hostage-taking, organizing terrorist groups or organizations, and the financing of terrorist organizations are criminalized in domestic legislation.³

In the Federation of Bosnia and Herzegovina, we note that there has been no attempt to criminalize some terrorist acts, such as incitement to commit terrorist activities, organizing terrorist groups or joining foreign terrorist organizations (Criminal Code of the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina, 2003). The reason why the legislature failed to criminalize these terrorist acts remains unclear. The same shortcoming, that is, the non-criminalization of all unlawful terrorist acts is also observed in the Criminal Code of the Brčko District of Bosnia and Herzegovina, because it does not identify the danger that if an act is not prescribed as a criminal offense by law (*lex certa*), the punishment of the person responsible for such a terrorist act is prevented (Criminal Code of the Brčko District of Bosnia and Herzegovina, Official Gazette of Brčko District, 2003). Failure to criminalize these acts in the legislation of the two entities and the legislation of the Brčko District of Bosnia and Herzegovina, despite the requirements of international conventions for the prevention and suppression of terrorist acts,⁴ results in the non-fulfilment of international obligations, the non-punishment of certain terrorist acts and the creation of haven for the responsible persons.

3 This group of criminal offenses as terrorism offenses are criminalized not only in the Criminal Code of Republic of Srpska (Articles 299 - 305), but also in the Criminal Code of the Federation of Bosnia and Herzegovina (Articles 200 - 202), in the Criminal Code of the Brčko District (Articles 197 - 199), and in the Criminal Code of Bosnia and Herzegovina (Articles 200 - 202d).

4 The 1977 Council of Europe Convention on the Suppression of Terrorism entered into force, in relation to Bosnia and Herzegovina, in 2004, published in the Official Gazette of Bosnia and Herzegovina No. 12/2003. The 2005 Council of Europe Convention on the Prevention of Terrorism entered into force, in relation to Bosnia and Herzegovina, in 2008 and was published in the Official Gazette of Bosnia and Herzegovina, No. 14/2007. The 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, in relation to Bosnia and Herzegovina, entered into force in 2008 and was published in the Official Gazette of Bosnia and Herzegovina, No. 14/2007. The 1997 International Convention for the Suppression of Terrorist Bombings, in relation to Bosnia and Herzegovina, entered into force in 2003 and was published in the Official Gazette of Bosnia and Herzegovina, No. 7/2003.



CRIMINAL PROCEDURAL MECHANISMS FOR DETECTING TERRORISM IN BOSNIA AND HERZEGOVINA

Special investigative actions are a necessary means of proof which is used when it is not otherwise possible to collect the necessary evidence of the criminal offense committed. The application of special investigative actions justifies interference with the suspect's right to respect for private and family life only to prevent the commission of the most serious offenses which endanger the right to life and health of people, and the security of the state. Evidence obtained in the course of special investigative actions is legal only if the investigative actions are conducted in accordance with the principle of proportionality, the necessity of conducting such actions to collect evidence relating to the commission of the most serious crimes (Buha, 2019).

The application of special investigative actions in the detection of serious forms of crime is regulated by special rules to justify an interference with the suspect's right to respect for his/her private and family life (Škulić, 2016). In this regard, it is necessary to meet the legal conditions for the application of special investigative actions as specified under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).⁵ This would mean that the state should establish an effective and, in the essence of human rights, compatible legal framework for the implementation of special investigative actions. Article 8 of the ECHR requires that a balance be achieved between two opposing public interests in the process of applying special investigative actions – the prevention of “serious, sophisticated” crime and the restrictions imposed by the state on interfering with an individual's right to respect for private and family life. The right to respect for one's private life contained in Article 8, paragraph 1 of the ECHR, is not an absolute right and the exercise of this right is limited by the need to protect some other values in society. Special investigative actions restrict the suspect's right to respect for his/her private and family life if a serious crime has been committed, and the suspect has the right to challenge the legality of evidence obtained in the course of special investigative actions if they are not conducted in accordance with the law (Buha, 2018). The obligatory conditions for the application of special investigative actions are the following: it must be a serious criminal offense (a criminal offense difficult to prove, such as terrorism offenses) and the application of these actions is the last and necessary means of gathering evidence. These conditions are arranged cumulatively. Special investigative actions are coercive evidentiary actions taken against the suspect or the accused as they restrict his/her fundamental right to respect for private and family life (Buha, 2019).

Special investigative actions, which are applied in detecting and proving terrorism offenses, are an important means of proof, recognized by criminal procedure legislation which clearly prescribes that special investigative actions may be applied in cases involving terrorism offenses which are difficult to detect using other means of proof (Škulić, 2016).

Article 117, paragraph 1, item (c) of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: BiH CPC) stipulates that a special investigative action may be applied in terrorism cases. Interestingly, under the same Article, paragraph 1, item (b), special investigative actions may be ordered in the case of crimes against humanity and the values protected by international law (Criminal Procedure Code, Official Gazette of BiH, 2003). We find this item (c), Article 117 of the BiH CPC, interesting, because terrorism is criminalized in the Criminal Code of Bosnia and Herzegovina and categorized as a crime against humanity and values protected by international law, and the same Article of the BiH CPC stipulates that special investigative actions may be ordered for terrorism offenses,

⁵ The 1950 Council of Europe Convention. The original text of the convention entered into force in 1970.



including crimes against humanity and values protected by international law. Therefore, the question arises as to why the legislature describes the same thing twice but in a different way in regard to special investigative actions which may be applied in cases concerning terrorism and crimes against humanity and values protected by international law, and in the Criminal Code of Bosnia and Herzegovina terrorism is criminalized and classed as a crime against humanity and values protected by international law. Certainly, special investigative actions are particularly important for detecting terrorism offenses. However, it is logical that the BiH CPC stipulates that special investigative actions may be applied in cases concerning crimes against humanity and values protected by international law because this allows for a possibility to use them as a means of proof in cases concerning other terrorism offenses, such as terrorist financing, incitement to terrorism, terrorist training, organizing terrorist groups and other criminal offenses for the purpose of terrorism. Perhaps the legislature has chosen to single out terrorism in relation to other crimes against humanity and values protected by international law, although terrorism belongs to the group of these crimes because special investigative actions must be applied if we want to detect and prove a terrorism offense. It is questionable to what extent this thesis is meaningful given that other crimes belonging to the group of crimes against humanity and values protected by international law are very difficult to detect and prove by other means of proof.

The remark that the legislature prescribes the same thing twice, the application of special investigative actions in the case of terrorism and crimes against humanity, because terrorism is one of the crimes against humanity, does not stand regarding legislation of the two entities because their legislation does not define terrorism as a crime against humanity and value protected by international law, given that terrorism offenses are defined in a special chapter. Article 235, paragraph 1, item (c) of the Criminal Procedure Code of Republic of Srpska (Official Gazette of Republic of Srpska, 2012) stipulates that special investigative actions may be ordered for terrorism offenses. Given that the legislature does not specify that the application of special investigative actions refers to all terrorism offenses listed in Chapter XXIII of the Criminal Code of Republic of Srpska (Official Gazette, 2017), it causes a dilemma whether the application of special investigative actions refers to other terrorist offenses such as terrorist financing and other offenses. Even if such a dilemma arose due to linguistic ambiguity, there is a possibility of applying special investigative actions in respect of other terrorist offenses, because a term of imprisonment of three years or a more severe sentence may be imposed in respect of all terrorism offenses listed in Chapter XXIII of the Criminal Code of Republic of Srpska, while according to Article 235, paragraph 1, item (d) of the Criminal Procedure Code of Republic of Srpska, special investigative actions may be ordered for offenses punishable by imprisonment ranging from three years to a more severe sentence. Therefore, a term of imprisonment of three years may be imposed for all terrorism offenses, which means that terrorism offenses are recognized as offenses for which special investigative actions may be ordered in order to detect and prove them. We encounter a similar legal solution in the Criminal Procedure Code of the Federation of Bosnia and Herzegovina (FBiH CPC); Article 131 of the FBiH CPC prescribes that special investigative actions may be ordered for the criminal offenses punishable by imprisonment ranging from three years to a more severe sentence, while according to the Criminal Code of the Federation of Bosnia and Herzegovina (FBiH CC), a term of imprisonment of three years may be imposed for the terrorism offenses listed in Chapter XVIII. The Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina (BD CPC) clearly stipulates that special investigative actions may be ordered in relation to the terrorism offenses contained in Chapter XVIII of the Criminal Code of Brčko District.



CONCLUSION

Bosnia and Herzegovina is a complex state with a complex legal system. Terrorism-related offenses are criminalized in the state and entity criminal codes, including the Brčko District of Bosnia and Herzegovina. However, there are different approaches to criminalizing terrorism in the Criminal Code of Bosnia and Herzegovina in relation to the entity criminal codes and the Criminal Code of the Brčko District of Bosnia and Herzegovina. Additionally, there are differences between the entities' codes and the Criminal Code of the Brčko District of Bosnia and Herzegovina. The key difference between the Criminal Code of Bosnia and Herzegovina in relation to the entity criminal codes and the Criminal Code of the Brčko District lies in the subject of the legal protection. In the state criminal code, terrorism offenses fall into the category of crimes against humanity and values protected by international law, while the entity criminal codes and the Criminal Code of the Brčko District define terrorism offenses in a special chapter. The entity criminal codes do not recognize the element of foreignness because the two entities do not have the status of a state – they do not enjoy legal personality. Since the entity legislatures decided to criminalize terrorism and terrorism-related offenses in a special chapter of the criminal codes, the question arises regarding the subject of the legal protection, that is, the type of values protected (Ristivojević, 2011). This is unclear in the existing legal solutions. There is also a difference in the scope of criminalization, since the Criminal Codes of the Federation of Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina, unlike the Criminal Codes of Bosnia and Herzegovina and Republic of Srpska, do not criminalize some terrorist acts, such as incitement to terrorist activities, organizing and joining foreign terrorist organizations. This is contrary to international conventions on the prevention and suppression of terrorism. Regarding criminal procedure law, that is, the application of special investigative actions in terrorism cases, legislation at the state and entity levels is harmonized with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The existing legal solutions allow for the application of special investigative actions in cases involving terrorism and terrorism-related offenses.

REFERENCES

1. Ambos, K. (2014). *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Vol. 2). Oxford University Press.
2. Azinović V. (2013). Bosnia and Herzegovina and Terrorism 1996-2011: Defining the Threat, Devising Counterterrorism Strategy. In: J. Le Bau (Ed.), *The Dangerous Landscape: International Perspectives on Twenty-First Century Terrorism; Transnational Challenge, International Responses*, (pp. 191-210). Procon Ltd.
3. Beckman, J. (2007). *Comparative legal approaches to homeland security and anti-terrorism*. London: Routledge.
4. Boister, N. (2003). Transnational criminal law. *European Journal of International Law*, 14(5), 953-976.
5. Buha, M. (2018). (NE)zakonitost posebnih istražnih radnji. *Srpska pravna misao*, 51, 41-57.
6. Buha, M. (2019). Izmjena odredaba Zakona o krivičnom postupku BiH – RS o posebnim istražnim radnjama u svjetlu odluke Ustavnog suda BiH (123-135). Zbornik radova *Posebne istražne radnje*, Sarajevo: Pravosudni forum za Bosnu i Hercegovinu.



7. Cassese, A. (2006). The multifaceted criminal notion of terrorism in international law. *Journal of International Criminal Justice*, 4(5), 933-958.
8. Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (1950). (Evropska konvencija o zaštiti ljudskih prava i osnovnih sloboda, Konvencija Savjeta Evrope iz 1950).
9. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005). Official Gazette of Bosnia and Herzegovina, No. 14/2007. (Konvencija Vijeća Evrope o pranju, traganju, privremenom oduzimanju i oduzimanju prihoda stečenih krivičnim djelom i finansiranjem terorizma iz 2005. Službeni glasnik Bosne i Hercegovine br. 14/2007).
10. Council of Europe Convention on the Prevention of Terrorism (2005). Official Gazette of Bosnia and Herzegovina, No. 14/2007. (Konvencija Savjeta Evrope o sprečavanju terorizma, Službeni glasnik Bosne i Hercegovine br. 14/2007).
11. Council of Europe Convention on the Suppression of Terrorism (1977). Official Gazette of Bosnia and Herzegovina, No. 12/2003 (Evropska konvencija o sprečavanju terorizma iz 2005. Službeni glasnik Bosne i Hercegovine br. 12/2003).
12. Crelinsten, R. (2013). *Counterterrorism*. New Jersey: John Wiley & Sons.
13. Criminal Code of Bosnia and Herzegovina, No. 03/03, Amendments and additions to the Code (Krivični zakon Bosne i Hercegovine, br. 03/03, izmjene i dopune zakona). Downloaded 5 May, 2021 <http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=4&id=40&jezik=s>.
14. Criminal Code of Republic of Srpska, Official Gazette of Republic of Srpska, 64/17, 15/21 (Krivični zakonik Republike Srpske, Službeni glasnik Republike Srpske, 64/17, 15/21).
15. Criminal Code of the Brčko District, Official Gazette of the Brčko District, No. 19/2020 (Krivični zakon Brčkog Distrikta, Službeni glasnik Brčkog Distrikta, br. 19/2020).
16. Criminal Code of the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina, No. 36/03, Amendment and additions to the Code (Krivični zakon Federacije Bosne i Hercegovine, glava XVIII krivična djela terorizma, Službene novine Federacije Bosne i Hercegovine, br. 36/03, izmjene i dopune zakona). Downloaded March 3, 2021 <http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=4&id=42&jezik=s>.
17. Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 03/03 (Zakon o krivičnom postupku Bosne i Hercegovine, Službeni glasnik Bosne i Hercegovine, br. 03/03). Downloaded 5 May, 2021 <http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=4&id=40&jezik=s>.
18. Criminal Procedure Code of Republic of Srpska, No. 53/12 (Zakon o krivičnom postupku Republike Srpske, Službeni glasnik Republike Srpske br. 53/12). Downloaded May 3, 2021 <http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=4&id=43&jezik=s>.
19. Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina, Official Gazette of the Brčko District of Bosnia and Herzegovina, Nos. 34/2013, 27/2014, 3/2019, 16/2020 (Zakon o krivičnom postupku Brčkog Distrikta, glava IX posebne istražne radnje, „Službeni glasnik Brčkog Distrikta“, br. 34/2013, 27/2014, 3/2019, 16/2020).
20. Criminal Procedure Code of the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina, No. 35/03 (Zakon o krivičnom postupku Federacije Bosne i Hercegovine, glava IX posebne istražne radnje, Službene novine Federacije Bosne i Hercego-

vine, br. 35/03). Downloaded May 3, 2021 <http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=4&id=42&jezik=s>.

21. Cryer, R., Friman, H., Robinson D. & Wilmshurst, E. (2010). *An Introduction to International Criminal Law and Procedure*. Cambridge University Press: Cambridge – New York – Melbourne.
22. De Graaf, B. (2011). *Evaluating counterterrorism performance: A comparative study*. London/New York: Routledge.
23. Dimitrijević, D. (2018). Evropski pravni okvir za suzbijanje međunarodnog terorizma. *Evropsko zakonodavstvo*, 17(64), 156-174.
24. Gaćinović, R. (2006). *Antiterorizam*. Beograd: Draslar partner.
25. Ganor, B. (2002). Defining terrorism: Is one man's terrorist another man's freedom fighter? *Police Practice and Research*, 3(4), 287-304.
26. International Convention for the Suppression of Terrorist Bombings (1997). Official Gazette of Bosnia and Herzegovina, No. 7/2003 (Međunarodna konvencija o zabrani terorističkih bombaških napada iz 1997. Službeni glasnik Bosne i Hercegovine br. 7/2003).
27. Kolarić, D. (2013). Nova koncepcija krivičnih dela terorizma u Krivičnom zakoniku Republike Srbije. *Crimen*, 4, 49-71.
28. Krueger, A. B., & Malečková, J. (2003). Education, poverty and terrorism: Is there a causal connection?. *Journal of Economic perspectives*, 17(4), 119-144.
29. Londras, F. (2010). Terrorism as an International Crime. In: William Schabas & Nadia Bernaz (eds). *Routledge Handbook on International Criminal Law*. London: Routledge.
30. Peterson, P. G. (2002). Public diplomacy and the war on terrorism. *Foreign Affairs*, 81(5), 74-94.
31. Ramraj, V. V., Hor, M., & Roach, K. (Eds.). (2009). *Global anti-terrorism law and policy*. Cambridge: Cambridge University Press.
32. Ristivojević, B. (2011). O zaštitnom objektu zločina protiv čovečnosti: novo ruho međunarodnog prava o ljudskim pravima. *Crimen(II)* 1, 52-66.
33. Roberts, A. (2002). Counter-terrorism, armed force and the laws of war. *Survival*, 44(1), 7-32.
34. Škulić, M. (2006). Pojam međunarodnog krivičnog dela. Međunarodni naučni skup: Pojam međunarodnog krivičnog prava. Udruženje za međunarodno krivično pravo, Tara, 88 -110.
35. Škulić, M. (2016). Posebne dokazne radnje u funkciji suzbijanja terorizma i osnovni pravni aspekti protivterorističkog djelovanja vojnih snaga. *Vojno delo*, 6, 275-292.
36. Stojanović, Z., & Delić, N. (2019). *Krivično pravo–posebni deo, šesto dopunjeno izdanje*. Pravna knjiga: Beograd.
37. Thomas, P. (2016). Youth, terrorism and education: Britain's Prevent programme. *International Journal of Lifelong Education*, 35(2), 171-187.
38. Young, R. (2006). Defining terrorism: The evolution of terrorism as a legal concept in international law and its influence on definitions in domestic legislation. *BC Int'l & Comp. L. Rev.*, 29, 23.





THE ROLE AND THE STATUS OF HUMAN TRAFFICKING VICTIMS IN CRIMINAL PROCEEDINGS, NORMATIVE FRAMEWORK AND THE STATE OF AFFAIRS IN SERBIA

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Abstract: In recent decades special attention has been paid to the status of human trafficking victims, with a particular focus on their role and active participation in criminal proceedings. This has resulted in the adoption of international documents such as Council of Europe Convention on Action against Trafficking in Human Beings (CETS No.197) and in the development of internationally agreed standards whose application should contribute to the protection of these extremely vulnerable victims of crime. Although it is generally not disputed that in most cases human trafficking victims do deserve to be granted a special status of a particularly sensitive witness, in practice there are significant problems that call into question the quality and usefulness of the protection provided for these persons. The paper consists of two key segments. The first segment is dedicated to the analysis of normative framework related to the protection of human trafficking victims in criminal proceedings, covering both the international context and the national context in Serbia. The second part of the paper includes an overview of the results of empirical research conducted in Serbia that point out to the practical problems in the field of victim protection, such as: inadequate techniques applied in the process of witness examination, inability to obtain compensation for the victims in criminal proceedings and victims *de facto* being disabled to take part in criminal proceedings ending in a plea bargain. The authors have applied normative-dogmatic and comparative methods. The aim of the paper is to provide some recommendations that could contribute to full implementation of the existing normative framework.

Keywords: human trafficking, witness, victim, criminal proceedings, protection, Serbia.

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INTRODUCTION

Victims of trafficking fall into a particularly vulnerable group of victims given the forms and intensity of victimization that they have experienced. These victims deserve special empathy because trafficking in human beings among others includes recruitment, transfer, harbouring or receipt of persons by means of threat or use of force or other forms of coercion, of abduction, of fraud or of abuse of power for the purpose of exploitation, all in accordance with the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25 of 15 November 2000), Art. 3.

It is common knowledge that trafficking is carried out for the sake of sexual exploitation, although this form of exploitation is only one of many forms, since trafficking is also carried out for the purpose of labour exploitation, forced marriage, begging, warfare and organ theft (Shelley, 2010: 2). Victims of trafficking are often harshly exploited by abuse of trust or by becoming addicted, intimidated and threatened (Goodey, 2008: 422). Furthermore, trafficking in human beings is a crime committed in large number of cases by organized criminal groups, which means that there is a high risk for the safety of victims. Given all that has been said, it is clear why it is extremely important that victims of trafficking have to be adequately protected during their participation in criminal proceedings. Clarification of criminal matters and bringing those responsible to justice also largely depends on the protection of witnesses.

Bearing in mind the above-mentioned, the aim of the paper is to provide some recommendations that could contribute to the effective implementation of the existing normative framework in the field of protection of victims of human trafficking in criminal procedure.

INTERNATIONAL LEGAL FRAMEWORK

Over the last few decades, exceptional attention has been paid to the issue of human trafficking, which has been recognized as a global problem that threatens the progress of humankind and causes significant suffering. Therefore, multiple international documents have been adopted in this matter. Of particular importance is the Protocol to Prevent, Suppress and Punish Trafficking in Human Beings, Especially Women and Children (Palermo, 2000, better known as the Palermo Protocol), which complements the United Nations Convention against Transnational Organized Crime (Palermo, 2000). The main purpose of this protocol is to provide protection and assistance to the victims of trafficking in human beings with respect for their human rights. The protocol refers to various forms of support for victims of human trafficking, so that assistance is not limited only to support during criminal proceedings, but it also includes support in the field of housing, counselling and psychological treatment. Specifically, when it comes to victims of trafficking as participants/witnesses in criminal proceedings, the protocol stipulates that authorities are obliged to protect privacy, identity and safety of victims in accordance with the law of a particular state. It is particularly important that national regulations provide for adequate notification of victims in the context of court proceedings and that they enable victims to participate in criminal proceedings, while at the same time respecting the defendant's right to defence (Art. 6).

The Council of Europe Convention on Action against Trafficking in Human Beings (CETS No.197, 2005) builds on the United Nations Convention against Transnational Organized Crime and the Pro-



to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, in order to provide additional protection in relation to the protection already provided by the mentioned documents and in order to improve the standards of protection of victims of human trafficking. The objectives of the convention are to protect the human rights of victims of trafficking, to design a comprehensive framework for the provision of protection and assistance to victims and witnesses while guaranteeing gender equality and to ensure effective investigation and prosecution. The convention defines a victim as any natural person who has become the object of trafficking in human beings, while the notion of a child includes any person under the age of 18 (Art. 4). A significant part of the text of the convention refers to the protection of witnesses and victims in the context of criminal proceedings. Thus, Art. 28 stipulates that each state shall, within the framework of its national legislation, provide for appropriate measures to ensure effective and adequate protection against possible retaliation or intimidation, especially during and after investigations/criminal proceedings against perpetrators. In addition to the involvement of state bodies in the field of protection of victims of trafficking in human beings, the work of non-governmental organizations in this sphere should also be adequately supported and encouraged. With regard to the conduct of legal proceedings, convention stipulates that each contracting party shall adopt legislative and other measures to protect the privacy of the victim and, where appropriate, his or her identity and to prevent intimidation. In the case of child victims, special attention shall be paid to their needs, in accordance with Art. 30. Also, a special mechanism has been designed to monitor the implementation of the convention, which is embodied in the expert group for combating trafficking in human beings, known under the acronym GRETA. GRETA consists of a minimum of 10 and a maximum of 15 experts from different fields, taking into account gender equality and balance when it comes to the nationality of experts.

Specific types of support for human trafficking victims/witnesses in criminal proceedings have also been provided by Recommendation no. R (97) 13 of the Committee of Ministers to member states of the Council of Europe on Witness intimidation and the rights of the defence, which builds on documents such as 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 Prevention of victimization, Recommendation No. (91) 11 on Sexual exploitation, pornography, prostitution and trafficking of children and young adults and Recommendation No. (96) 8 on Crime policy in Europe in a time of change.

Recommendation no. R (97) 13 defines a witness as any person, irrespective of his/her status under national criminal procedural law who possesses information relevant to criminal proceedings. This definition also includes experts as well as interpreters. Intimidation means any direct, indirect or potential threat to a witness, which may lead to interference with his/her duty to give testimony free from the influence of any kind. This includes intimidation resulting either from the mere existence of a criminal organization having a strong reputation of violence and reprisal, or from the fact that the witness belongs to a closed social group and is in a position of weakness. Anonymity means that the identifying particulars of the witness remain totally unknown to the defendant.

The aforementioned recommendation stipulates that acts of intimidation of witnesses should be made punishable either as separate criminal offenses or as part of the offense of using illegal threats. While taking into account the principle of free assessment of evidence by courts, procedural law should allow for consideration of the impact of intimidation on testimonies. Witnesses should be provided with alternative methods of giving evidence that protect them from intimidation resulting from face to face confrontation with the accused by allowing witnesses to give evidence in a separate room, while respecting the rights of the defence (Recommendation no. R (97) 13, *General principles*). Also, criminal justice personnel should have adequate training in order to become capable to deal with the cases



where witnesses might be at risk of intimidation. In order to provide adequate protection, there may be a need to record by audio-visual means statements made by witnesses during pre-trial examination, use pre-trial statements given before a judicial authority as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in great and actual danger to the life and security of witnesses, their relatives or other persons close to them, reveal the identity of witnesses at the latest possible stage of the proceedings and/or release only selected details excluding the media and/or the public from the trial.

However, Recommendation (97) 13 also takes into account the need to strike a balance between witness protection and respect for the right to defence and fair trial. Therefore, anonymity should only be granted when the competent judicial authority, after hearing parties, finds that life or freedom of the person involved is seriously threatened or, in the case of an undercover agent, his potential to work in future is seriously threatened, as well as when the evidence is likely to be significant because the witness appears to be credible. However, when anonymity has been granted, the conviction shall not be based solely or to a decisive extent on the statement of anonymous witnesses (Recommendation (97) 13).

Furthermore, Recommendation (97) 13 provides for a wide range of measures to be applied in relation to vulnerable witnesses. It also implies that the best interests of the child should be protected throughout proceedings by a social agency and if appropriate through specially trained lawyers. Among other things, at the court hearing the examination of the witness should be closely supervised by the judge. If a cross-examination might have a serious traumatic effect on the witness, the judge should consider taking appropriate measures to control the manner of questioning.

NORMATIVE FRAMEWORK IN THE REPUBLIC OF SERBIA

Code of Criminal Procedure

Code of Criminal Procedure-ZKP, Official Gazette, no. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 35/19, 27/21 and 62/21, stipulates that particularly sensitive witnesses may be those who have been seriously traumatized by specific crime due to their age, life experience, lifestyle, gender, health condition, or due to nature, manner or consequences of the crime, as well as other circumstances of the case, Art. 103, Para. 1.

The above-mentioned implies that the position of a sensitive witness may be based on objective and subjective characteristics of the witness or on the combination of both (Brkić, 2014: 212). Given the nature, gravity and consequences of human trafficking, we conclude that victims of trafficking undoubtedly tend to be among the most sensitive witnesses.

If a witness may be additionally (secondarily) victimized by the act of testifying in criminal proceedings, the body of procedure (public prosecutor, presiding judge or individual judge) may *ex officio*, or at the request of interested parties or at the request of witness himself, determine the status of a particularly sensitive witness. No special appeal is allowed against the decision by which the procedural body adopts or rejects the request for the witness to be granted the status of a particularly sensitive witness, which implies that dissatisfied party may challenge the decision only within an appeal against the verdict in a criminal matter.



Obtaining the status of a particularly sensitive witness provides the witness with different and more favourable position in criminal proceedings compared to the usual position of a witness, which is also reflected in the specific method of examination and in other forms of protection and assistance. Examination of a particularly sensitive witness is possible only through the body of the procedure which must treat the witness with special care, while trying to avoid possible harmful consequences of the criminal procedure on physical and mental health of the witness (Art. 104 ZKP). However, it has been pointed out in the literature that there is an error in ZKP because it does not exclude the possibility of asking suggestive questions while cross-examining particularly sensitive witnesses (Škulić, 2015: 12).

Given the leading role of the body of the procedure during the examination of a particularly sensitive witness, it is his professional conduct that will have the greatest impact on the quality of testimony and on the protection against secondary victimization and additional trauma for the victim/witness.

Special protection of a particularly sensitive witness involves the application of specific measures. There are some measures that prevent direct encounters of particularly sensitive witnesses with the defendant and other participants in the proceedings. Thus, the witness is examined in a separate room, away from the space in which the defendant, defence counsel and other participants in the proceedings are seated. A witness may also be examined by use of technical means for video and sound transmission, so that the possibility of contact with the defendant is excluded. Hence, if the body of the procedure decides to examine a particularly sensitive witness by using audio-visual technology, the examination shall be conducted without the presence of parties and other participants in proceedings, pursuant to Art. 104 ZKP. The process of examination of particularly sensitive witnesses may also include experts of various profiles who have the knowledge and skills necessary for adequate communication with vulnerable persons. Psychologists, social workers or other professionals may appear in the role of an interrogator during all phases of criminal proceedings. An expert may conduct direct interview with a particularly sensitive witness, while the procedural body monitors the examination and if necessary, asks additional questions through the expert. On the other hand, the body of the procedure itself could examine a particularly sensitive witness, while the expert only monitors whether the witness has been examined in an appropriate manner.

Particularly sensitive witnesses may not be confronted with the defendant unless the defendant requests so and the procedural body allows it taking into account the degree of sensitivity of the witness, as well as the right of the defendant to have a fair trial. In such cases only two persons are allowed to face each other at the same time - that being the witness and the defendant or two witnesses, in such a way that they stand opposite each other while giving their statements alternately. Confronting particularly sensitive witnesses can be extremely stressful for victims/witnesses, which is why it should not be insisted on it, but *vice versa* - avoided if possible.

ZKP allows the identity of a witness to be kept secret if the specific circumstances of the case require so. Such a witness is given the status of a protected witness. This measure of protection should be applied in a restrictive manner, so that it must not deny or limit the right to defence and to a fair trial, which are guaranteed by Art. 6 of the European Convention on Human Rights (Rome, 1950). According to Art. 106 of ZKP, the court may decide to grant a witness the status of a protected witness if the life, health or liberty of the witness, or a person close to him/her, is so endangered that it justifies the restriction of the right to defence, while at the same time the witness is considered to be credible. Information on the identity of the witness may be denied even to the defendant and his defence counsel, although the identity of the witness must be revealed to the defendant and his defence counsel no later than 15 days before the main trial in terms of Art. 106 Para. 3 ZKP.

The decision determining the status of a protected witness shall state the pseudonym of the protected witness, the duration of the measure and the manner in which the measure will be implemented - modification or deletion of the identity data and application of audio-visual technology in the process of testifying. Information on the identity of the protected witness and persons close to him and other circumstances that may lead to the disclosure of their identity will be sealed in a special envelope marked with *Protected witness – strictly confidential* and afterwards sealed and handed over to the pre-trial judge.

Law on Juvenile Offenders and Criminal Protection of Juveniles

More detailed provisions on the status of juvenile victims and juvenile witnesses of criminal offenses are provided in the Law on Juvenile Offenders and Criminal Protection of Juveniles, Official Gazette RS, no. 85/05. Provisions of this law should be analyzed in connection to ZKP which defines a witness as a person who is likely to give information about criminal offense, perpetrator or other facts which should be established in the proceedings (Art. 91). It is not disputed that children in certain cases may be able to reproduce relevant facts about the crime, so there is no need for a special definition of a juvenile/child witness. Also, according to the positive legal framework in Serbia, a child is a person under the age of 14, and at the same time the term minor includes all persons under the age of 18. International legal framework implies that a child is a person under the age of 18, which is in accordance with the UN Convention on the Rights of the Child (New York, 1989). The aforementioned indicates that the Serbian legal framework does not differ from international protection standards.

The Law on Juvenile Offenders and Criminal Protection of Juveniles provides several detailed rules which guarantee complex protection to the juvenile witness during the implementation of criminal procedure. We will list those rules.

In the cases of specific criminal offenses to the detriment of juveniles, a judicial panel should be presided over by a judge who has acquired substantial knowledge in the field of children's rights and protection of juveniles. These crimes include aggravated murder, encouraging or assisting suicide, grievous bodily harm, kidnapping, human trafficking and others. The public prosecutor, who has also acquired special knowledge in the field of children's rights and protection, is authorized to initiate proceedings that include special protection of minors for some other criminal offenses too if he assesses that special protection is necessary to protect a minor.

Further along, according to the Law on Juvenile Offenders and Criminal Protection of Juveniles, it is envisaged that the investigation should be conducted by an investigating judge who has acquired special knowledge in the field of children's rights and protection. However, there is no longer an institute of an investigating judge in the domestic criminal procedure law and nowadays investigation is to be led by the public prosecutor, which implies that the public prosecutor should actually be the one that has been adequately trained. Also, specialized police officers who have acquired special knowledge in the field of children's rights and criminal protection of minors should participate in the investigation of criminal offenses to the detriment of minors, pursuant to Art. 151. The first impression about the system of formal reaction is based on the contact with the police, so that an inadequate response can lead to the withdrawal of the victim (Kesić, Bjelovuk & Žarković, 2017: 330-331), which emphasizes the importance of the role of police officers.

Public prosecutors and judges will treat a juvenile victim in a manner that takes into account his/her age, personality traits, education and other circumstances, while at the same time trying to avoid any



harmful consequences. The interrogation of juveniles is to be conducted with the help of a psychologist or other child experts. In the case of a juvenile witness who has been harmed by criminal offenses, the interrogation may be conducted no more than twice. However, only under exceptional circumstances, interrogation can take place more than twice. In such very unusual cases, special care should be taken of the protection of personality and development of the juvenile, under Art. 152.

If it is assessed that it is in the best interest of the juvenile, the principle of taking evidentiary actions directly before the court and the parties may not be applied. If considering the peculiarities of the criminal offense and personality traits of the juvenile it is deemed necessary, the judge shall order the juvenile to be heard using audio-visual technology, so that the hearing is to be conducted without the presence of parties and other participants. Entitled persons may ask the witness questions by means of a judge, psychologist, social worker or other child experts. Minors may also be interrogated at their home or other premises or in an authorized organization professionally trained for the examination of juveniles with the use of appropriate technology, so that the testimony is afterwards read/played at a trial. Also, the law stipulates that if a juvenile is examined as a witness who is particularly sensitive or is in a particularly difficult state of mind, it is prohibited to confront him and the defendant. If there is a need for identification of the suspect by juvenile, the suspect must be disabled to see the juvenile, thus preventing additional trauma and intimidation.

Juvenile victims must have legal representatives from the first hearing of the defendant up to the termination of the proceedings. The obligatory engagement of a legal aid provides special guarantee that a juvenile will be able to exercise his/her rights, which is in concordance with relevant international documents.

By all means, an important feature of the criminal procedure for acts by which minors have been damaged is that the process must be urgent.

Protection of victims of human trafficking - State of affairs in Serbia

Research indicates that the level of protection provided to the victims of trafficking in criminal proceedings in Serbia is not sufficient (Žarković et al, 2011, Žarković, 2020, Kolaković-Bojović, Drobnjak & Banić, 2021). Truth be told, the state of affairs in this field is also grim in many other countries across the world (Wemmers, 2012).

The Supreme Court of Cassation of the Republic of Serbia has made an extensive analysis of ten convictions passed in the period from 2015 to 2019 for the crime of human trafficking. The analysis of the court records has indicated that injured parties/victims were not able to exercise their right to compensation in criminal proceedings and that they were generally referred to civil procedures in order to achieve material satisfaction.

Also, in only one case did the victim receive the status of a particularly sensitive witness, which was actually a case of an intellectually challenged sexually exploited 15-year-old girl. In the mentioned case, it was pointed out that there has been some good cooperation between the Center for Social Work and the Center for Protection of Victims of Trafficking in Human Beings – resulting in some services for the victim, which could imply that court and public prosecutor tend to be passive when it comes to the protection of victims. According to the aforementioned Analysis of the Supreme Court of Cassation of the Republic of Serbia, one could conclude that the court and the public prosecutor did not determine the status of a specially protected witness on their own initiative.



The question arises as to why special protection measures were lacking, given that in a significant number of cases covered by the analysis victims were juveniles, and that there have been multiple cases of sexual and labour exploitation, as well as of abuse of trust. Furthermore, there is no mention of special protection of juvenile victims in accordance with the Law on Juvenile Offenders and Criminal Protection of Juveniles, so that the question arises whether provisions guaranteeing special protection of this category of vulnerable witnesses/injured parties have been applied at all.

The non-governmental organization ASTRA has also analyzed court cases from the year 2019 which refer to the criminal offense of trafficking in human beings, as well as to criminal offenses of mediation in prostitution (art. 184 of Criminal Code of the Republic of Serbia - KZ, Official Gazette no. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019) and trafficking in minors for adoption (art. 389 of KZ). The analysis covered a total of 29 court convictions, with the total number of victims being 37. It was determined that in 82% of cases there was sexual exploitation, forced labour in 12% of cases, while in 6% of cases victims were abused for committing crimes, while in the year 2020 all trafficking cases have included sexual exploitation (ASTRA, 2021). The average duration of the procedure in the year 2019 was three years and two months, which is not in accordance with the need for urgent action in order to adequately protect victims and to prevent additional trauma.

ASTRA report for the year 2019 has stated that the protection provided for victims could not be characterized as sufficient or good enough, even though generally adequate legal solutions are in place. First, it is unclear in which form victims have been given instructions from authorities about their rights and the possibilities for exercising them. Namely, Art. 8 of ZKP stipulates that the body of the procedure is obliged to instruct the defendant as well as other participants in the procedure about the rights that belong to them and also to warn them of possible consequences of not using their rights and privileges. Article 50 of ZKP stipulates that the injured party, among other things, has the right to be informed about the course of the procedure, the right to point out relevant facts and to propose evidence, as well as the right to appeal against certain decisions regarding criminal matter. However, there is significant doubt that legal instructions have been given to participants in a *pro forma* manner, which may adversely affect the position of the victim and the possibility of his/her active participation in criminal proceedings.

Furthermore, ASTRA notes that there are no adequate mechanisms for cooperation between justice system and civil society organizations functioning in the field of victim protection. In general, court records do not mention whether the victims were provided with any special protection in terms of housing, psychological assistance and other important areas, so that the main impression is that sufficient attention has not been given to the protection of human trafficking victims. It was noticed that, despite the fact that there are legal provisions for granting the status of a particularly sensitive witness to the victims of human trafficking, these provisions are only sporadically used (ASTRA, 2020). Namely, given the gravity and nature of the crimes in question, and the complex position of the victims, of which as many as 38% were minors, it remains unclear why victims are rarely granted the status of a particularly sensitive witness. Only six injured parties received the status of a particularly vulnerable witness, although the total number of victims was 37. Also, only 12 victims, of which five minors, were granted legal representatives for the sake of protection of their rights and interests, although the law recognizes the possibility of acquiring legal aid.

Unfortunately, there is a lack of understanding for the complexity of the position of victims, as a result of which exclusion of the presence of public at the trial is rarely applied, pursuant to Art. 363 of ZKP. Namely, from the opening of the trial session until the end of the main trial, the panel may *ex officio*



or at the suggestion of parties or defence counsel exclude the public for the entire main trial or for the part of it if it is found to be necessary in order to protect interests of national security, public order and morals, interests of minors and the privacy of the participants in the criminal procedure. Given the significant representation of juvenile victims, as well as the delicacy of the position of victims, one gets the impression that the provisions on the exclusion of the public are used quite restrictively.

Also, the possibility of using technical means when examining victims is insufficiently used, as well as victims are scarcely examined in special rooms, although such possibility has been provided by the law. The question arises as to why some forms of protection are not being used if it is known that the application of appropriate measures could contribute to suppression of secondary victimization and also to the acquisition of a meaningful statement which is very important for the full clarification of the criminal matter.

Although international documents suggest that victims should be provided with adequate compensation, this issue has been almost completely neglected in Serbian court practice. Thus, in most cases no attention has been paid to the claim for damages or in best case scenario—victims were referred to the litigation in order to exercise their rights. Given the position of the victims and the complexity, length and cost of litigation, it is clear that this is not an adequate solution. It should be borne in mind that victims often come from marginalized social groups and that they tend to be educationally neglected, as a result of which their coping in a complex legal system could be extremely difficult.

ASTRA report also indicates that victims of trafficking are regularly questioned at least twice – in the investigation phase and at the main trial, although there is a possibility to avoid re-examination. It was also noticed that the possibility of providing special protection for juvenile victims in accordance with the Law on Juvenile Offenders and Criminal Protection of Juveniles is poorly and insufficiently applied.

When it comes to protecting the safety of victims and preventing their intimidation by defendants, not much could be learned from court records. In 44% of cases the defendants were put into custody, which should guarantee a somewhat higher degree of security for the victims. However, there is no information on whether measures to prohibit approaching, meeting or communicating with certain persons and to prohibit visiting certain places have been applied, or some other similar measures in order to prevent witness intimidation or tampering with evidence. According to Art. 197, Para. 1 of ZKP if there are circumstances that indicate that the defendant could obstruct proceedings by influencing the injured party, witnesses, accomplices or undercover agents or that he could repeat the crime, complete the attempted crime or commit the crime he threatens with, the court may prohibit the defendant from approaching, meeting or communicating with a particular person or prohibit him from visiting certain places, but it remains unknown whether the application of these measures succeeds in achieving its purpose. It should be borne in mind that in several court cases ASTRA stated that some juvenile witnesses have changed their statements during the proceedings, which could be considered to be the consequence of intimidation by the defendants (ASTRA, 2020).

It is unknown whether and to what extent the rights of the injured parties have been exercised in cases concluding with a plea bargain. The general conclusion that emerges from report is that victims continue to be treated mainly as a source of information or knowledge about the crime, which denies them of their rights to be treated in a dignified and protective manner and especially calls into question the protection of minors. There is a lack of understanding of the specific situation of victims of trafficking in human beings and especially of the position of juvenile victims, which indicates the need to pay additional attention to the issue of protection of these extremely vulnerable persons.



CONCLUSION

Normative framework that defines the position of victims of human trafficking in Serbia is harmonized with relevant international standards in this field. It is provided by law for witnesses to be examined in a specific way that protects their privacy and security. There is a possibility of hiring legal representatives for victims in order to fully guarantee the exercise of their rights.

However, in practice the legal provisions on a particularly vulnerable witness are insufficiently used, which adversely affects the exercise of victims' rights. Also, victims rarely exercise the right to compensation for material damages in criminal proceedings, which negatively affects their future social integration and threatens their overcoming of trauma. Moreover, when it comes to minors one cannot be satisfied with the current state of affairs, because provisions of the ZKP and Law on Juvenile Offenders and Criminal Protection of Juveniles should be applied in a complementary way in order to achieve substantive protection.

With the above-mentioned in mind, additional training of public prosecutors and judges on the specific needs and status of victims of trafficking is needed. Both public prosecutors and judges need to be sensitized for recognizing specific needs of these vulnerable witnesses for the additional protection, so that victims of trafficking do not depend solely on their own capability to seek help and support.

In cases when the procedure ends with a plea bargain, it should be possible to adequately inform the injured parties about it and to pay appropriate attention to the realization of compensation claims.

Mechanisms need to be devised for the more intensive cooperation between judiciary and civil society organizations, with the focus being on the victim with his or her needs and problems. In that sense, the authorities should keep in mind that providing protection for victims of human trafficking is practically an integral part of criminal proceedings for these crimes and that by providing support for victims they do not only express empathy, but actually fulfil obligations accepted by the state through ratifying relevant international agreements.

REFERENCES

1. ASTRA. (2020). Položaj žrtava u krivičnom postupku - Analiza pravosudne prakse za 2019. godinu za krivična dela posredovanje u vršenju prostitucije, trgovina ljudima i trgovina maloletnim licima radi usvojenja, Downloaded on July 14, 2021 <https://www.astra.rs/analiza-pravosudne-prakse-2019/>
2. ASTRA. (2021). Položaj žrtava u krivičnom postupku - Analiza pravosudne prakse za 2020. godinu za krivična dela posredovanje u vršenju prostitucije, trgovina ljudima i trgovina maloletnim licima radi usvojenja, Downloaded on August 25, 2021 <https://drive.google.com/file/d/1ZdVakPMLd8Ya-QQsDbWUCmZTM3fOmmpl/view>
3. Brkić, S. (2014). Posebno osetljivi svedoci. *Zbornik radova Pravnog fakulteta u Novom Sadu*, 2, 211-227, DOI: 10.5937/zrpfns48-6708.
4. Council of Europe Convention on Action against Trafficking in Human Beings (CETS No.197, 2005).
5. Criminal Procedure Code of the Republic of Serbia, Official Gazette RS, no. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 35/19, 27/21 and 62/21.



6. Criminal Code of the Republic of Serbia, Official Gazette RS, no. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.
7. Goodey, J. (2008). Human trafficking: Sketchy data and policy responses. *Criminology and Criminal Justice*, 8(4), 421-442. DOI: 10.1177/1748895808096471
8. Kesić, T, Bjelovuk, I. & Žarković, M. (2017). Odgovor policije na zločine iz mržnje. *Zbornik radova-Kriminalističke teme, Međunarodna naučna konferencija Crimen, Forensis, Securitas, Sarajevo, 5-6 oktobar 2017*, 5, 320-335.
9. Kolaković-Bojović, M, Drobnjak, T. & Banić, M. (2021). **Formativna analiza** - Izveštaj o postojećem zakonodavnom i normativnom okviru u oblasti pravosuđa po meri deteta u Srbiji i njihova primena u praksi. Beograd: International Rescue Committee, Serbia.
10. Law on Juvenile Offenders and Criminal Protection of Juveniles, Official Gazette RS, no. 85/05.
11. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25 of 15 November 2000).
12. Recommendation no. R (97) 13 of the Committee of Ministers to member states of the Council of Europe on Witness intimidation and the rights of the defense.
13. Shelley, L. (2010). *Human Trafficking: A Global Perspective*. Cambridge and New York: Cambridge University Press.
14. Supreme Court of Cassation of Republic of Serbia, (2020). Analysis of case law in trafficking cases 2015-2019, Downloaded on July 15, 2021 <https://www.vk.sud.rs/sites/default/files/attachments/Analiza%20odluka-trgovina%20ljudima-za%20sajt%20suda.pdf>.
15. Škulić, M. (2015). *Položaj žrtve krivičnog dela/oštećenog krivičnim delom u krivičnom pravnom sistemu Srbije*. Beograd.
16. UN Convention on the Rights of the Child (New York, 1989).
17. Wemmers, J. (2012). Victims' rights are human rights: The importance of recognizing victims as persons. *Temida*, 15(2), 71-84, DOI: 10.2298/TEM1202071W.
18. Žarković, M. et al. (2011). *Krivičnopravni sistem i sudska praksa u oblasti borbe protiv trgovine ljudima u Srbiji*. Beograd: Zajednički program UNHCR, UNODC i IOM za borbu protiv trgovine ljudima u Srbiji.
19. Žarković, M. (2020). Posebno osetljive kategorije oštećenih lica – pojam i krivičnoprocesni instrumenti zaštite. *Zbornik sa savetovanja Srpskog udruženja za krivičnopravnu teoriju i praksu, Zlatibor 17-19 septembar 2020*, LX, 521-537.



ELDER PRISONERS – A SIGNIFICANT GROUP, A MARGINALIZED MINORITY OR A CHALLENGE FOR THE PRISON SYSTEM

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Abstract: Execution of a prison sentence is a complex process burdened with a series of problems, which are multiplied when it comes to the elderly, whose share in the prison population around the world is growing rapidly. Prisons and treatment programs are designed for younger people, as the dominant part of the prison population. Elderly people face numerous problems during penal treatment, such as: outdated architectural solutions, overcrowding, victimization, inappropriate accommodation, severance of family ties, difficult access to justice, inadequate health care and lack of individualized programs to prepare for release. There are also difficulties that are a consequence of earlier risky lifestyles and the aging process: impaired health, alcoholism, addiction to psychotropic substances, poverty of social interactions, impaired mobility, helplessness, depression, fear of death, especially death in prison, etc. The unfavorable position in prison calls into question the respect for the human rights of elderly convicts, but also the possibility of quality corrective engagement and successful social reintegration. It therefore insists of the development of strategies to reduce the imprisonment of the elderly, as well as to adapt prison treatment to their specific needs. Adequate response to the special needs of older prisoners and overcoming the existing marginal status is a major challenge that requires training prison staff to work with them and special attention in classifying, accommodating, creating and implementing treatment programs, solving security problems, improving health care, maintaining family ties and realization of the program of preparation for dismissal.

Keywords: Elderly prisoners; Treatment; Prison; Challenge

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INTRODUCTION

Elderly prisoners are the fastest growing age group in many prison systems, including EU member states, the United Kingdom, the United States (USA), Canada, Australia, New Zealand and Japan. Prison populations around the world are aging rapidly. In Australia, the participation rate of prisoners over the age of 50 was 8.3% in 2000 and 12.9% in 2017 (Australian Bureau of Statistics, 2000; 2017). Similarly, in the USA, the representation of people over the age of 55 in the prison population increased from 3% to 10% between 1993 and 2013 (Carson & Sabol, 2016), while in England and Wales prisoners over the age of 50 make up 17% of the prison population (Her Majesty's Inspectorate of Prisons and Quality Care Commission, 2018). Also, in Japan, between 2000 and 2006, the number of prisoners aged 65 and over increased by 160% (Porporino, 2014). That Serbia is no exception in this respect is confirmed by official statistics that in 2012, convicts aged 50 and over accounted for 12% of the total number of convicts admitted to serve their sentences (2012 Annual Report on Prison Administration Operations, March 2013: 94). Demographic research indicates that this global trend will continue in the coming decades. The rapid change in the age structure of the prison population poses numerous challenges to the criminal justice system, the neglect of which can result in a number of harmful consequences for prisoners, but also for society as a whole.

In order to eliminate possible doubts and set a framework for further exposure, it is necessary to point out that aging is an inevitable biological process, the essence of which is the progressive disruption of the physiological functions of the organism. It is primarily determined by genetic and environmental factors, it is irreversible and results in age, as the final period of life, and human death. Although accompanied by increased mortality, it is not a disease. Age (biological, psychological and social) degrades the functional ability of the organism, i.e. its physiological competence and the ability to adapt to changes in the environment, which negatively affects the quality of life. The difficulties faced by the elderly in society are further exacerbated in prisons. Accordingly, the paper focuses on the conceptualization and types of elderly prisoners, the causes of their increase in representation, the current situation and problems they face, human rights violations due to systematic neglect and inadequate satisfaction of their specific needs, challenges and policy formulation. and strategies that should enable meaningful action in order to successfully resocialize and reintegrate this vulnerable group. In parallel with adapting prison treatment to the needs of older prisoners, it is necessary to consistently implement a strategy to reduce their imprisonment.

The Concept and Types of Elderly Prisoners

Although the level of participation of older people in the prison population, expressed in both absolute and relative terms, is growing steadily, there is still a consensus among researchers, policy makers and penitentiary staff on who is considered an "older prisoner". Starting from national, historical, cultural and demographic specifics, the authors, when defining older prisoners, opt for the age of 45, 50, 55, 60, 62, and even more years. The lack of a generally accepted definition makes it difficult to compare and draw scientifically based conclusions, to form a reliable database on elderly prisoners, to determine the rate of recidivism, to properly consider and respond to health problems, and to manage prisons. Despite the existence of different understandings, the prevailing functional definition is that a person aged 50 and over is considered an older prisoner. Such a low starting age is based on research findings that have identified an obvious ten-year difference between the overall health of prisoners and the health of members of the general population. The difference between chronological age and physiological health specifically means that a 50-year-old prisoner corresponds to a 60-year-old from



the general population in terms of health status. The accelerated aging process of prisoners is generally attributed to a combination of risky pre-prison lifestyles (including inadequate nutrition, alcohol and psychotropic substance abuse, lack of medical care, etc.) and the fact that the prison environment can lead to an expansion of aging-related diseases and conditions. As a result, older prisoners are significantly more likely to have physical and mental health problems that require appropriate medical and psychological treatment.

Elderly prisoners are not a homogeneous, but highly heterogeneous population, which requires prison staff to take an individualized approach in evaluating, planning, implementing, and evaluating treatment programs. Based on the criminal history, they can be divided into three groups: a) persons entering prison for the first time at the age of 50 and over (most often perpetrators of serious crimes – e.g. murders and sexual offenses, with serious difficulties in institutional adjustment); b) elderly recidivist offenders who have been in prison several times and return to it in old age (as a rule, they suffer from chronic health problems, are well accustomed to prison life, have limited contact with the outside world) and c) persons who grow old in prison while serving a long sentence (they form the largest group, they successfully adapt to prison conditions, institutionalization and severance of ties with the community make it difficult for them to successfully reintegrate socially) (Handbook on Prisoners with Special Needs, 2009: 126).

Causes of Aging of the Prison Population

The aging trend of the prison population should be viewed in the context of the accelerated aging of the world population, whether it is an increase in the number of people over the age of 65 or their share in the total population. From 1950 to 2000, the number of elderly people more than tripled and increased from 131 million to 417 million, i.e. from 5% to 7% (Kinsella & Wan, 2009). In the middle of the 21st century, which is also called the age of population aging, the share of people older than 65 should be 16.2%, and in developed countries 26.2%. Population aging is a global phenomenon and is not unique to the developed world, although it is most intense in it. Europe, which has completed its demographic transition and is going through a post-transition period, is inhabited by the oldest population. All demographically oldest countries in the world, except Japan, are European, i.e. from the Old Continent. Among them is Serbia, where people over the age of 65 make up 17.4% of the total population (Devedžić & Stojilković Gnjatović, 2015: 6-7).

In addition to the global aging of the general population, changes in the legislative field, as well as in the area of criminal prosecution and sentencing, have significantly contributed to the increase in the number of elderly prisoners. Namely, in order to more successfully control crime, in the eighties and nineties of the last century in the USA (later in other parts of the world) an approach was promoted which includes the adoption of stricter laws, prescribing high special minimum prison sentences for numerous crimes, long sentences and restrictive application, premature release, introduction of the practice of sentencing multiple offenders convicted of a third felony (murder, rape, robbery, drug trafficking) to life imprisonment without the possibility of parole (three-strikes and you're out), etc. It should not be emphasized that imprisonment as a means of thwarting criminals, especially if it is imposed en masse and lasts for an unjustifiably long time, leads to the aging of the prison population - the so-called silver tsunami. This causes a number of economic, social, ethical and health consequences, so there is a serious risk that the criminal justice system, if decisive action is lacked, will collapse under its own weight (The High Costs of Low Risk: The Crisis of America's Aging Prison Population, July 2014: 3).



Problems of Elderly Prisoners

The difficulties that the elderly face in society on a daily basis are, as we have pointed out, further increasing in prisons. Older prisoners are a heterogeneous group, so significant differences in terms of their age, origin, criminal history, needs and adjustment to life in prison, necessitate additional engagement and individualized approach of penitentiary staff, and any generalizations and stereotypes counterproductive (Handbook on Prisoners with Special Needs, 2009: 126). Starting from these findings, in the following text we analyze the problems that have the strongest destructive impact on quality of life, successful resocialization and social reintegration of elderly prisoners:

1. Health problems – impaired health is a problem faced by the largest number of elderly prisoners, mainly due to advanced age, risky lifestyles established before entering prison, as well as the accelerated process of biological aging (a prisoner who is chronologically 50 years old in terms of health corresponds to a person aged 60 from the general population). In addition to cardiovascular diseases (hypertension, angina pectoris, cardiomyopathies, insufficiency, etc.), chronic obstructive pulmonary disease, tuberculosis, hepatitis, diabetes, ulcers, cancer, osteoporosis and Parkinson's disease, members of this vulnerable group often face mental and mental health problems – disorder of cognitive processes (perception, attention, memory, thoughts, language, learning), anxiety, agitation, depression, fear of dying, especially dying in prison, etc. Despite the fact that the health of elderly prisoners is deteriorating at an accelerated pace and may result in terminal illness, many of their health needs will not be recognized and adequately met. For example, in the USA, approximately 40-60% of prisoners aged 50 and over report mental health problems, but only one in three has access to treatment (James & Glaze, 2006).
2. Increase in costs – an increase in the number of elderly people in the prison population causes high costs. The USA spends over \$ 16 billion a year on the closure of individuals over the age of 50, well over the overall budget of the Department of Energy (Chettiar, Bunting, & Schotter, 2012). On average, imprisoning a person aged 50 and over costs twice as much (\$ 68,270) as imprisoning a younger, more capable individual (\$ 34,135), and in some cases it can cost up to five times more (Chettiar et al. 2012). In order to optimally respond to the specific health needs of the elderly, many prisons hire staff specializing in palliative care or gerontology and/or form special units for their care (Grant 1999, Caldwell, Jarvis & Rosefield, 2001). More complex medical procedures that cannot be performed in prison require the safe transfer of prisoners to a medical facility and constant supervision of correctional officers, which due to the high cost (\$ 2,000 per 24 hours) further increases the already enormous costs (Schaenman et al. 2013).
3. Inadequate prison environment and regime – prisons are primarily designed according to the requirements and needs of young and healthy people who make up the largest part of the prison population, so that the elderly, especially prisoners with physical disabilities (impaired mobility, complete or partial loss of sight and/or hearing, geriatric incontinence, etc.) face numerous problems on a daily basis that make it difficult or impossible to meet the most basic needs. Inaccessibility of wheelchairs, walkers, electric ramps to overcome stairs and slopes, inappropriate layout of rooms, difficulties in accessing toilets, overcrowding, use of bunk beds, excessive heat or cold, as well as other architectural and construction restrictions, are the characteristics of many prisons of the third decade of the 21st century. Some authors have described this situation as “double punishment”, emphasizing that the elderly, through no fault of their own, serve their prison sentences in much more difficult conditions than younger prisoners (Stojkovic, 2007).

Just like the prison environment, the regimes are aligned with the needs of younger people as the dominant part of the prison population. Treatment programs should contribute to reducing the rate of



recidivism through vocational training, education (improving literacy and numeracy) and recreation. In general, social, educational and recreational programs for younger prisoners are not available and suitable for older prisoners – e.g. many are not interested in acquiring work skills, because due to their advanced age they will not be employed after their release from prison, or due to their impaired health they cannot engage in physical activities. All this indicates that individual treatment programs must be adapted to the personality of older prisoners, age, health and other needs, as well as the length of the sentence.

4. Vulnerability to victimization – prison circumstances, especially marginalized status, lack of power and influence in the informal prison hierarchy, make the elderly more predisposed to become victims of intimidation, harassment, sexual abuse, bodily harm, etc. Such victimization limits the social engagement of older prisoners, creating a sense of isolation (Dawes, 2009). This is confirmed by the fact that older prisoners, especially those with physical disabilities, perceive themselves as more vulnerable to victimization than younger, more vital colleagues (Dawes, 2009). Part of prison staff tend to neglect the health needs and well-being of older prisoners, especially in overcrowded facilities, also contributes to the increased risk of victimization. In England and Wales, staff reluctance to provide assistance to wheelchair-bound prisoners has led to seek for help, in some cases even by paying for it (Her Majesty's Inspectorate of Prisons, 2004). The high degree of victimization and the feeling of insecurity present in a significant number of elderly prisoners, requires a detailed consideration of situations and circumstances that contribute to the risk of victimization, risk factors and defining strategies to avoid victimization. Undoubtedly, preventing and combating victimization will contribute to the prevention of crime in prisons.

5. Termination of family ties and problems with release – maintaining family ties has a positive effect on the mental well-being, resocialization and social reintegration of all prisoners, especially the elderly. However, older people who have spent many years in prison lose contact with their families and the outside world over time, so that they develop prism (institutionalization). Maintaining family contacts also depends on the type of crime. If the offense was committed against a family member(s), family visits are likely to be absent. The intensity of these relationships also atrophies when the prisoner is far from the place of residence, or the spouse is too old to travel. A significant stimulus for maintaining stable family ties is the accumulation of time provided for visits – e.g. if visitors have travelled a long way or rarely visit a prisoner due to limited material resources.

Significant differences between older prisoners in terms of age, origin, criminal history, personality characteristics, health, social, economic and other needs, existence/non-existence of family ties, as well as length of sentence (due to possible prism), require an individualized approach to design and implementation programs to prepare for their release and post-release support. Prisons should work in close coordination with health and social services, civil society agencies and the non-profit sector in this area to develop strategies to address the specific needs of older people, especially those left without the support of family, relatives and friends, and so on facilitated an extremely complex process of social reintegration.

Although elderly prisoners have a lower risk of re-offending, restrictive criteria are often used for their conditional release or compassionate release (early medical release of terminally or chronically ill prisoners). Decisions on parole also take into account the prospects for accommodation and employment upon release from prison, which puts elderly prisoners at a disadvantage. Consideration of options for early release or parole is also opposed by victim advocacy groups, the victims themselves, their families, and public opinion. All this, and especially the loss of hope for release, has a detrimental effect on the mental health of prisoners.



Challenges, Strategies and Solutions

Recognizing that mass imprisonment as a means of controlling crime and violence results in accelerated aging of the prison population and other unintended consequences (human rights violations, inhumane overcrowding conditions, inefficiency, high prison costs, etc.), academics, penitentiary staff, and civic activists around the world at the beginning of this century on the necessity of developing qualitatively different policies and strategies for combating crime. The new approach includes more frequent application of alternative sanctions, reduction of imprisonment, revision of strict practice of long sentences, as well as reform of release mechanisms, which will enable easier approval of parole and compassionate release of older prisoners who do not pose a high security risk. The challenges of an aging prison population require numerous, well-designed and coordinated responses. According to their importance, the following stands out:

1. Staff training – staff involved in the supervision and care of elderly prisoners should be provided with continuous training, professional development, improvement of knowledge, qualifications and motivation for competent and successful work with this vulnerable group, understanding of the aging process and health problems related to it, as well as development communication skills.
2. Accommodation – in some prison systems, older prisoners are housed in separate, special units. The advantages of this solution are multiple: protection from victimization, easier access to professional staff, resources, specialist care and treatment programs tailored to their specific needs, a positive impact on mental health, identification with peers and social interaction. Due to limited financial resources, most elderly prisoners are still housed in the general population. This approach allows for a stay close to the place of residence and facilitates the maintenance of family ties, life in the general prison population is reminiscent of life outside prison and provides a more normal environment for older prisoners. No matter which solution is adopted, prisons must be designed according to the needs of older prisoners and contribute to maintaining health and improving their quality of life.
3. Health care – due to impaired health and present comorbidities, elderly prisoners will most often need various health services (medical, nutrition, psychological, etc.), which implies a multidisciplinary approach, i.e. hiring experts of different specialties. Prison authorities must establish close cooperation with community health facilities to provide specialist care as well as accommodation in civilian hospitals for prisoners whose health problems cannot be adequately treated in prison (e.g. if they suffer from a terminal illness and have a life expectancy of 6 months, or less). In that case, it is expedient to consider the possibility of compassionate release as soon as possible.
4. Treatment programs – the introduction of special programs adapted to the needs of elderly prisoners is a *conditio sine qua non* of their successful re-socialization and leading a socially harmonious life in freedom. These prisoners, in accordance with the programs of professional training and education (but also their wishes and abilities), can engage in the creation of art objects, other forms of creative expression, reading, improving the skills they already master, etc. Adequately designed, filled with quality and diverse content programs alleviate tension, stress, deprivation and monotony of prison life, while encouraging the development of positive habits and attitudes. Penological theory and practice also emphasize the importance of advice and support for terminally and chronically ill prisoners, as well as those sentenced to life imprisonment without the possibility of parole (Handbook on Prisoners with special needs, 2009: 136).
5. Contacts with the outside world – elderly prisoners should be placed in the prison as close to home as possible so that they can maintain contact with family members. Regular absences from prison, as an integral part of the prison regime, and family stays also improve family ties and contribute to reducing feelings of isolation. The interests expressed by civil society organizations during their visits to the prison also have a positive effect on elderly prisoners.



6. Preparation for release – in the development and implementation of programs for preparation of release and support after release from prison, an individualized approach is necessary that will take into account the special needs of elderly prisoners and the absence of family, kinship and friendship ties, in order to facilitate social reintegration. In order to provide maximum support to these persons, it is necessary to achieve productive cooperation of the prison authorities with community health institutions, social protection services, civil and non-profit sector. In many societies, the problem is further complicated by the lack or insufficient capacity of homes to accommodate and care for the elderly (Handbook on Prisoners with Special Needs, 2009: 138).

CONCLUSION

The elderly is the fastest growing, but also vulnerable, marginalized and systematically neglected segment of the prison population. Their long prison experience, which has profound and comprehensive psychological consequences, is generally unfavorable. Given that mass imprisonment as a means of crime control results in an accelerated growth in the number of elderly prisoners and a series of adverse economic, social, ethical and health consequences, the idea of the need to articulate a new paradigm of combating crime has gradually matured. This qualitatively different approach implies more frequent application of alternative sanctions, reduction of imprisonment, revision of the strict practice of imposing long sentences and easier approval of parole and compassionate release of elderly prisoners who do not pose a high security risk. In parallel with the development of policies and strategies to reduce the imprisonment of the elderly, it is necessary to design and implement programs of treatment tailored to their specific needs, as well as the highest international standards in this area. This will make the prospects for resocialization and social reintegration of members of this vulnerable group much more certain. At the same time, it will relieve the prison systems, which, due to the numerous problems they face, are facing collapse. Undoubtedly, this is an extremely complex process full of challenges, but the longest way, to paraphrase an old Chinese proverb, begins with the first step.

REFERENCES

1. Australian Bureau of Statistics (ABS). (2000). *Prisoners in Australia 2000*. cat. no. 4517.0. Canberra, Australia: ABS.
2. Australian Bureau of Statistics (2017). *Prisoners in Australia 2000*. cat. no. 4517.0. Canberra, Australia: ABS.
3. Carson, EA. & Sabol, WJ. (2016), *Bureau of Justice Statistics, Special Report. U.S. Department of Justice: Aging of the state prison population, 1993-2013*. <https://www.bjs.gov/content/pub/pdf/aspp9313.pdf>
4. Caldwell, C. Jarvis, M. & Rosefield, H. (2001). Issues impacting today's geriatric female offenders. *Corrections Today*, 63(5): 110–114.
5. Chettiar, I., Bunting, W. & Schotter, G. (2012). *At America's Expense: The Mass Incarceration of the Elderly*. American Civil Liberties Union. <http://www.aclu.org/criminal-law-reform/americas-expense-massincarceration-elderly>
6. Dawes, J. (2009). Ageing prisoners: Issues for social work. *Australian Social Work*, 62(2): 258–271.



7. Девеџић, М. & Стојилковић Ѓатовић, Ј. (2015). *Демографски профил старог становништва Србије*, РЗС, Београд.
8. Grant, A. (1999). Elderly inmates: Issues for Australia. *Trends & Issues in Crime and Criminal Justice* no. 115. Canberra: Australian Institute of Criminology. <http://www.aic.gov.au/publications/current%20series/tandi/101-120/tandi115.aspx>
9. *Handbook on Prisoners with special needs*, (2009). United Nations Office on Drugs and Crime, New York.
10. Her Majesty's Inspectorate of Prisons (HMIP) (2004). 'No problems – old and quiet: Older prisoners in England and Wales: A thematic review by HM Chief Inspector of Prisons. London: Her Majesty's Inspectorate of Prisons.
11. Her Majesty's Inspectorate of Prisons and Quality Care Commission (2018), *Social care in Prisons in England and Wales: A thematic report*. Her Majesty's Inspectorate of Prisons, London: England.
12. James, D. & Glaze, L. (2006). *Mental health problems of prison and jail inmates* (NCJ Publication No. 213600). Rockville, MD: U.S. Department of Justice.
13. Kinsella, K. & Wan, H. (2009). *U.S. Census Bureau, International Population Reports, P95/09-1, An Aging World: 2008*, U.S. Government Printing Office, Washington, DC.
14. Porporino, F. J. (2014). *Managing the Elderly in Corrections*, UNAFEI.
15. Schaenman, P. et al. (2013). *Opportunities for Cost Savings in Corrections Without Sacrificing Service Quality: Inmate Health Care*. The Urban Institute. <http://www.urban.org/UploadedPDF/412754-Inmate-Health-Care.pdf>
16. Stojkovic, S. (2007). Elderly prisoners: A growing and forgotten group within correctional systems vulnerable to elder abuse. *Journal of Elder Abuse and Neglect*, 19(3): 97–117.
17. *The High Costs of Low Risk: The Crisis of America's Aging Prison Population* (July 2014). Prepared by the Osborne Association for: The Florence V. Burden Foundation.
18. *2012 Annual Report on Prison Administration Operations* (March 2013). Republic of Serbia, Ministry of Justice and Public Administration, Administration for Enforcement of Penal Sanctions.



ENCRYPTED MOBILE PHONES

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Abstract: The secure phone industry has become increasingly important in mobile computing. Various security mechanisms have been developed and put in place to counter the threats to which a smartphone user is exposed - one of them is encryption. There are many software and hardware solutions that enable encryption. On top of that are encrypted phones i.e. customized smartphones that are said to be more secure than mass-market phones. All of these products have been produced and used for legitimate reasons. However, criminals also use them as well. Encryption systems based on software and hardware represent the obstacle in criminal investigation, depriving authorities the possibility to gain electronic evidence while conducting search of phone or surveillance of electronic communications (Going dark problem). Also, in several past years the law enforcement agencies throughout the world encountered encrypted phones while investigating serious crime activities. That resulted in proactive approach which is presented and analyzed in this article.

Keywords: criminal procedure, digital evidence, mobile phone, encryption

INTRODUCTION

The increase in usage of smart phones and mobile applications for routine needs gave rise to privacy-related risks. Since a smartphone user is exposed to various threats, mobile device security is of particular concern, aiming to provide the protection against different types of attacks. Security countermeasures in different layers are being developed and applied, and encryption is only one of them. There are many software and hardware solutions enabling encryption, which may be applied to data in transit or to data at rest (in different levels: file, folder, partition or disk; at different location at same time), by different actors (hardware/software manufacturer, service provider or a user) (Pisarić, 2020). The manufacturers have been integrating full-disk encryption into devices as a factory default, so accessing stored data is increasingly challenging - the only way to access encrypted device is to get around the encryption, rather than to break it (Pisarić, 2021). Beside that, many communication

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applications (particularly instant messaging applications) rely more and more on end-to-end (E2E) encryption, as a manner to protect privacy of their users' communications.

On top of that, there are encrypted mobile phones, customized for encrypted communication that are said to be more secure than regular, mass-market phones, since they encrypt all communications, and block unauthorized tracking systems. In 2014 a company called Silent Circle launched the Blackphone (and Blackphone 2 in 2015) - a secure mobile handset, promising users to be able to make encrypted calls and send encrypted messages that could not be eavesdropped (Silent Circle, 2021). Other companies replicated the Blackphone's features afterwards. This industry have become a lively one², and the market is mainly driven by customers' inclination towards better security and reliable transmission of data. These ultra-secure smartphones (also called encryphones, cryptophones etc.) are typically Android devices with a customized operating system, preloaded with applications for secure messaging, and they are designed in such a way that the stored data are encrypted as well. Some of them even have the microphone and camera removed, and other special security features.

Although encrypted phones were originally designed for military usage and have been commercially produced and used for legitimate reasons, a handful of them have been recognized as being used also by criminals. Since reports had shown the increased criminal abuse of cryptophones across many criminal threat areas³, and since these devices are specifically designed and modified with features that frustrated the usual methods by which investigative bodies intercept communications and identify the communicators, the law enforcement agencies (LEA) have engaged in several actions in order to overcome such an investigative obstacle. The LEA managed so far to shutter a number of secure phone companies, but criminals continue to use encrypted phones to communicate, moving from one provider to another.

ENNETCOM

Ennetcom sold customized PGP BlackBerrys. Namely, the devices could only send and receive PGP encrypted email messages with other devices connected to the same Ennetcom network - they could not be used on conventional cellular telephone networks, nor could take pictures, the microphones had either been removed or disabled, and there was even a possible for Ennetcom to remotely "wipe" or erase the contents of any of their devices at any time. Rather, they operated through a system run by Ennetcom, that was generating anonymous email addresses by which the users of these devices could communicate in complete anonymity, while the devices could only operate through a BlackBerry Enterprise Server - i.e. a software package that permits IT administrators, within an organization, to control virtually all functions of BlackBerry devices connected to the network. According to Dutch Public Prosecution Service (2019, May 10), the company sold nearly 19,000 encrypted cell phones at 1500 euros each in a few years.

In the course of investigation against Danny Manupassa, a man who allegedly ran a company, the Dutch police discovered that the keys for the PGP encryption system were generated and stored on

² According to report Ultra-Secure Smartphone Market (2018) in 2016 the global ultra-secure smartphone market was valued at \$818 million and is projected to reach \$4,934 million by 2025, growing at a CAGR of 22.3% from 2018 to 2025. The key players operating in the global ultra-secure smartphone market are ESD Cryptophone, BlackBerry Limited, DarkMatter, Inc., Sirin Labs, Turing Robotic Industries, Boeing, Silent Circle, LLC, and Atos SE.

³ For example, see National Crime Agency (2018)



Ennetcom's server, rather than by the device – that was the lead for the farther course of investigation, according to Ontario Superior Court of Justice (2016). Although PGP encryption, by itself, is unbreakable, it doesn't offer any security if private keys are not secure as well – so, the fact the keys for the PGP encryption system were generated by the company's server, rather by the customers' devices, meant that the complete key management system would be found during the search of the server.

Although the majority of Ennetcom customers were in the Netherlands, the company's servers were in Canada, so on 8 April 2016, the Dutch authorities asked Canada to assist in a criminal investigation. On April 18th 2016 a Canadian judge authorized a search of Ennetcom's server, and in April 2016 police arrested Manupassa, seized company's servers based in the Netherlands and Canada and pulled them offline. Data was made available to the Dutch police on September 19th 2016. By taking down the servers, the police discovered a total of 7TB of data on the central server of Ennetcom in Canada and accessed to the contents of 3.6 million messages stored on that server⁴, which data were processed and analyzed using Hansken, a forensic search engine developed at the Netherlands Forensic Institute.

It is not clear how the servers were identified, but the main question is how the LEA managed to decrypt the PGP-encrypted messages transmitted using the servers, not having the physical access to the devices themselves, and whether they obtained them correctly. Also, many issues on legality, reliability and accuracy of Hansken's use were raised in the course of criminal procedure. Nevertheless, on 19 April 2018 the criminal court in Amsterdam ruled that evidence collected from Ennetcom's servers are lawfully obtained and the use of Hansken is permitted. As a result, Manupassa was convicted to 18 years imprisonment for money laundering and attempted murder (Court of Amsterdam, 2018).

PHANTOM SECURE

Beginning at least as early 2008, the Canadian company Phantom Security Communications had been operating a worldwide encrypted telecommunication network, selling electronic communication devices and encryption service. The company achieved a revenue of \$80 million over its ten years of activity and sold up to 20 000 devices (FBI News (2019, March 16). The company provided encrypted network, selling encrypted devices and service to its clients – at a cost of approximately \$2,000-\$3,000 per six-month subscription. Phantom Secure was operating mainly on the adjusted Blackberry handsets – they removed all of the typical functionality: the hardware and software tools responsible for external communications (a microphone, GPS navigation, camera, internet access and messaging applications) were removed and then PGP software and Advanced Encryption Standard (AES) were installed on top of an e-mail program, which was directing data through encrypted servers located in Panama and Hong Kong. In order to conceal the location of its keys and mail services, the company cloaked them in multiple layers of virtual proxy networks. Only existing clients could recommend new ones, and the company did not request, track or record the users' real names or other identifying information, but instead communicated with them via usernames, nicknames or email handles. After initiating service, the clients would create anonymous mail handle and the company owned domain would be assigned to him, so the email address was created. Phantom Secure devices communicated exclusively on the Phantom Secure network with other Phantom Secure devices, within which the smaller networks were created. On the request of a customer, all information stored on a device (or devices within a close network) could be remotely wiped.

4 Although Ennetcom's servers were reported to have been configured such that messages are wiped/overwritten after 48 hours.



In the course of investigation against Vincent Ramos, the company's CEO, multiple FBI undercover agents met him in 2017, posing as members of a transnational drug trafficking organization who were seeking secure communications and data deletion services. They purchased 10 devices with accompanying services at a cost of \$20,000 for six months and renewed the service for additional \$25,000 afterwards. On May 2018 Ramos was arrested, and authorities shut down the Phantom Secure network, and took over more than 180 web domains it used. The Australian, Canadian, and American LEA executed 30 search warrants across offices associated with Phantom as well as the homes of criminal users of the phones. Ramos and his associates were charged for RICO (Racketeer Influenced and Corrupt Organizations) conspiracy and conspiracy to distribute controlled substances, and in May 2019 he was sentenced to nine years in prison for leading a criminal enterprise that facilitated the transnational importation and distribution of narcotics through the sale of encrypted communication devices and services (Department of Justice, 2019, May 28).⁵

ENCROCHAT

Encrochat, a company based in the Netherlands, offered custom-built phones that sent E2E encrypted messages to one another. The EncroChat phones are essentially modified Android devices in which a special, encrypted operating system, EncroChat OS, is installed (phones were dual boot⁶), as well as encrypted messaging programs which route messages through the company's servers. These devices were presented as guaranteeing perfect anonymity and perfect discretion both of the encrypted interface (being hidden so as not to be detectable) and the terminal itself (the camera, microphone, GPS and USB port were disabled). The devices provided special facilities such as automatic deletion of messages on the terminals, specific PIN code intended for the immediate deletion of all data on the device (a panic wipe feature), deletion of all data in the event of consecutive entries of a wrong password, remote wiping from a distance by the reseller/helpdesk. EncroChat phones did not allow voice calls but only text or picture messages, and instead of using mobile networks, it used a Wi-Fi signal. The devices were sold at international scale at cost of around 1,000 EUR, while the EncroChat service with 24/7 support was priced at 1,500 EUR per six months. In early 2020, EncroChat was one of the largest providers of encrypted digital communication (around 60,000 users) with a very high share of users presumably engaged in criminal activity (Europol, 2020, July 2).

The French authorities started investigating EncroChat phones in 2017, after they began finding them in operations against organized crime groups, and discovered that the network was using servers in France. In April 2020 the joint investigation team (JIT) with LEA of the Netherlands was created. In the Netherlands, under the code name Lemont, and in France, under the code name Emma 95, investigators were following the communications of thousands of criminals, with authorization of magistrates. The interception of EncroChat messages ended on 13 June 2020, when the company sent a warning to all its users with the advice to immediately throw away the phones, and decided to shut itself down entirely. The investigation has so far led to the arrest of 60 suspects, the seizure of drugs and dismantling of synthetic drugs labs, the seizure of dozens of (automatic) fire weapons, expensive watches and 25 cars, including vehicles with hidden compartments, and almost EUR 20 million in cash. The JIT has also passed information to law enforcement in other countries, including in the UK, Sweden and Norway (Eurojust (2020, July 2).

⁵ Ramos's co-defendants remain international fugitives.

⁶ There are two operating systems side-by-side: the devices run on the OTR (Off-The-Record) operating system, but users could alternatively start the Android operating system.



The phrase used in official reports stating that the police “had access to an encrypted data stream” could be read as suggesting that EncroChat’s encryption had been broken, but that’s not what happened. The method used to access the EncroChat systems is still unknown to the public. Supposedly, the police hacked into devices – they managed to install software on the servers that provided the phones with updates, or delivered malware to the phones in another form - either way, infecting devices allowed them to see the unencrypted messages. That let the investigators to go beyond the encryption technique, to infiltrate the network, which made it possible to intercept, share and analyse millions of messages that were exchanged between users – meaning, they read users’ messages written and stored on the device before they were encrypted and sent (Pisarić, 2021). French police said that they had legal authority to deploy this mass hack, while there is a legal mechanism that allows the capture of computer data by such a technical tool without the consent of the interested parties, to access, in any places, computer data, to record it, to keep it and to transmit it. What is not clear is whether the hack/ malware/technical device allowed the authorities to read messages as they were sent (but before they were encrypted) or once they had been received (and after being de-encrypted).

SKY GLOBAL

After the EncroChat network was infiltrated, users opted to switch to a new cryptophone supplier, and that was Sky Global. The company, founded in 2008 and operating from Canada and the US, installed sophisticated encryption software on a device (iPhone, Google Pixel, Blackberry or Nokia), which routed encrypted text messages through its servers in France and Canada, while using proxy servers to hide their location. On the modified devices the camera, GPS, and microphone were disabled, and the application itself was in a “stealth mode”, hidden on the screen of the device. All messages were encrypted using 512-bit elliptical curve cryptography, while network connections were secured by 2,048-bit SSL encryption. The company stored the Sky ECC app in a secure container on the phone, to protect it from malware, such as keyloggers, while no encrypted messages were stored on its servers - the encrypted message sent to unreachable contact would be hold for up to 48 hours, and then it would be deleted. Also, there was the option of self-destructing messages, and if a user would enter a “panic” password, the contents of the device would be immediately deleted. These devices could be bought online or through “authorised partners” for between €900 and €2,000, depending on model, while the subscriptions cost between \$1,200 and \$2,000 for six months. Worldwide, in March 2021 approximately 170 000 individuals used the tool (mainly in Europe⁷, North America, some Central and Latin American countries (mainly Colombia) and the Middle East), around 70,000 phones actively communicated on the SKY ECC network, with around three million messages exchanged each day (Eurojust (2021, March 2021).

After Sky ECC mobile phones had been recognised as being used in increasing number by criminal groups, the Belgian investigation into the tool started at the end of 2018. As of mid-February 2019 the judicial and law enforcement authorities in Belgium, France and the Netherlands were monitoring the criminal use of the Sky ECC communication service tool, which provided insights into hundreds of millions of messages exchanged between criminals. The investigation mirrored the French and Dutch infiltration of EncroChat, by conducting a two-stage attack on the network. In the first phase, the encrypted communications were intercepted and stored. Extensive investigative work, extensive international cooperation and the support of special expertise have been put into finding a way to decipher encrypted communications as much as possible. In a second phase, the content of the de-

⁷ Over 20 percent in Belgium and the Netherlands



encrypted messages was read live for about 3 weeks. On 9 March 2021, a large number of arrests were made, as well as numerous house searches and seizures in Belgium and the Netherlands, several SKY ECC phones were seized from users who could be identified, and also over 1.2 million euros, 15 prohibited weapons, eight luxury vehicles, three money-counting machines, police uniforms and GPS beacons (Police Federal (2021, March 2021). Following the international police operation, a federal grand jury in the US has indicted Sky Global's CEO, Jean-François Eap, on 12 March 2021, along with former phone distributor Thomas Herman, for racketeering and knowingly facilitating the import and distribution of illegal drugs through the sale of encrypted communications devices (according to US District Court, Southern District California (2021, March 12).

Although the Belgian authorities claim they have successfully unlocked the encryption of Sky ECC, which enabled them to decrypt around a billion messages sent by users and to read tens of thousands of Sky messages in real-time (De Staandaard (2021, March 10), the officials have not described how they were able to access Sky ECC message content. Have the police analysed unencrypted metadata, or had access to a limited number of decryption keys? The company claimed that Belgian authorities may have broken into counterfeit code to uncover a network— not Sky ECC, i.e. that someone created a fake phishing application, installed that onto unsecure devices, while the security features of authorized SKY ECC phones were eliminated in these devices, which were then sold falsely branded as SKY ECC through unauthorized channels. This statement raises questions: Which phones and networks were broken into? Did the police hacked, or even created, an insecure imposter device they can monitor, the one that make potential criminals believe they have the encrophone? It remains unclear.

ANOM

After the authorities take down one of these platforms, the users seek a replacement – so after the take-down of Sky ECC in March 2021, there was a migration toward ANoM. The only working application on these devices was the messaging application which came preinstalled, disguised as the calculator function, while the devices themselves were stripped of all other functionality. After entering a code, users could send encrypted text and voice messages, make secure voice calls, share photos, videos, animated GIFs, locations, drawings, and send files of any type. Also, phone owners also had the option to verify their contacts via a QR code, create distribution lists, and chat completely anonymously without even requiring a phone number, according to a listing from the now taken down anom.io website. By May 2021, the phones, which were procured from the black market, had increased to 11,800 in number, of which at least 9,000 were in active use, spanning over 300 criminal syndicates operating in more than 100 countries. Reportedly, the top five countries, where ANoM devices was used, were Germany, the Netherlands, Spain, Australia, and Serbia. The devices cost varied by location, but were generally sold, on six-month subscriptions available for \$1,700 in the United States and Australia, and 1000-1500 EUR in Europe.

However, this was a honeypot tactic, used in covert investigation by the authorities in Operational Task Force, under code name Operation Ironside (AFP), Operation Greenlight (Europol), and Operation Trojan Shield (FBI). Since 2019, the FBI in close coordination with the AFP, strategically developed and covertly operated this encrypted device company, in order to fill the vacuum left by Phantom Secure. The encrypted communications application was monitored in order to collect its users' messages - more than 20 million messages from over 11,800 devices used by suspected criminals. The FBI and the 16 other countries of the international coalition, supported by Europol and in coordination with the US Drug Enforcement Administration, then exploited the intelligence from messages obtained and



reviewed them over 18 months while ANoM's criminal users discussed their criminal activities. The operation resulted in more than 700 house searches, more than 800 arrests and the seizure of over 8 tons of cocaine, 22 tons of cannabis and cannabis resin, 2 tons of synthetic drugs (amphetamine and methamphetamine), 6 tons of synthetic drugs precursors, 250 firearms, 55 luxury vehicles and over \$48 million in various worldwide currencies and cryptocurrencies in June 2021. Acting U.S. attorney in San Diego charged 17 foreign nationals with were charged for RICO conspiracy and criminal forfeiture.

The users believed their ANoM devices were secured by encryption. They were — but every message was also fed directly to law enforcement agents. Supposedly, the FBI recruited a confidential human source, who had previously sold phones from both Phantom Secure and Sky Global to criminal organizations and had invested a substantial amount of money into the development of a new hardened encrypted device to penetrate the crime networks and distribute the devices - the informant agreed to work for the FBI for the possibility of a reduced prison sentence (he developed a “master key” that allowed them to reroute the messages to a third country and decrypt them, and authorities also relied on the informant to get the devices into criminal networks). The informant started in October 2018 by offering the devices to three other distributors with connections to organized crime in Australia (according to US District Court, Southern District California 2021, May 28). The AFP gained lawful access to these encrypted messages using the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018, i.e. executing a man-in-the-middle (MitM) scheme to decrypt and retrieve the messages as they were transmitted (according to US District Court, Southern District California (2021, May 17).

CONCLUSION

The market of super secure phones have flourished in past several years, and although companies state they are only offering a reliable and secure service for any organization or individual that want to secure their information, these devices and accompanying services are used, not only for legitimate, but for criminal purpose as well. Criminal networks have a huge demand for encrypted communication, and beyond regular messaging application that use E2E, they also have a great interest in the customized phones with special security features, which make it difficult for authorities to intercept communications. This has additionally deepened the Going dark problem, so government officials continue to demand that the use of strong encryption by communications networks be banned and only weak encryption - containing a backdoor, thus enabling exceptional access for police upon a court order - be allowed.

The authorities have been targeting companies providing these devices and platforms and its leaders for assisting a criminal organization by providing them with technology to “go dark,” or evade law enforcement's detection of their crimes. In s several successful police operations, in which encrypted platforms have been dismantled, LEA have demonstrated that are able to disrupt even encrypted communications networks. The Phantom, Sky, and Encrochat operations showed that law enforcement may shutdown or even hack into encrypted phone companies. But the Anom case shows that law enforcement will also go one step further: they might run such a network themselves. This supports our point that the police doesn't need built-in backdoors to catch criminals. Providing LEA with backdoor access into platforms would be a dangerous precedent, putting all (even legitimate) users' information in jeopardy. Instead, there is yet another possibility.



Although encryptions from presented examples were marketed as bullet-proof to surveillance, they are not actually – since they were not resistant to the malware, which enabled the LEA to hack into end-point device in order to surveil communication before encryption, or after decryption. However, it remains to be seen whether the results of these operations will be admissible in court.

These cases do not represent the end of encrypted phones – although it may have seemed that criminal groups would not revert to communication via encrypted phones in the near future, soon after one company's shut-down, users go to new provider. Encryptions market will not disappear overnight. While the status, impact and potential legal arguments that can be raised against the admissibility of cryptophone evidence remain uncertain and currently untested, criminal groups will certainly continue to operate and will be awaiting the next device that is able to offer security and anonymity.

REFERENCES

1. Court of Amsterdam (2018). Judgment in case No. 13/997097-16, April 19, 2018. <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:2504>
2. Department of Justice (2019, May 28). Chief Executive of Communications Company Sentenced to Prison for Providing Encryption Services and Devices to Criminal Organizations. <https://www.justice.gov/usao-sdca/pr/chief-executive-communications-company-sentenced-prison-providing-encryption-services>.
3. Eeckhaut, M (2021, March 10). Zware klap voor georganiseerde misdaad: gerecht hackt 'onkraakbare' misdaadtelefoons. De Standaard. https://www.standaard.be/cnt/dmf20210309_93750346
4. Eurojust (2020, July 2). Dismantling of an encrypted network sends shockwaves through organised crime groups across Europe. <https://www.eurojust.europa.eu/dismantling-encrypted-network-sends-shockwaves-through-organised-crime-groups-across-europe>
5. Eurojust (2021, March 2021). New major interventions to block encrypted communications of criminal networks. <https://www.eurojust.europa.eu/new-major-interventions-block-encrypted-communications-criminal-networks>
6. Europol (2021, June 8). 800 Criminals arrested in biggest ever law enforcement operation against encrypted communication. <https://www.europol.europa.eu/newsroom/news/800-criminals-arrested-in-biggest-ever-law-enforcement-operation-against-encrypted-communication>
7. FBI News (2019, March 16). International Criminal Communication Service Dismantled.. <https://www.fbi.gov/news/stories/phantom-secure-takedown-031618>;
8. National Crime Agency (2018). National Strategic Assessment of Serious and Organised Crime. <https://nationalcrimeagency.gov.uk/who-we-are/publications/173-national-strategic-assessment-of-serious-andorganised-crime-2018/file>
9. Ontario Superior Court of Justice (2016). Mutual Legal Assistance in Criminal Matters Act (Re), 2016 ONSC 5699 (CanLII). <https://www.canlii.org/en/on/onsc/doc/2016/2016onsc5699/2016onsc5699.html?searchUrlHash=AAAAAQAIZW5uZXRjb20AAAAAAQ&resultIndex=1>
10. Opnieuw aanhoudingen voor leveren crypto-gsm's aan onderwereld, (2019, May 10). <https://www.om.nl/actueel/nieuwsberichten/@98954/opnieuw-aanhoudingen/>
11. Pisarić, M. (2020). Encryption as an Obstacle for Criminal Investigation and Evidence Collection. Collected Papers of the Faculty of Law in Novi Sad, LIV (3), 1079–1100



12. Pisarić, M. (2021). Mobile phone encryption as an obstacle in criminal investigation – review of comparative solutions. *Annals of the Faculty of Law in Belgrade*, LXIX (2), 415-442
13. Police Federal (2021, March 2021). Des messages décryptés donnent un aperçu unique du fonctionnement des organisations criminelles. <https://www.police.be/5998/fr/actualites/des-messages-decryptes-donnent-un-apercu-unique-du-fonctionnement-des-organisations>
14. Silent Circle (2021). <https://www.silentcircle.com/looking-for-blackphone/>
15. Ultra-Secure Smartphone Market by Operating System (Android and iOS) and End User (Government Agencies, Aerospace & Defense, and Enterprises) - Global Opportunity Analysis and Industry Forecast, 2018-2025 (2018). <https://www.alliedmarketresearch.com/ultra-secure-smartphone-market>
16. US District Court, Southern District California (2021, March 12). Indictment in Case No. '21 CR822 GPC. <https://cryptome.org/2021/03/sky-indictment.pdf>
17. US District Court, Southern District California (2021, May 17). Application for a warrant by a telephone or other reliable electronic means in Case No. '21 MJ01948. <https://storage.courtlistener.com/recap/gov.uscourts.casd.707623/gov.uscourts.casd.707623.1.0.pdf>
18. US District Court, Southern District California (2021, May 28). Indictment in Case No. '21 CR1623 JLS. <https://int.nyt.com/data/documenttools/anom-indictment/17316f82c405ed83/full.pdf>





ABUSE OF SUBJECTIVE PROCEDURAL RIGHT TO ATTORNEY

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Abstract: In this paper the author deals with instances of abuse of procedural law in court proceedings. The basic thesis of the paper is the legal understanding, bringing under the legal norm the phenomenon that has been noted in practice but that has not been legally defined and that is the engagement of attorneys in court proceedings by persons who do not need an attorney, only to create additional costs that will be awarded to represented persons at the end of the proceedings. The author qualifies this procedural situation as an abuse of the subjective procedural right to attorney in court proceedings. Abuse is shown in civil, criminal and executive court proceedings by the method of modeling. The final part of the paper presents the consequences of abuse, the legal reaction of the court to the observed abuse.

Keywords: Court proceeding, attorney, abuse of right, abuse of procedural right.

INTRODUCTION

Before our courts, there is a shameless robbery of citizens who owe fees for utilities, vehicle parking services (Beta, 2016), for delivered gas (Ivanišević, 2012), water, electricity, and it is committed by public companies that provide utilities, parking services, or companies that distribute gas, water, electricity, which hire attorneys at law to sue the debtor citizens. Businesses are entitled to this. The creditor company has the right to hire an attorney in court proceedings for certain or all procedural actions. However, in this way, the costs of the procedure, which are reflected in the fee for the services of a lawyer, calculated according to the valid lawyer's tariff, are added to and charged to the amount of the basic debt that the debtor has to pay.

The phenomenon is decades-long, territorially comprehensive and massive (Beta, 2020). It has not been noticeable to that extent before, but with the declining standard of living and increased efficiency of debt collection by hiring public executors over the past decade it has become noticeable among the lay public, through appeals of consumer associations to stop the described practice (Danas Online, 2018; Insajder, 02/12/2019).

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This resulted in the fact that in some cities, the decisions of the city authorities forbade utility companies from their territories to hire attorneys in disputes against citizens-debtors (E.V.N., 2014; Todorović, 2017).

An interesting review of the phenomenon is the public address of the Protector of Citizens to the city authorities of Belgrade in December 2019, during which he asked them if they were familiar with the practice of Public Utility Company Infostan Technology to hire law firms for forced collection. On that occasion, the Protector of Citizens stated that the circumstance that the executive debtors of communal services, in addition to the costs of public executors, are additionally burdened by the costs of lawyers whose services are not necessary in specific cases “justifiably raises suspicion that this is an abuse of rights [...] deterioration of the already economically unenviable position of executive debtors of communal services” (Insajder, 10/12/2019).

It should be said that the Protector of Citizens was right. The described conduct of utility companies in the executive court proceedings is an abuse of rights, more precisely, an abuse of the subjective procedural right to an attorney.

THE RIGHT OF PARTICIPANTS IN THE PROCEDURE TO AN ATTORNEY

A participant in court proceedings has the right to an attorney. In civil proceedings, the parties may (have the right to) take action in person or through an attorney, who must be a lawyer.² Exceptionally [...] the attorney of a legal entity may be a law graduate who has passed the bar examination, who is permanently employed in that legal entity.³ In the criminal procedure law, this is said even more specifically: the aggrieved party,⁴ also aggrieved as a prosecutor,⁵ also a private prosecutor ⁶ *has the right to* [...] hire an attorney from the ranks of lawyers.

The right to an attorney is the right to legal aid. The purpose of the right to an attorney is to provide effective legal assistance to the right holder, the person represented in the procedure. Therefore, the purpose of the attorney, *his right duty* in court proceedings (civil, criminal) is to effectively provide legal assistance to a legally ignorant participant in the proceedings, realization and protection in the proceedings in the best faith of procedural and substantive interests of the represented person.

Furthermore, this means that the right to an attorney will be exercised, i.e. an attorney will be hired, by the person who needs such legal assistance, and that is a procedurally legally ignorant participant in the procedure. *A contrario*, the right to an attorney in the proceedings will not, i.e. should not be exercised by a participant in the proceedings who does not need such legal assistance; the category of such includes all legally educated persons who have the knowledge necessary to participate in court proceedings (law graduates, lawyers who have passed the bar examination).

² Article 85, paragraph 1, Law on Civil Precedure, Official Gazette of the Republic of Serbia, no. 72/2011, 49/2013 – OUS, 74/2013 – OUS, 55/2014.

³ Article 85, paragraph 2, Law on Civil Precedure.

⁴ Article 50, paragraph 1, point 3, Criminal Procedure Code, Official Gazette of the Republic of Serbia no. 72/2011, 101/2011, 121/2012, 32/2013, 45/3013 and 55/2014.

⁵ Article 58, paragraph 1, point 3, Criminal Procedure Code.

⁶ Article 64, paragraph 1, point 3, Criminal Procedure Code.



ON THE ABUSE OF SUBJECTIVE PROCEDURAL RIGHTS IN GENERAL

First of all, although abuses of procedural rights have been investigated for decades (Fischer, 2010), in procedural theory there is no generally accepted concept of procedural abuse, abuse of subjective procedural rights in court proceedings (Трубникова, 2015). As a consequence, comparatively legally speaking, there is no procedural law that would contain a normative definition of procedural abuse (Nicotra, 2008), that is, which regulates the limits of exercising subjective procedural rights (Fischer, 2010).

In theory, there are requirements and attempts to develop a general concept of abuse of procedural rights that would be applicable to all court proceedings. It is certain that a selection of characteristics of procedural abuses are extensible to court proceedings and that there seems to be a concept of abuse of procedural rights that has common characteristics in relation to all jurisdictions, but assumes inevitable specifics and adaptations within certain jurisdictions, in the function of different structure and subject of the procedure (Comelli, 2012).

According to the opinions expressed in theory (Scarpantoni, 2015; Nacul, 2014), but also in practice,⁷ the doctrine of procedural abuse is based on the general theory of abuse of rights, because the abuse of procedural rights is only a part of the abuse of rights in general, as a whole. According to the general theory, abuse of rights is an act that would – otherwise – represent the content of an authority, if – in a given case – it is not, as harmful (individual, diffuse or public interest), legally unrecognized or prohibited due to motive, action, manner or worthlessness, and therefore sanctioned (Vodinelić, 1997). In other words, abuse of rights is an action of the holder of the right that is allowed in abstracto, but in this particular case it is not because it is harmful to someone else's interest and because of the existence of one or more reasons that make it abuse. These reasons, the constituents of abuse are: chicanery, namely, when exercising the right, the holder of the right is guided by the intention to harm another; uselessness, namely, the right is exercised without any justified or any significant interest; lack of interest, namely, by exercising the right, an interest is realized that is disproportionately less valuable than the interest of another who is harmed in the process; counter-purpose, namely, the right is exercised in order to achieve an interest that is not in accordance with the purpose of the right; inappropriateness, namely, the right is exercised in a way that is unnecessarily burdensome for another; contradiction, namely, the right is exercised in a manner contrary to other holder of the right's behavior; immorality, namely, the exercise of rights is contrary to social morality; unfairness, namely, the exercise of rights is at odds with fairness (Vodinelić, 1997). These constituents are, in fact, types of abuse of rights, forms in which abuse of rights manifests itself in practice.

Abuse of rights is not a right, it is not an exercise of a right; it is a non-right, therefore it is not allowed. If it is committed, it should be sanctioned. If we accept this and apply it to the procedural legal relationship, we will try to determine the definition of abuse of subjective procedural rights in court proceedings, based on the material one. Abuse of rights in court proceedings (procedural abuse) could be defined as a *procedural action* (doing, not doing) of participants in the proceedings that could *in abstracto* correspond to the legal description of the procedural possibility that constitutes the content of procedural authority, if in a specific procedural situation it is not harmful (to an individual, diffuse or publicly protected interest), legally unrecognized or prohibited due to motive, action, manner or invalidity.

⁷ Cass. Pen., Sez. un., 29.9.2011. (dep. 10.1.2012), N. 155/12, point 15. of the reasoning of the judgment under the title: L'abuso del processo; the text of the judgement is available at: <http://www.penalecontemporaneo.it/upload/S.U.%20Rossi%20DPC.pdf>, accessed on 04.06.2016.



We come to a more difficult question: what are the constituents and forms of abuse of subjective procedural rights in court proceedings? In other words, what are the circumstances that turn an *otherwise* lawful procedural action - if there are any in *a specific case*, due to motive, action, manner of performance or insignificance - into a procedural abuse? Yet again, to put it differently, if the abuse of a right - any right - is a step outside, a departure of the holder of the right not from the form, but rather from *the essence of the right*, and the transition to non-right - to something that cannot and must not be done - what are the limits of the subjective procedural law that the holder of the right must not overstep or else he/she shall no longer be exercising the right, but rather abusing it?

In the first paragraph of this section, we stated that neither the legislator, nor the theory, except for rare partial opinions (Камышникова, 2011), have an answer to these questions.

In the explanation of the mentioned judgment of the Supreme Court of Cassation of Italy, Cass. Pen., Sez. un., 9/29/2011 (dep. 10.1.2012), the Court said that in qualifying whether a procedural action, in civil or criminal proceedings, is an abuse of procedural law, one should start from the general notion of abuse of rights as the use of rights for purposes, interests that are objectively different, harmful in relation to the interests for the realization of which the right is given by objective law. In other words, the target, the target purpose of the right is the limit of exercising subjective procedural rights. Subjective procedural rights are given to the participants in the procedure in order to use them in accordance with their purpose (Юдин, 2005), in order to actualize the interests for which those rights are intended. If the holder of the right by exercising procedural right seeks to achieve some other interest (legal or not protected by law) for which that right is not intended, then he is not exercising a subjective right, but an abuse of procedural right.

Therefore, in court proceedings, abuse of counter-targeted exercise of procedural rights is possible (as a *type of abuse of procedural rights*).

In previous presentations related to the theory of abuse of rights, we have stated that chicanery, harassing the exercise of rights, is a special type of abuse of rights. The exercise of a right is defined as chicanery if the right is exercised only to harm another participant (chicanery in the narrow sense), or primarily just to use chicanery as it is (chicanery in the broad sense) (Vodinelić, 1997).

The use of chicanery in exercising procedural right exists when the holder of a subjective procedural right exercises the right only or predominantly to harm another participant in the proceedings. A. V. Yudin (А. В. Юдин) believes that using chicanery in the course of exercising procedural rights is a type of procedural abuse that is characteristic of both civil and criminal proceedings. This type of procedural abuse is called *unfounded initiation of proceedings* (Юдин, 2006). Therefore, the use of chicanery in exercising procedural right always exists when a court procedure (litigation, criminal) is initiated and is conducted due to an action (e.g. civil offence of interference with the right to use a road, which from the criminal aspect manifests itself as a criminal offense of vigilantism) that has not been committed, when the event which is the subject of the procedure is fabricated, and the plaintiff conducts the procedure only for the reason of causing the greatest possible damage to the other party (defendant, the accused). The damage to the other party is manifested in the actual damage in the form of costs for hiring a lawyer (attorney, legal representative); in the fact that he was deprived of the salary he lost due to spending time in court instead of at work. Non-financial damage is manifested in mental suffering due to the fact that, although innocent, he is obliged to appear in court and defend himself from false accusations, to prove that the accusations are unfounded and false. The damage to the public interest is manifested in the unnecessary involvement of the judiciary: each initiation requires high costs.



This is just one typical example of chicanery in exercising procedural rights. Thus, we can say that in court proceedings it is possible to use chicanery when exercising procedural rights (as a *form of procedural abuse*).

We can conclude that there are procedural abuses, i.e. *types of procedural abuse* extendable to all court proceedings (litigation, criminal, administrative).

ABUSE OF THE SUBJECTIVE PROCEDURAL RIGHT TO AN ATTORNEY IN COURT PROCEEDINGS

Abuse of the subjective procedural right to an attorney implies conscious action of two executors: a participant in the procedure who possesses the professional knowledge necessary for the realization of his / her interests in the court procedure (represented person) and his / her attorney. Abuse is typical of civil proceedings. It is manifested in such a way that a plaintiff *who does not need professional legal assistance* (because he has the professional knowledge necessary to pursue his interests in court proceedings, i.e. a permanently employed law graduate with a bar examination) formally hires an attorney to perform certain or all procedural actions for the sake of obtaining effective legal assistance, but only with *the intention* of making the costs of the proceedings as high as possible with the formal presence of an attorney in the proceedings. The costs of the proceedings shall be awarded to him by the court at the expense of the other party.

For example, AA, who is a lawyer, sued another person for a well-founded, certain debt. AA wrote the lawsuit himself, but, in order to make the costs of the procedure as high as possible, he asked his colleague BB, also a lawyer, to put his facsimile on the lawsuit, so he faked that his attorney made and charged the lawsuit. At the same time, he issued a power of attorney to BB to represent him in the procedure, not because he needs professional legal assistance from a lawyer (of which lawyer BB is aware), but *in order* to make the costs of the procedure as high as possible. At each hearing before the court, plaintiff AA and his attorney BB appear together. Nevertheless, all procedural actions in the procedure are undertaken by AA, while the attorney BB is passively present in the courtroom. Each time BB, the attorney, appears in court costs a certain amount of money, and there is a presumption that AA paid for BB's representation service according to the applicable lawyer's tariff. At the end of the procedure, the court will oblige the defendant to pay the main debt to the plaintiff AA, who won the dispute, as well as the total costs of the procedure, i.e. those incurred by hiring an attorney. It can easily happen that these costs of the procedure exceed the value of the basic debt, due to which the lawsuit was filed in court, many times over.

Why is this considered to be a procedural abuse? From the aspect of form, the plaintiff's actions seem to be *the usual exercise of the right to an attorney*: the plaintiff has formally, based on the objective norm that gives him that right, hired an attorney, and the lawsuit contains a facsimile of the attorney. There is a power of attorney in the case file for representation by an attorney. However, in the specific case, *from the aspect of content*, the right was not exercised for the purpose for which it was intended (for obtaining professional legal assistance), but only *with the intention* to harm the other party, to harm it by incurring costs of the proceedings. Abuse is complete, total only if the attorney *consciously and passively participates* in its execution with the intention of harming another. Why passive? Simply, from the aspect of form, his presence in the procedure is perfect (there is his facsimile on the lawsuit, there is a power of attorney authorizing him to perform the right-duty of representation, he is present before the court), but *from the aspect of content* of performing the right-duty of representation *he does*



nothing. The described procedural situation is procedural abuse both from the aspect of the represented person and from the aspect of the attorney; their acts of abuse are complementary, that is, they commit abuse as co-perpetrators (Давидовић, 2019).

According to the manner, this is an example of using chicanery in the abuse of the procedural right to an attorney, because it is done with the intention of harming, damaging another party. From the aspect of the goal (Давидовић, 2019), i.e. what the perpetrators wanted to achieve through such an abuse, this is a procedural abuse which is used to obtain benefits for themselves and / or others.

Under the same conditions as in litigation, the abuse of the right to an attorney can be done in criminal proceedings. If a plaintiff (or injured party, or injured party as a plaintiff) is a person who has the professional knowledge to participate in court proceedings (lawyer, judge, public prosecutor, deputy public prosecutor, public attorney, deputy public attorney, prosecutor's associate, public attorney's associate, etc.) or a company that employs a law graduate with a bar examination, and the indictment or some other submission was allegedly made by a lawyer, and if, at each main trial hearing, in addition to the represented person, his attorney is present (passively present in courtrooms) – there is a great probability that in this particular case there is an abuse of the right to an attorney in court criminal proceedings.

The abuse of the procedural right to an attorney has its expansion, an explosion in the executive court procedure. Consequently, the same procedural abuse is committed in exactly the same way by public companies that perform utility services when in the executive court procedure – although they employ law graduates who are able to initiate the procedure and represent the interests of the company in it – they hire an attorney to make a proposal for execution. In fact, in all specific cases, the initial act (proposal for execution) is made in the legal department of the company, by the company's lawyers, yet at the same time supplied with a facsimile of the lawyer and thus claims to be made by an attorney (Protić, 2018); at the end of the motion for execution, the cost price of the composition of the motion made by the attorney is stated and is in accordance with the lawyer's tariff. This is done exclusively in order to create the illusion that the company has paid the attorney's fee for making a proposal for execution, i.e. that the company has to pay the costs of the procedure. In reality, neither the attorney made a motion for enforcement, nor did the company incur any costs arising from the proceedings. The company then submits a proposal for execution to the executor, who makes a decision on execution, collects from the debtor the main debt and the costs of the enforcement procedure and pays this money to the company. The company pays the amount collected for the costs of the enforcement procedure to the attorney. There are certain circumstances that assure us that the attorney then returns part of the money, usually in the amount of 50%, which he received from the company as compensation for the composition of the proposal for execution. This could be an official obligation according to the contract made between the attorney and the company when he got the job (Danas Online, 2018; E.V.N., 2014), or it could be an unofficial return of money to people who simply authorized him to represent the company (Todorović, T., (2017). Due to the massive occurrence of this abuse in the executive court proceedings, it is a source of great property benefit, both for lawyers and for utility companies, i.e. directors of these companies.

LEGAL REACTION TO THE ABUSE OF THE PROCEDURAL RIGHT TO AN ATTORNEY

The legal order has a negative attitude towards abuse of rights. Abuse of rights is not allowed. The prohibition of abuse of procedural rights in court proceedings is prescribed by the provision of the Law on Civil Procedure: “The court is obliged to prevent and punish any abuse of rights of the parties in the proceedings”,⁸ and the provision of the Criminal Procedure Code: “The court is obliged [...] to prevent any abuse of rights aimed at delaying the proceedings”.⁹

Whether there is an abuse of the procedural right to an attorney in each specific case should be decided by the court, *ex privato*, upon the objection of the other party or *ex officio*. Legal provisions relating to the prevention, disabling, and punishment of procedural abuses are *ius cogens*; the court must apply them in each particular case.

Assuming that the court noticed an abuse of procedural rights to an attorney during the proceedings, we believe that the court should determine the existence of abuse in a specific case by a special decision. The dictum of this decision should read: “It is established that NN and PP, his/her attorney, abused the procedural right to an attorney by the fact that NN hired PP as his/her attorney only to cause the costs of the procedure.” If in this procedural situation the court opts only for this declaration, then in criminal and civil proceedings this is a procedural decision on the minutes of the main trial/hearing, in respect of which the parties, i.e. the interested person has no right to a special appeal.

This is followed by the sanctioning of procedural abuse. The basic sanction of this procedural abuse consists in the fact that the court will deny legal recognition and protection of abuse by not recognizing the costs of the procedure incurred in the name of hiring an attorney to the represented person who committed the abuse. In other words, the court will not recognize or award the costs of the proceedings that the represented person allegedly had on the basis of hiring an attorney. In criminal and civil proceedings, this sanction will be contained in the reasoning of the verdict, in the part that refers to the reasoning of the decision on the costs of the procedure, with a reference to the procedural decision (from the minutes of the main trial/hearing) which determines the existence of abuse.

The Law on Civil Procedure prescribes the obligatory *general* punishment of perpetrators of procedural abuses¹⁰ by a fine.¹¹

The reasons of expediency and procedural legal technique speak in favor of the fact that, in civil proceedings, the court makes a decision on punishing procedural abuse together with the decision which determines its existence. Therefore, paragraph 1 of the decision should read: “It is established that AA and his attorney BB abused the procedural right to an attorney by hiring the attorney BB only to cause costs of the proceedings”; paragraph 2 of the decision should read: “AA is fined for the procedural abuse in the amount of 100,000 dinars, which he is obliged to pay in favor of budget funds within 15 days upon receiving the decision”; and paragraph 3 of the decision should read: “The attorney BB is fined for the procedural abuse in the amount of 100,000 dinars, which he is obliged to pay in favor of budget funds within 15 days upon receiving the decision.” This decision should be made by the court as a special one and its copy with the right to appeal should be delivered to the participants in the procedure.

8 Article 9, paragraph 2, Law on Civil Procedure.

9 Article 14, paragraph 1, Criminal Procedure Code.

10 Article 9, paragraph 2, Law on Civil Procedure.

11 Article 186, Criminal Procedure Code.



In the enforcement proceedings, the court (IPV board), deciding on the debtor's complaint, will primarily determine by the same decision (resolution) that the company AA and its attorney BB abused the (procedural) right to an attorney by hiring the attorney BB only to cause the costs of the proceedings; paragraph 2 will change the decision on execution of the public executor / court in the part of the decision on the costs of the enforcement proceedings by reducing it by the amount recognized to the creditor as compensation to the attorney for the composition of the proposal for execution; paragraph 3 of the decision should read as follows: "Company AA is fined for the procedural abuse in the amount of 200,000 dinars, which is obliged to pay in favor of budget funds within 8 days upon receiving the decision"; paragraph 4 of the decision would read: "BB is fined for the procedural abuse in the amount of 100,000 dinars, which he is obliged to pay in favor of budget funds within 8 days upon receiving of the decision." This decision must be made by the court as a separate one and its copy with the right to appeal should be delivered to the participants in the procedure

When it comes to the lawyer, there is another type of sanctioning procedural abuse. It is the filing of a disciplinary report against the lawyer for a procedural abuse. In addition to procedural laws, attorneys are explicitly prohibited from committing procedural abuses in court proceedings by law and bylaws governing the legal profession.¹² The performance of procedural abuse in court proceedings by an attorney is considered to be a violation of Rule 39.2. Code of Professional Ethics of Lawyers, which explicitly states that "a lawyer must not resort to procedural abuses ...", and that any "violation of the Code is the basis of disciplinary responsibility of a lawyer" (Rules 2.1, 2.3 and 2.5 of the Code). Therefore, in each specific case, whenever it is established that the attorney has committed procedural abuse, the court is obliged to submit the decision establishing this fact along with the disciplinary report to the Bar Association for the purpose of conducting disciplinary proceedings against the lawyer.

CONCLUSION

Abuse of the subjective procedural right to an attorney in court proceedings exists when a participant in a procedure who does not need an attorney (because he has the knowledge to act in the procedure, i.e. a permanently employed law graduate with a bar examination) formally hires an attorney solely to incur costs. The costs will be awarded to the represented person at the end of the proceedings. This procedural abuse implies the conscious participation of two persons participating in the procedure: the represented person who commits the abuse actively, by doing, and the attorney, who participates in the abuse passively, by not doing so. According to the manner, this is an example of using chicanery in the abuse of the procedural right to an attorney, because it is done with the intention of harming, damaging another party. From the aspect of the goal, i.e. what the perpetrators wanted to achieve through such an abuse, this is a procedural abuse which is used to obtain benefits for themselves and / or others.

This procedural abuse can be committed in any court proceeding. In practice, it is particularly common in the enforcement proceedings; it consists of public companies that provide utilities and lawyers, in such a way that the company, which as a creditor in the enforcement proceedings realizes its well-founded claim from the citizen – debtor, although it employs law graduates with a bar examination, hires an attorney to compile proposals for enforcement only in order to create the highest possi-

¹² Law on Advocacy (Official Gazette of the Republic of Serbia, nos. 31/2011 and 24/2012 – decision of the Constitutional Court), Statute of the Serbian Bar Association (Official Gazette of the Republic of Serbia, nos. 85/2011, 78/2012 and 86/2013) and Code of Professional Ethics of Lawyers (Official Gazette of the Republic of Serbia, no. 27/2012).



ble costs of the procedure, which the body of the procedure will recognize and collect from the debtor in his favor at the end of the procedure.

Abuse of rights is not allowed. It is the duty of the court to qualify and determine the existence of abuse and its perpetrators in each specific case, *ex privato* or *ex officio*, to sanction it by not acknowledging to the represented person the costs of the proceedings on the basis of representation by an attorney, and if the law prescribes – to fine the perpetrators, and, as a final point, inform the Bar Association about the procedural abuse in order to initiate disciplinary proceedings against the attorney for the committed abuse.

REFERENCES

1. Comelli, A., (2012), *Labuso del processo, con particolare riferimento al processo tributario*, Periodico: Diritto e pratica tributaria, 2012. I, 755-783.
2. Fischer, T, (2010), *Konfliktverteidigung, Mißbrauch von Verteidigungsrechten und das Beweisantragsrecht*, StV 8/2010, 30 Jahre Strafverteidiger, 423-428.
3. Камышникова, И. В., (2011), *Сущность и признаки злоупотребления правом в уголовном судопроизводстве*, Правовые проблемы укрепления российской государственности, Часть 51, Издательство Томского университета, 20-24.
4. Nicotra, L., (2008), *Labuso del processo tra regole deontologiche ed esigenze di economia processuale*, Seminario interdisciplinare sul tema Etica, economia e diritto, Genova, 12 dicembre 2008.
5. Юдин, А. В., (2005), *Злоупотребление процессуальными правами в гражданском судопроизводстве*. СПб.: Издательский Дом С.-Петерб. гос. ун-та. Издательство юридического факультета С.-Петерб. гос. ун-та.
6. Юдин, А. В., (2006), *Злоупотребление процессуальными правами в гражданском и уголовном судопроизводстве: межотраслевой анализ*, Lex Russica (научные труды МГЮА), № 5/2006, 976-987.
7. Scarpantoni, C., (2015), *Tesi: Labuso del processo: configurabilità e sanzioni*, Luiss Guido Carli, Libera Università Internazionale degli Studi Sociali, Anno Accademico 2014/2015.
8. Шебанова, Н. А., (2002), *Злоупотребление процессуальными правами*, Арбитражная практика № 5/2002, 49.
9. Protić, D., (2018), *Problemi i prepreke za pristup pravdi u izvršnom postupku iz perspektive zaštite potrošača*, Centar za evropske politike, Beograd, 37.
10. Трубникова, Т. В., (2015), *Злоупотребление правом в уголовном процессе: критерии и пределы вмешательства со стороны государства*, Вестник Томского государственного университета. Право. №3 (17)., 65-78.
11. Vodinić, V. V., (1997), *Takozvana zloupotreba prava*, Beograd, 217-218.
12. WEB SOURCES
13. Beta, (2016, 19 May), Niš: Koliko pravnika ima Parking servis, a koliko advokata, Radio-televizija Vojvodine, available at: https://www.rtv.rs/sr_lat/drustvo/nis-koliko-pravnika-ima-parking-servis-a-koliko-advokata_719951.html, accessed on 25.08.2020.



14. Beta, (2020, 20 January), SRS: Izvršitelji i advokati da prestanu sa pljačkom Novosađana, Danas, available at: <https://www.danas.rs/politika/srs-izvršitelji-i-advokati-da-prestanu-sa-pljackom-novosadjana/>, access on 25.08.2020.
15. Cass. Pen., Sez. un., 29.9.2011. (dep. 10.1.2012), N. 155/12, point 15. of the reasoning of the judgment under the title: "L'abuso del processo"; the text of the judgement is available at:
16. <http://www.penalecontemporaneo.it/upload/S.U.%20Rossi%20DPC.pdf>, accessed on 04.06.2016.
17. Danas Online, (2018, 9 December), Efektiva: JKP Infostan nastavlja sa nezakonitim ponašanjem na štetu građana, Danas, available at:
18. <https://www.danas.rs/drustvo/efektiva-jkp-infostan-nastavlja-sa-nezakonitim-ponasanjem-na-stetu-gradjana/>, accessed on 25.08.2020.
19. Давидовић, М., (2019), *Злоупотребе процесних права у кривичном поступку*, Докторска дисертација, Универзитет у Крагујевцу, Правни факултет, 293 et seq; available at <http://www.jura.kg.ac.rs/index.php/sr/disertacije-uvjed-javnosti.htm>.
20. E.V.N., (2014, 8 May), Zašto javna preduzeća i pored svojih pravnika angažuju advokatske kancelarije, Novosti, available at:
21. <https://www.novosti.rs/vesti/srbija.73.html:490727-Zasto-javna-preduzeca-i-pored-svojih-pravnika-angazuju-advokatske-kancelarije>, accessed on 25.08.2020.
22. Insajder, (2019, 2 December), Efektiva: Komunalnim preduzećima zabraniti angažovanje advokata u postupcima protiv potrošača, Insajder, available at: <https://insajder.net/sr/sajt/vazno/16264/>, accessed on 25.08.2020.
23. Insajder, (2019, 10 December), Zaštitnik građana od Infostana traži objašnjenje za angažovanje advokata u postupcima protiv potrošača, Insajder, available at: <https://insajder.net/sr/sajt/vazno/16349/>, accessed on 25.08.2020.
24. Ivanišević, A., (2012, 31 October), Distributer gasa reketira potrošače, Danas, available at: <https://www.danas.rs/ekonomija/distributer-gasa-reketira-potrosace/>, accessed on 25.08.2020.
25. Nacul, I., *El abuso procesal. Poderes, Deberes y Facultades del juzgador como garante de un proceso sin dilaciones*, Universidad del Norte Santo Tomas de Aquino. Available at: www.judicialdelnoa.com.ar/doctrina/tesis_dra_nacul.doc, accessed on 17.10.2014.
26. Todorović, T., (2017, 12 March), Nema više ja tebi, ti meni, Politika, available at: <http://www.politika.co.rs/sr/clanak/376025/Srbija/Nema-vise-ja-tebi-ti-meni>, accessed on 25.08.2020.

DEFERRING OF CRIMINAL PROSECUTION IN THE CRIMINAL PROCEDURAL LAW OF SERBIA, MONTENEGRO AND CROATIA WITH SPECIAL REFERENCE TO THE INSTRUCTIONS OF THE PROSECUTOR'S ORGANIZATIONS¹

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Abstract: Deferring of criminal prosecution belongs to so-called diversion methods of resolving criminal proceedings. This institute was introduced into the criminal procedure systems of the Republic of Serbia, Montenegro, and Croatia at approximately the same time. As this was an entirely new institute, there was no previous prosecutorial practice or criteria that would help in the concretization and implementation of the legal provisions themselves. This resulted in the issuance of bylaws – instructions for improving the implementation of this institute by the prosecutor's organizations. Therefore, although the legal regulation of this institute is of primary importance, the fact that it is also regulated by instructions issued by the prosecutor's organizations, which provide additional guidelines in its implementation, should not be ignored. Aiming to offer a complete review of this topic, this paper will present and analyze the provisions found not only in the laws but also in the bylaws of the above countries and point out their similarities and differences while providing specific suggestions *de lege ferenda* in relation to Serbian procedural law.

Keywords: the principle of opportunity, deferring of criminal prosecution, legal regulations, instructions of the prosecutor's organization.

1 Dedicated to Mila, for the time I denied her while writing this paper.

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INTRODUCTION

In the theory of criminal procedure, the principle of legality is defined as the obligation of the prosecuting authority to prosecute criminal cases as soon as all the conditions prescribed by law are met.³ On the other hand, the principle of opportunity is the antithesis of the principle of legality, and it essentially prescribes that the public prosecutor may decide not to prosecute a criminal case even though both real and legal conditions have been met. Instead, they may assess the expediency of prosecution with regard to the public interest in each individual case. Thus, the core of the principle of opportunity is the public prosecutor's discretionary assessment, which must not be arbitrary or partial (Бркић: 2013: 77).

In the past, the principle of legality used to be applied without exception: criminal offenses which by their gravity, manner of execution or consequences did not pose great danger from the perspective of public interest could not be excluded from the regular criminal procedure. However, modern criminal procedure is also characterized by certain diversion methods which "deviate" from the path of the obligatory general procedure. One of these methods is the conditional deferring of criminal prosecution, which is also in theory referred to as conditional opportunity. Essentially, it refers to the public prosecutor's authority to defer criminal prosecution against suspects by ordering them to meet one or more legally prescribed obligations within a certain period and, when a suspect agrees and complies voluntarily with the prosecutor's order, the public prosecutor is obliged to dismiss the criminal charges.

The principle of opportunity was introduced into the criminal procedure systems of the Republic of Serbia, Montenegro, and Croatia at approximately the same time, at the end of the 20th and the beginning of the 21st century. It is important to note that since it was a new procedural institute, there was no direct experience in its application, and therefore no prosecutorial practice, nor guidelines or criteria that would help in the implementation of legal provisions. For that purpose, and in order to ensure the legality, efficiency, and uniformity of the practices of all public prosecutors, prosecutorial organizations adopted bylaws in the form of instructions. Therefore, although the law is the main grounds for the application of conditional deferring of criminal prosecution, we should also consider the bylaws adopted by the prosecutorial organizations of these countries, which contain additional conditions, criteria, and guidelines for prosecutors regarding the application of this institute.

In this sense, the next sections of this paper are dedicated to the content and analysis of laws and bylaws related to the deferring of criminal prosecution in Serbia, Montenegro, and Croatia. We believe that we will provide a comprehensive analysis of this important topic in this manner, while the breakdown of comparative regulations in this area will specify potential shortcomings in our procedural law and offer better, more accurate, and more efficient solutions.

DEFERRING CRIMINAL PROSECUTION IN THE REPUBLIC OF SERBIA

Deferring criminal prosecution of adult criminal offenders was introduced into the criminal procedure legislation of the Republic of Serbia by the Criminal Procedure Code from 2001, which entered into force on 28 March 2002.⁴ Pursuant to this law, a criminal prosecution could be deferred in the case of criminal offenses for which a fine or imprisonment of up to three years is prescribed (Art.

³ For example: Cigler (1995: 22-23).

⁴ Official Gazette of the FRY, 70/2001 and 68/2002 and the Official Gazette of RS.



236, par. 1). If the suspect agreed to comply with one or more of the measures imposed by the public prosecutor, and if they did so within a maximum period of six months, the criminal charges would be dismissed by a ruling. The suspect could be ordered to comply with one or more of the following measures (Art. 236, par. 1, item 1 - 4): 1) to remove the harmful consequence caused by the criminal offense or to provide compensation for the damage caused; 2) to pay a certain amount of money to a humanitarian organization, fund, or public institution; 3) to perform certain socially useful or humanitarian work or 4) to fulfill maintenance obligations which have fallen due. The consent of the injured party for deferring criminal prosecution was required for the measures from items 2 and 3, while the consent of the injured party for the obligations from items 1 and 4 was not required. If the suspect fulfilled the obligations within the given deadline, the public prosecutor would issue a ruling to dismiss the criminal charges. In such a case, the injured party could not continue the criminal prosecution after that, nor were they entitled to any appeal against such a decision of the public prosecutor.

Several changes to this law followed after that, and we will discuss the most important ones. The amendments from 2004⁵ prescribe that a criminal prosecution may be deferred only with the consent of the court. Such amendments to Art. 236 of the CPC brought into question the operation of the principle of opportunity as the public prosecutor's discretionary right (Киурски, 2015: 108). The two new measures prescribed that the suspect may be subjected to alcohol or drug abuse treatments (Art. 236, par. 1, item 5), or undergo psychosocial treatment (Art. 236, par. 1, item 6). The amendments from 2009⁶ expand the possibilities for deferring criminal prosecution to criminal offenses carrying a sentence from three and five years in prison, but only with the consent of the court, while the consent of the court was not required for criminal offenses punishable by up to three years in prison. The list of measures that can be imposed on a suspect was additionally expanded (Art. 236, par. 1, item 6-8): 1) to undergo psychosocial treatment; 2) to fulfill the obligation prescribed by the final court decision, i.e. to comply with the restriction determined by the final court decision, 3) to pass the driving test, attend additional driving training or complete another appropriate course. This amendment also introduced the possibility of substituting the injured party's consent by the fulfillment of the measures from items 2 and 3 of the CPC. Namely, when the public prosecutor assesses that the injured party, who was fully compensated for the damage caused, for obviously unjustified reasons does not agree that the suspect may fulfill such obligations, and the public prosecutor finds that the performance of such obligations is expedient, they will ask the court council to prescribe those obligations. If the council prescribes these obligations, and the suspect fully complies with them, the prosecution will be deferred, and the injured party cannot continue the criminal prosecution after the decision to dismiss the criminal charges. A significant change/extension of the scope of the public prosecutor's discretionary assessment, and of the procedure after the indictment, was the possibility of the public prosecutor to, with the consent of the court in charge of the trial, drop the criminal charges for criminal offenses punishable by a fine or jail time of up to three years, if the defendant fulfills one or more of the above-mentioned measures (Art. 236, par. 6). This is actually a conditional deferring of the already initiated criminal procedure. For criminal offenses punishable by between three and five years in prison, the prosecutor was allowed to act in the manner described, but only with the consent of the extra-procedural council (para. 7). Additionally, we would like to point out another significant change which was a radical modification of the regulation of criminal charges, by which the principle of opportunity became the main principle for certain crimes, and not a deviation from the principle of legality (Bejatović *et al.*, 2012: 14). Namely, when criminal charges were filed for a criminal offense for which a fine or prison sentence of up to three years is prescribed as the principal penalty, the public prosecutor was obliged to examine the possibility of deferring the criminal prosecution before filing the motion to indict or the motion for investigation before the mo-

5 Official Gazette of RS, 58/2004.

6 Official Gazette of RS, 72/2009.



tion to indict. For this purpose, the prosecutor was allowed to speak to the suspect and the injured party, as well as other persons, i.e. to collect other necessary information. Additionally, the prosecutor was obliged to compile an official report on these matters (Art. 236, par. 9 of the CPC). We believe such a provision was introduced with two goals in mind: on the one hand, it required the application of Art. 236 of the CPC in the case of criminal offenses punishable by up to three years in prison. On the other hand, it ensured that the public prosecutor's decisions on the application of the principle of opportunity are monitored (Mirkov: 2012: 489).

The applicable Criminal Procedure Code from 2011⁷ brought changes in relation to previous laws. First of all, deferring criminal prosecution is possible for criminal offenses for which a fine or imprisonment of up to five years is prescribed, and the suspect may be required to fulfill one or more of the following obligations (Art. 283): 1) to remove the harmful consequence caused by the criminal offense or to provide compensation for the damage caused; 2) to pay a certain amount of money to the account specified for the payment to the public funds, used for humanitarian or other public purposes; 3) to perform certain socially useful or humanitarian work; 4) to fulfill maintenance obligations which have fallen due; 5) to undergo withdrawal from alcohol or drugs; 6) to undergo psychosocial treatment in order to treat the causes of violent behavior; 7) to comply with the obligation established by a final court decision, i.e. to comply with the restriction determined by a final court decision. Therefore, it can be concluded that the option of deferring criminal prosecution has been extended to criminal offenses punishable by up to five years in prison, whereby the public prosecutor is no longer obliged to seek the consent of the court or the injured party in any part of the procedure, so the application of this institute now depends entirely on the public prosecutor's discretionary assessment. Starting from the idea that procedural roles should be separated, we believe that the decision on criminal prosecution, and thus on deferring criminal prosecution, is justifiably left to the public prosecutor's exclusive jurisdiction. On the other hand, we believe that the public prosecutor, as the person whose jurisdiction is the protection of the injured party's rights, among other things, will adequately protect the interests of the injured party (Илић *et al.*, 2013: 652). It is noticeable that the list of measures that can be imposed on the suspect does not include the obligation to take a driving test, attend additional driving training or complete another appropriate course. Also, the form of the document in which the public prosecutor defers the criminal prosecution was prescribed for the first time (Art. 283, par. 2): in the order for deferring criminal prosecution, the public prosecutor will determine the deadline within which the suspect must comply with the assumed obligations; the deadline has been extended to a maximum of one year, instead of six months. If the suspect fulfills the obligations imposed by the order within the deadline, the public prosecutor will dismiss the criminal charges and notify the injured party. In this case, the provision that allows that an objection to this decision may be filed directly to the higher prosecutor will not apply. It is important to note that the applicable Code no longer prescribes that the public prosecutor is obliged to examine the possibility of deferring criminal prosecution for a criminal offense punishable by a fine or imprisonment of up to three years, which made the principle of opportunity an exception again, and not the main principle that coexists with the principle of legality of criminal prosecution (Bejatović *et al.*, 2012: 14). Finally, a significant change is also the fact that, according to the applicable law, there is no possibility of conditional withdrawal from criminal prosecution which has already commenced. Formally, this had never been the typical application of the principle of opportunity in criminal prosecution (Шкулић, 2013: 81).

In order to achieve legality, efficiency, and uniformity in the practices of public prosecutors, the Public Prosecutor's Office of the Republic of Serbia (Serbian: RJT)⁸ has issued several instructions regulating

7 Official Gazette of RS, Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 and 62/2021.

8 Hereinafter: RJT.



deferred criminal prosecutions. They provide important guidelines for the application of this institute, achieve uniformity in conduct, unification of prosecutorial practice, greatly facilitate control in these cases, while limiting arbitrariness and reducing the possibility of abuse in this type of case.

The RJT's instruction no. A 246/08-01 dated 28 March 2019 prescribes that starting from 1 April 2019, public prosecutor's offices may independently and directly enter information on persons to whom Art. 283 and Art. 284, par. 3 of the CPC apply into the database of the Judicial Information System, and it specifies the obligation to enter these data without delay, i.e. to update the database daily.⁹ Starting from that date, public prosecutor's offices are obliged to independently and directly, using this database, check whether the reported person has already been entered into the electronic record database of deferred criminal prosecutions and dismissed criminal charges. Pursuant to the Instruction, the principle of opportunity cannot be applied to the reported person if that measure has already been applied twice for the same criminal offense. Additionally, if the reported person has been entered in the records for another criminal offense, the public prosecutor will make a decision considering all circumstances. In this way, the procedure for checking the reported person was greatly streamlined. In the past, the prosecutor's office considering the application of the principle of opportunity sent a letter with the reported person's information to the RJT office (which was undoubtedly swamped with requests of this type, because this office was the only one authorized to decide on them). After that, the report on whether the person is in the records was sent, also by mail, to the prosecutor's office which requested the check. The whole procedure lasted for several days, while the information requested by the new system is obtained within a few minutes.

The RJT also adopted the General Mandatory Instruction no. A 2/19 dated 22 July 2019, which prescribes that when applying the institute of deferring criminal prosecution for the crime of unauthorized possession of narcotics under Art. 246a, par. 1 of the Criminal Code¹⁰, public prosecutors may offer the suspect to accept an obligation (or one of them) to undergo drug withdrawal if required by the circumstances of the case and when the conditions are met. This instruction is based on the RJT Instruction no. A 478/10 dated 24 February 2011, which prescribes that it is necessary to examine the conditions for deferring criminal prosecution in the case of the above mentioned criminal offense, but only if the narcotic in question is marijuana in the amount of up to 5 grams. This instruction from 2019 stipulates that for the criminal offense of construction without a construction permit from Art. 219a of the CC and the criminal offense of tax evasion under Art. 229, par. 1 of the CC (now Art. 225, par. 1 of the CC) it is no longer possible to defer criminal prosecution¹¹, because these are criminal offenses for which a sentence of imprisonment and a fine are stipulated cumulatively, which excludes the application of Art. 283 of the CPC.

In the first years after the introduction of this institute into our legal system, criminal prosecutions were not deferred at all¹² or were deferred rarely. Today, it is a generally accepted institute and is applied by all public prosecutors' offices on the territory of the Republic of Serbia. In 2020, a total of

9 The above-mentioned instruction amended the RJT Instruction no. A 246/08 of 28 August 2008, which prescribed that these records shall be maintained by the RJT, so the public prosecutor was obliged to check whether the reported person was entered into the records of the Public Prosecutor of the Republic of Serbia.

10 Official Gazette of RS, Nos. 85/2005, No. 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019. Hereinafter referred to as: CC.

11 Pursuant to the opinion of RJT from 26 November 2010, in the case of the criminal offense of tax evasion under Art. 229, par. 1 of the CC, it was possible to defer criminal prosecution after the tax obligation was subsequently discharged.

12 The institute of conditional deferred criminal prosecution, for example, was not applied in the Basic Public Prosecutor's Office in Kikinda in the period from 2003 to 2005 (Mirkov, 2012: 490), nor was it applied in the prosecutor's offices in Mladenovac, Obrenovac, and Lazarevac (Kiurski, 2009) between 1 January 2003 until 31 December 2007.



57,629 criminal charges were dismissed in the territory of the Republic of Serbia, out of which 15,152 charges (26.29%) were dismissed pursuant to Art. 283 of the CPC, and a total of 506,051,761.00 dinars were paid.¹³ According to the 2011 amendments, the funds received in terms of the provision of Art. 283, par. 1, item 2 of the CPC, shall be granted to the humanitarian organizations, funds, public institutions or other legal entities and natural persons, upon conducted public tender, which shall be announced by the ministry competent for the judiciary.

The impression is that the provisions of the CPC referring to the deferral of criminal prosecution do not adequately regulate the rights and position of the injured party. Their consent to the implementation of this institute is no longer sought, nor are they able to seek a review of the public prosecutor's decision to implement this institute through a legal remedy. The law does not even provide for the obligation of the public prosecutor to notify the injured party about their decision to implement this institute or that the deferring of criminal prosecution is in progress. Given that the maximum deadline for the execution of measures imposed on the suspect is one year, the injured party may find themselves in a situation where they are oblivious to the stage of the criminal proceedings, or whether this institute has been implemented at all, which may, in turn, affect their other rights, primarily their right to compensation. If the suspect complies with the ordered measures, the legal obligation of the public prosecutor consists only of notifying the injured party that the suspect had acted on the order of the prosecution and that the criminal charges have been dismissed. Therefore, the public prosecutor is under no obligation to deliver to the injured party the decision terminating the procedure or to inform them that they have the option of pursuing their restitution claim through civil action. The ruling on a dismissal of the criminal complaint, as a document terminating the procedure of deferring the criminal prosecution, bears significance for the injured party, as it contains the basis for the dismissal of criminal charges, identifies the suspect, and qualifies their actions legally in terms of the criminal offence that injured or endangered the personal or property rights of the injured party. Such legislation regarding the position of the injured party is not in line with some international sources, such as the Council of Europe Recommendation No. R (87) 18 concerning the simplification of criminal justice (adopted by the Council of Ministers on 17 September 1987)¹⁴, according to which one of the obligations of the authority conducting proceedings, when implementing the deferral of criminal prosecution, is to consider the position of the victim. Likewise, Directive No. 2012/29 of the European Parliament and of the Council of 25 October 2012¹⁵ establishing minimum standards on the rights, support, and protection of victims of crime, stipulates, in Art. 11, that the injured party may request a review of the decision not to prosecute and that they have the right to obtain additional information in writing, without delay, based on which they will decide whether to request a revision of the decision not to prosecute. One of the aspirations of this Directive is to take significant steps towards raising the level of protection of victims throughout the European Union, especially in criminal proceedings, so it is evident that improving the position of the injured party when it comes to the deferring of criminal prosecution will be necessary to harmonize the normative framework of Serbia with the requirements of the EU accession process.

13 RJT Report on the performance of public prosecutor's offices in crime prevention and upholding the Constitution and legality in practices in 2020 (http://www.rjt.gov.rs/docs/rad_javnih_tuzilastava_2020_0421.pdf, accessed on 15 July 2021).

14 <https://rm.coe.int/16804e19f8> (accessed on 29 September 2021).

15 <https://eur-lex.europa.eu/eli/dir/2012/29/oj> (accessed on 29 September 2021).



DEFERRING CRIMINAL PROSECUTION
IN THE REPUBLIC OF MONTENEGRO

The reform of criminal procedural law in Montenegro began even before its independence from the State Union of Serbia and Montenegro, so that at the end of 2003, Montenegro adopted its Code of Criminal Procedure¹⁶ which was mainly modeled on the 2001 Criminal Procedure Code. The new Code retains all of the good solutions from the previous criminal procedural legislation, so in a sense, it continues the evolution of the previous criminal procedural legislation (Radulović, 2015: 59).

This Code introduced the possibility for the public prosecutor to defer criminal prosecution for criminal offenses punishable by a fine or up to three years in prison if the suspect accepts to fulfill one or more of the following obligations (Art. 244, para. 1): 1) to remove the harmful consequence caused by the criminal offense or to provide compensation for the damage caused; 2) to pay a certain amount of money to a humanitarian organization, fund, or public institution; 3) to perform certain socially useful or humanitarian work or 4) to fulfill maintenance obligations which have fallen due. The measures from items 1 and 2 do not require the consent of the injured party, while the measures from items 3 and 4 require such consent. This article provides additional conditions that must be met in order for this institute to be applied: the prosecutor must decide that it will not be expedient to conduct criminal proceedings, depending on the nature of the crime and the circumstances under which it was committed, the perpetrator's previous life and his personal qualities. Therefore, some of the conditions are objective in nature and refer to the crime, while others are subjective in nature and refer to the suspect's personality (Radulović, 2017: 298).

The public prosecutor determines the above-mentioned obligations by a ruling which must be delivered to the suspect, the injured party (if any), or to the humanitarian organization or public institution to which the decision pertains. The injured party and the suspect may file an objection to this decision of the public prosecutor directly with a higher public prosecutor's office within eight days from the receipt of the decision (Art. 244, para. 3). If the suspect complies with the prescribed obligation(s) within the maximum period of six months, the public prosecutor will dismiss the criminal charges, the injured party will have no right to undertake or continue criminal prosecution, and the public prosecutor shall notify the injured party about the above-mentioned fact before they accept the settlement (Art. 244, para. 6).

The provisions on deferring criminal prosecution were amended in 2009¹⁷, by adopting a new and currently applicable Code of Criminal Procedure. The most significant changes included the extension of the scope of this principle's application to criminal offenses punishable by up to 5 years in prison, and allowing the injured party or suspect to file an objection directly to a higher public prosecutor's office.

In addition to the provisions of the CPC, deferring criminal prosecution is specified in more detail by bylaws. Pursuant to the provisions of the CPC from 2003, this document was issued in the form of an instruction by the Supreme Public Prosecutor, while the amendments from 2009 stipulate that the Ministry of Justice shall closely regulate the fulfillment of obligations, the content of the decision on deferring, as well as the application of these provisions. Accordingly, the Rulebook on deferred criminal prosecution was adopted in 2010.¹⁸ The provisions of this Rulebook closely regulate various issues that are important for deferring criminal prosecution. For example, the Rulebook contains provisions relating to the manner of summoning a suspect to accept an obligation, which may also be done by

16 Official Gazette of the Republic of Montenegro, 71/2003.

17 Official Gazette of the Republic of Montenegro, 57/2009.

18 Official Gazette of the Republic of Montenegro, 60/2010.



telephone or other means of electronic communication, at which point the suspect is notified that criminal prosecution will be initiated should they fail to comply with the summons. The Rulebook also regulates the manner in which suspects may give statements, the manner in which the injured party is summoned to give consent and obtain consent, as well as the content of the ruling on deferring criminal prosecution. It is interesting that the Rulebook stipulates that if the suspect and injured parties are not able to respond to the summons, due to illness or other justified reasons, the statement or consent will be obtained in the place where the suspect or the injured party are located, or they will be provided transportation to the building of the competent public prosecutor's office or another place where the statement or consent can be given. Additionally, the Rulebook regulates mediator assignment for determining certain obligations, as well as the manner in which the obligations in the deferred procedure are fulfilled, for each prescribed obligation. Special records are kept for the cases of deferred criminal prosecutions.

When analyzing the frequency of application of deferring criminal prosecution against adults in Montenegro, it can be concluded that this institute was almost never applied until 2007 (on these grounds, only 4 rulings on dismissal of criminal charges were issued in 2005, while 26 such rulings were adopted in 2006). The records show that in the period between 2005 and 2015, this institute was most often applied in 2012, when out of a total of 4345 dismissed charges, 1000 charges were dismissed on the grounds of the principle of opportunity, which amounts to 23.01%. In 2015, out of a total of 3038 dismissed charges, 437 charges were dismissed by deferring criminal prosecution, i.e. 16.13% of charges (According to: Radulović, 2017: 301, 302).

DEFERRING CRIMINAL PROSECUTION IN THE REPUBLIC OF CROATIA

This institute was first introduced into the Croatian criminal procedure system by the provision of Art. 175 of the 1997 Criminal Procedure Code.¹⁹ Pursuant to the provisions of this Article, the public prosecutor was able to defer the commencement of criminal proceedings if the suspect agreed to fulfill one or more of the following obligations: 1) to perform any action that will help repair or compensate for the damage caused by the criminal offense; 2) payment of a certain amount to a public institution, for humanitarian or charitable purposes, or to a fund for compensation of damages to victims of criminal offenses; 3) fulfillment of the maintenance obligations which have fallen due; 4) performing work for the common good (in case of suspects who are not jailed); 5) undergoing treatment for drug or other addiction in accordance with special regulations. The law did not specify a deadline for meeting the prescribed obligation. It is interesting that the law determined the scope of criminal offenses to which this institute can be applied in a qualitative way, and not quantitatively, e.g. by specifying the duration of the stipulated penalty (Burić, Pleić, Radić, 2021: 85). Thus, a criminal prosecution could be deferred if criminal charges were filed for a lesser offense whose harmful consequences are absent or insignificant, which means that the criminal prosecution is not in the public interest. However, the decision to defer criminal prosecution did not depend only on the prosecutor's assessment and the suspect's consent. The competent court's council was also required to approve the prosecutor's decision to defer a criminal prosecution (Art. 175, par. 2 and 3). When the suspect fulfilled the obligation imposed on them, the public prosecutor issued a ruling dismissing the criminal charges, and the decision was delivered to the injured party and the person/institution which filed the charges, while the injured party was notified that they may pursue their restitution claim through civil action (Art. 175, par. 5). This

19 Official Gazette of RH, No. 110/97.



institute could be applied even after the prosecutor filed the indictment, at the stage of lodging objections against the indictment. Following its development, it can be concluded that the new changes in this legal document have continuously prolonged the stages of its application. Pursuant to the 2002 amendments, a criminal prosecution could also be deferred at the stage of preparation for the main hearing. The applicable CPC²⁰ has extended its application until the end of the main hearing (Gjoni, Sirotić, 2016: 160), so that the public prosecutor shall, if the suspect/defendant fulfills the imposed obligation, dismiss the criminal charges by a ruling, or decide not to prosecute, and inform the court about it (Art. 206d, par. 4). *Argumentum a contrario*, if the obligation is not fulfilled, the public prosecutor shall commence or continue the criminal prosecution (Pavlović, 2017: 582).

In 2002, amendments to the CPC were adopted,²¹ and they brought several changes: 1) deferring criminal prosecution became limited to criminal offenses that carry a fine or up to three years in prison; 2) judicial review was excluded from the application of this institute, but the injured party's consent was now required; 3) a new measure was introduced – obligatory psychosocial therapy in order to treat violent behavior, in which case the suspect consents to live separately from their family during the treatment.

In 2008, a new CPC was adopted²², and we would like to point out the most important changes. First of all, the institute of deferring criminal prosecution was moved from the section dedicated to pre-investigation proceedings to the section of the law that regulated the summary proceedings, in Art. 522 of the CPC. Additionally, the scope of application was extended to criminal offenses which carry a fine or up to 5 years in prison, and for the first time, the law formally stipulated that there must be a reasonable suspicion that a criminal offense has been committed. Finally, for the first time, the law stipulated that the deadline for complying with the prescribed obligation cannot be longer than one year.

The amendment to the CPC from 2013²³ gave the institute of deferring criminal prosecution a legal form in which it is still applied today. Its systematics has been changed again so that it is now listed with the provisions for preliminary proceedings and regulated by Article 206d of the CPC. However, there have been no other changes of the formal conditions for its application, application procedures, lists of measures that may be imposed on the suspect, or the deadline for their fulfillment which we have already mentioned. The suspect's consent and the injured party's prior consent are the constitutive elements for the public prosecutor's decision on conditional deferring of criminal prosecution (Krapac, 2020: 105).

In order to collect data on bylaws regulating the conditional deferred criminal prosecution of adults, we sent a request to the Public Prosecutor's Office of the Republic of Croatia to exercise the right to access information, and we were informed that no special instructions had been issued to prosecutors for this field²⁴, and that this matter is regulated by the Handbook for Public Prosecutors (2012: 173-175). Pursuant to this handbook, the public prosecutor may defer criminal prosecution only if he/she assesses that the purpose of the proceedings can also be achieved in that manner. Whether the principle of opportunity will be applied depends on the specific case and the prosecutor's analysis of the finding of fact in the file, and no degree of culpability (intent, negligence) is excluded in advance when making a decision. When deciding on this matter, there should be a high degree of certainty that

20 Official Gazette of RH, Nos. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14 and 70/17.

21 Official Gazette of RH, No. 58/02.

22 Official Gazette of RH, No. 152/08.

23 Official Gazette of RH, No. 145/13.

24 The Public Prosecutor's Office of the Republic of Croatia issued special instructions for this institute in relation to the practices of public prosecutors for minors and to criminal charges filed against legal entities. See: Sirotić: 2012: 166.



the suspect has committed the criminal offense with which they have been charged. In order for the public prosecutor to be able to make a decision on deferring the commencement of criminal proceedings, they must take a written statement in writing, i.e. the prior consent of the victim or injured party. Also, the public prosecutor must verbally inform the victim/injured party that if they give their prior consent, they lose the right to continue the prosecution under this article, but that they may pursue their restitution claim through civil action. The next step includes the suspect accepting the obligation, and a separate record must be made in the form of a statement before the public prosecutor, which will specify the deadline for the fulfillment of these obligations. The supervision over the obligations is entrusted to the Probation Offices, the exception being the case when the suspect is ordered to pay a one-time fee. In that case, the public prosecutor will require from the suspect to provide them with proof that the obligation has been met. It is recommended to interview the suspect first, and then to take a statement from the injured party.

The analysis of the application of this institute in the procedural law of the Republic of Croatia established that its application is extremely rare. For example, in the period from 2003 to 2010, the total percentage of charges that were dismissed on these grounds was only 1.1%, although this percentage increased year on year (Sirotić, 2012: 196). In 2017, out of a total of 15,557 dismissed criminal charges, only 260 (1.7%) were dismissed after the criminal prosecution was deferred. In theory, the reason for the almost non-existent application of this institute is the relatively complicated and lengthy procedure (Carić, 2009: 611; Sirotić, 2012: 206; Garačić, Novosel, 2018: 538).

CONCLUSION

The institute of deferring criminal prosecution was introduced into the criminal procedure systems of the listed countries within a few years – first in Croatia in 1997, then in Serbia in 2001, and finally in Montenegro in 2003.

The analysis of this institute's development in the above-mentioned countries shows that the initial regulations changed to expand the list of crimes for which it is possible to defer a criminal prosecution. In Serbian procedural law, a criminal prosecution is deferred by an order, and by a ruling in the legal systems of the other two countries. With regard to the measures that can be imposed on the suspect, Montenegrin law specifies only four measures, Croatian law recognizes six, while Serbian law stipulates seven.

An important difference is the status of the injured party with regard to the public prosecutor's decision to defer a criminal prosecution. Namely, pursuant to applicable Serbian law, this institute is completely under the jurisdiction of the public prosecutor, and neither the injured party nor the court has any influence on it. On the other hand, Croatia has a completely different law: a criminal prosecution cannot be deferred unless the victim or the injured party has previously given their consent. This also might be the reason why the institute is rarely implemented, because it follows that, if there is no consent, the criminal prosecution shall be continued. Additionally, Croatian law does not stipulate whether the injured party's consent can be substituted in any way if they withhold their consent for an unjustified reason, as was the case, for example, in Serbian law after the adoption of the 2009 amendment to the CPC. This regulation in Montenegrin law is somewhere between the two solutions mentioned above: the injured party's consent is necessary for the fulfillment of certain measures, but not for all. Therefore, in that case, the prosecutors decide using their discretion.



Analyzing the bylaws of prosecutorial organizations, we can conclude that there is only one Rulebook in Montenegro, and its adoption resolved all the most important issues related to deferring criminal prosecutions in one place. On the other hand, the legal systems of Croatia and Serbia include several instructions and guidelines. Thus, we believe that it would be useful, for the purposes of practicality and uniformity of practice, to consolidate all instructions into one document, as is the case with the plea agreement institute, which is regulated in detail in a single regulation in both countries.

Having in mind the regulations on deferring criminal prosecutions in the legal systems of Croatia and Montenegro, which might improve the quality of regulations of this institute in our law, we would like to point out the provision stipulating that the ruling on deferring criminal prosecutions is also delivered to the injured party (Montenegro), i.e. to the injured party, victim and the person/institution which raised the criminal charges, with the notice that the injured party may realize their restitution claim through civil action (Croatia). Since Serbian law stipulates that the injured party may be notified only after the ruling to dismiss the criminal charges has been made, we believe that it would be expedient, for the purpose of protecting their rights, to inform the injured party as soon as the procedure of deferring criminal prosecution has begun. In this way, the injured party would know the stage of the proceedings, and since the deadline for fulfilling the obligation can be quite long (up to a year), they would know the suspect's deadline for fulfilling the obligation and the estimated time of resolution of the proceedings, so that they may pursue their rights through civil action. In order to protect the injured party's rights, we believe that the injured party should be provided with a copy of the ruling to dismiss the criminal charges, which clearly identifies the person whose criminal prosecution was deferred, the event that was the subject of the criminal charges and the legal qualification of the suspect's actions. Additionally, we believe that the provision by which this institute can be applied until the end of the trial (Croatia), should be re-introduced into our law and that it was unjustifiably omitted by the previous amendments to the law. Although, formally speaking, in this case charges are being dismissed and the criminal prosecution is not deferred (because it has already begun), we believe that this would help lessen the excessive burden of the judiciary and relieve the courts' caseload. If in the meantime the prosecution and the suspect reach an agreement on the fulfillment of some of the obligations, the procedure could be shortened, whereby material and human resources would be re-directed to the prosecution for more severe criminal offenses. Of course, when regulating this option legally, care should be taken to protect the injured party's interests.

REFERENCES

1. Bejatović S. *et al.* (2012). *Primena načela oportuniteta u praksi – izazovi i preporuke*. Beograd: Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije.
2. Бркић С. (2013). *Кривично процесно право II*. Нови Сад: Правни факултет у Новом Саду.
3. Burić Z., Pleić M, Radić I. (2021). Conditional deferral (and withdrawal) of criminal prosecution from national and comparative legal perspective. *Pravni vjesnik*, 37 (1), 83-104.
4. Carić M. (2009). Uvjetni odustanak od kaznenog progona. *Zbornik radova Pravnog fakulteta u Splitu*, 46 (3), 601-611.
5. Cigler S. (1995). *Načelo legaliteta i oportuniteta krivičnog gonjenja*. Novi Sad: Pravni fakultet.
6. Directive 2012/29/EU of the European parliament and of the Council of 25 October 2012, Downloaded September 29, 2021, <https://eur-lex.europa.eu/eli/dir/2012/29/oj>.



7. Garačić A., Novosel D. (2018). *Zakon o kaznenom postupku u sudskoj praksi – Knjiga prva*. Rijeka: Libertin.
8. Glasnović Gjoni V., Sirotić V. (2016). Uvjetni odustanak od kaznenog progona i praksa Općinskog suda u Puli – Pola. *Pravni vjesnik*, 32 (3-4), 157-181.
9. Илић Г., Мајић М., Бељански С., Трешњев А. (2013). *Коментар Законика о кривичном поступку*. Београд: Службени гласник.
10. Izveštaj Republičkog javnog tužilaštva RS o radu javnih tužilaštava na suzbijanju kriminaliteta i zaštiti ustanovnosti i zakonitosti koji se odnosi na postupanje u 2020. godini, Downloaded July 15, 2021, http://www.rjt.gov.rs/docs/rad_javnih_tuzilastava_2020_0421.pdf.
11. Kiurski J. (2009): *Načelo oportuniteta krivičnog gonjenja u postupku prema punoletnim učinocima krivičnih dela*. Materijal sa edukativnog treninga Oportunitet krivičnog gonjenja kao instrument efikasnosti krivičnog postupka i izricanja alternativnih krivičnih sankcija (Kaštel Ečka 12.3.2009).
12. Киурски Ј. (2015). *Начело опортунитета кривичног гоњења*. Докторска дисертација. Правни факултет Универзитета у Београду.
13. Krapac D. (2020). *Kazneno procesno pravo: Prva knjiga – Institucije*. Zagreb: Narodne novine.
14. Krivični zakonik RS. Službeni glasnik RS, Nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.
15. Mirkov Ž. (2012). Načelo oportuniteta krivičnog gonjenja. *Glasnik Advokatske komore Vojvodine*, 84 (7-8), 482-498.
16. Opšte obavezno uputstvo Republičkog javnog tužilaštva RS br. A 2/19 od dana 22.7.2019. godine.
17. Pavlović Š. (2017). *Zakon o kaznenom postupku*. Rijeka: Libertin.
18. Pravilnik o odloženom krivičnom gonjenju RCG, Službeni list RCG, 60/2010.
19. *Priručnik za rad državnih odvjetnika* (2012). Zagreb: Državno odvjetništvo Republike Hrvatske.
20. Radulović D. (2015). *Krivično procesno pravo*. Podgorica: Pravni fakultet.
21. Radulović D. (2017). Načelo oportuniteta krivičnog gonjenja u krivičnoprocesnom zakonodavstvu Crne Gore. *Crimen*, 8 (3), 290-304.
22. Recommendation No. R (87) 18 of the Committee of Ministers to member states concerning the simplification of criminal justice (Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies), Downloaded September 29, 2021, <https://rm.coe.int/16804e19f8>.
23. Sirotić V. (2012). Uvjetna odgoda kaznenog progona punoljetnog počinitelja kaznenog djela. *Hrvatski ljetopis za kazneno pravo i praksu*, 19 (1), 161-207.
24. Uputstvo Republičkog javnog tužilaštva RS br. A 246/08 od 28.8.2008. godine.
25. Uputstvo Republičkog javnog tužilaštva RS br. A 478/10 od 24.2.2011. godine.
26. Uputstvo Republičkog javnog tužilaštva RS, br. A 246/08-01 od 28.3.2019. godine.
27. Zakonik o krivičnom postupku RS, Službeni list SRJ, 70/2001 i 68/2002 i Službeni glasnik RS, 58/04, 85/05, 115/05 i 49/07.
28. Zakon o izmenama i dopunama Zakonika o krivičnom postupku RS, Sl. glasnik RS, 72/2009.

29. Zakonik o krivičnom postupku RS, Sl. glasnik RS, br. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 i 62/2021.
30. Zakonik o krivičnom postupku RCG, Službeni list RCG, 71/2003
31. Zakonik o krivičnom postupku RCG, Službeni list RCG 57/2009, 49/2010, 47/2014.
32. Zakon o kaznenom postupku RH, Official Gazzete RH, 110/97.
33. Zakon o kaznenom postupku RH, Official Gazzete RH, 152/08.
34. Zakona o kaznenom postupku RH, Official Gazzete RH, 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14 i 70/17.
35. Đurđić V., Subotić D. (2010). *Procesni položaj javnog tužioca i efikasnost krivičnog gonjenja*. Beograd: Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije.
36. Шкулић М. (2013). *Основне новине у кривичном процесном праву Србије*. Београд: Правни факултет.



PROBATION ADVICE IN SERBIA AND THE NETHERLANDS

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Abstract: The aim of this paper is to exchange knowledge and experience between a judge from Serbia and a public prosecutor from the Netherlands. The following questions will be addressed: In which cases in the Netherlands is a probation advice requested and in which cases not? What are the indications and/or guidelines? For what offences and for what offenders might probation advice be used? What alternative sanctions and measures can be proposed? Who can request for an advice of the Probation Service and what is the procedure? What are the content and form of the advisory report, what subjects are described? As for the function of the probation advice: in which way is it used and what are the advantages? The paper contains the analysis of cases in the Netherlands and Serbia and describes how the parties involved would deal with these cases in either Serbia and in the Netherlands, juxtaposing the similarities and differences. Finally, the paper contains the analysis of the possibilities and modalities of the application of the probation advice and alternative sanctions in the criminal procedure and the procedure for the execution of criminal sanctions in the Republic of Serbia and in the Netherlands.

Keywords: alternative sanctions, probation advice, Probation Service, personal circumstances of the defendant, sentence, justice chain

INTRODUCTION

The concept of alternative measures is based on the belief that by their implementation multiple goals can be achieved: an imposition of the sanction, rehabilitation of the offender as well as the reparation of the damage and an active policy of social help for the offender.

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Modern trends in the fight against crime are increasingly directed towards organised social activity of a preventive nature. This is reflected in the strengthening and development of the attitude towards perpetrators of the criminal offenses in the attempt to return them, more successfully and as soon as possible, as full members to the society by strengthening special criminal law prevention, and in weakening the classical retributive element in punishment. In general, there are changes in understanding and the meaning and content of the sentence. The notion of the punishment in the past as a pure retaliation, the punishment without a further aim, evolved into a penalty aiming to achieve socially useful goals – the protection of society from crime through reintegration of perpetrators and the compensation of the victim.

Probation service in the most countries acts and cooperates with the court and the prosecution in all phases of criminal procedure (Tigges, 2018). The assessment of sentences is very important for both the offender, on whom the sentence is imposed, and the public. Accordingly, the offender himself is a factor that significantly affects the process of sentencing as an individual. Taking the personality of an offender as a determinant in the process of sentencing, we come to the point of the individualization of a sentence.

Advice to the court on sentencing has traditionally been a key part of the probation officer's role. Reports of the Probation Service delivered to judges and prosecutors at their request, in the phase of imposing a sentence or deciding on an alternative sanction or pre-trial detention would be of great use. Probation advice would make it easier to decide on the criminal offense or on the merits of detention. The reports would give a much more complete picture of the personality and personal circumstances of the defendant. All this is of significant importance for the decision of the court and the public prosecutor on the application of the alternative sanction or a sentence of imprisonment.

The topic of this paper is the review of the relationship between the probation service and the judiciary in the Netherlands and the possibility of engaging the Probation Service in criminal proceedings in the Republic of Serbia before the imposition of a criminal sanction (in the form of providing advice and recommendations to judges or public prosecutors on the pronouncement of an alternative sanction). In this regard, the paper discusses the legal possibilities in Serbia: Does the court or public prosecutor under the Serbian Criminal Procedure Code have the authority to request a report on the personality of the defendant from the Probation Officer in the pre-trial criminal proceedings or in the phase of the main trial (before the decision on the criminal sanction)? What are the content and form of the report, what subjects are described? Concerning the function of the probation advice: in which way is it used and what are the advantages? These main characteristics of probation advice will be illuminated. The results on implementation of probation advice in the Netherlands, in the Serbian legal system and in the key international documents will be shared. The Dutch Probation Service is an independent service, and in cooperation with the prosecution has permanent place in the justice chain. It acts and cooperates with the court and prosecution in all phases of criminal procedure. In the Netherlands, the reports on the personal circumstances of the defendant are received from the Prosecution Service and the law allows the prosecutor or judge to use this information before deciding on the type and length of the criminal sanction. The data is provided in a specific format, which allows the stakeholders in the process to easily review the advisory report and notice the most important information.

PROBATION ADVICE IN THE REPUBLIC OF SERBIA

The communication between courts, prosecutors and probation officers is important. In Serbia the practice of providing judges and prosecutors with reports on the personality of the defendant during the course of the criminal proceedings does not exist.

In the field of alternative sanctions in the pre-investigative phase, the Public Prosecutor's Office in Serbia mostly applies the provision of Article 283 of the Criminal Procedure Code, hereafter CPC, (Official Gazette RS, 72/11, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/19) stipulating the conditions for the application of the institute deferring criminal prosecution. Deferring criminal prosecution is applied only in the pre-trial process in the pre-investigation stage.³ The prosecutor has a considerable discretion over crimes with penalties of less than five years and may defer prosecution upon the defendant's agreement to compensate for any harm that he/she has caused and satisfy other law-abiding life conditions that the prosecutor may propose (Article 283 paragraph 1 and 2 of the CPC). However, there are still many open questions regarding the most important issue: sentencing discount and the size of discount that can be offered in exchange for consenting with out-of-court proceedings.

In criminal acts such as violent behaviour and domestic violence, the obligation to undergo psycho-social treatment to eliminate the causes of violent behaviour proved to be the most effective. In this respect, the program that was implemented in the Centre for Social Work in Nis, Serbia, gave positive results. In this case the Probation Service could have a wide range of additional tasks and responsibilities. Some examples are:

- To provide information to judicial authorities in order to assist them in sentencing and other decisions (including risk assessment of re-offending);
- To develop, implement and monitor community sanctions and measures;
- To provide practical and social help, care and aftercare to the offender during his contact with the criminal law system;
- To implement interventions that aim to prevent recidivism (including individual or group training programmes ultimately aiming at changing criminal behaviour);
- To support (ex-)detainees and assist them during preparations for release;
- To control and supervise the conditions applied to offenders.

According to the current legislation and practice in Serbia, the Probation Service does not submit reports to the court nor to the prosecutor's office on the personality of the suspect before the imposition of criminal sanctions, i.e. in the phase of the pre-trial and pre-sentence when the court decides on the type and the level of punishment. Such reports are not submitted even during pre-trial proceedings when it is decided whether a pre-trial detention will be imposed or if an alternative sanction is more appropriate.

It is the opinion of the authors that it would be useful for the court and the public prosecutor to obtain the reports on the personality of the defendant (e.g. from the probation service), before deciding on the type and amount of the sentence (before the completion of the main trial) or before deciding on conditional release. Regarding the conditional release, the current practice in the Republic of Serbia is that the courts decide on conditional release based on:



1. The reports of a prison institution in which the offender is serving a prison sentence;
2. The extracts from the criminal records of the competent Police Directorate on the previous convictions of the offender;
3. Examining the case file concluded with a final judgment according to which the offender serves a sentence of imprisonment and according to which the decision on conditional release is to be made and;
4. The recommendation of the public prosecutor regarding the conditional release (whereby the practice of public prosecutors in Serbia is that they usually give a negative opinion in terms of conditional release, and suggest the rejection of the application of conditional release).

However, the aforementioned reports and the available information are, in some cases, not sufficient for the court to obtain a true picture of the current state of the convicted person and his/her personal circumstances and personality. In the absence of additional information, the court is more guided by the information related to his/her situation before the commission of the crime. Probation advice that contains information about the offender's circumstances and personality at the time when the judge decides on conditional release would be more relevant to the court. This is important to assess the effect of the conducted treatment on the offender during the enforcement of the prison sentence and to assess the risk of repetition of a criminal offense after release from prison.

Advice on appropriate sentencing is important and should consider the personality of the offender and the effect the sentence will have on him/her. This is particularly applicable to alternative sentences. It is also important to consider adequately which specific alternative sanctions will be appropriate for an offender, how they will be assessed, by what means and by whom and how their effectiveness will be assessed. This is consistent with R (2000) 22, paragraph 19, which recommends that "criteria of effectiveness should be laid down so as to make it possible to assess from various perspectives the costs and benefits associated with the programmes and interventions [...]"

The Serbian Criminal Code (CC) also refers to the necessity for the court to have sufficient information about "the personality of the perpetrator and his readiness to perform the community service" (Art. 52 CC). The same is applied to suspended sentence and the attached obligations where the court must consider the "personality of the offender" and other social information (Art. 72 and 74 CC).

Article 66, paragraph 4 CC states: "In determining whether to pronounce a suspended sentence the court shall, taking into account the purpose of suspended sentence, particularly take into consideration the personality of the offender, his previous conduct, his conduct after committing the criminal offence, degree of culpability and other circumstances relevant to the commission of crime."

Therefore, it is important that the prosecutor and the judge are provided with relevant information about the accused person (his personality, family and social circumstances). Advisory reports would make it easier to decide on the criminal offense or the merits of detention. The reports would give a more complete picture of the personality and personal circumstances of the defendant, which is important for the decision of the court or the public prosecutor to apply an alternative sanction or a sentence of imprisonment.



PROBATION ADVICE IN THE NETHERLANDS

In order to give an appropriate and balanced judgment on a criminal case, the gravity of the offences, their impact on society, the consequences for the victim and the personal circumstances of the accused are taken into account. As far as the latter is concerned, it is relevant that the court understands how the accused came to commit the offence and how they can be prevented from committing the offence again. A probation advisory report can inform the judge and the public prosecutor about this.

In the Netherlands, probation advice can be given at any stage of the criminal proceedings. It allows for the judge to be provided with advice at various stages of the proceedings on a suspect's personal circumstances and the likelihood of them reoffending. In the Netherlands, we distinguish the following types of probation advice:

- Probation advice shortly after the arrest;
- Probation advice in the event of a suspension of pre-trial detention;
- Probation advice for the judge or the public prosecutor;
- Probation advice in prison;
- Probation advice in the event of conditional release.

This article will predominantly focus on probation advisory reports that are issued to the judge and the public prosecutor, being the advice that is used in the disposal of the criminal case. In which cases is probation advice requested, what is its content and how is it used in the disposal of a criminal case?

Indications and procedure for requesting probation advice

By definition, the capacity of the probation service is limited. In order to be able to deploy this capacity efficiently, probation advice is – in principle – not requested in the cases involving organised crime, the cases where more than four years' imprisonment is expected and in the cases involving suspects who do not have residency status. In all other cases, the judge or the public prosecutor can request probation advice.

After a suspect is arrested, they are questioned by the police. The police usually conduct a so-called social interrogation during the first interview, before the offences are discussed. During this social interview, the suspect's social circumstances are discussed: with whom the suspect lives, what their living conditions are, if they have work and income, and if there are any addictions or other issues. The social interview enables the police to determine whether probation advice is necessary. In a simple case where personal circumstances have played only a limited role, no probation advice will be sought. Even in cases where the suspect exercises their right to remain silent, this course of action means that usually no probation advice is requested.

According to the Dutch law, a suspect must be brought before a judge within 3 days and 15 hours of arrest. At such time, the judge will assess whether the arrest was lawful and the pre-trial detention should be extended, and may request probation advice. The public prosecutor may also request probation advice at that time, or do so when reviewing the case at a later stage. In most cases, the public prosecutor will request the probation advice, partly because it has been agreed that a report will only be requested once the date of the court hearing has been set. This ensures that the probation advice is always up to date.



In order to ensure that the probation service also provides the required information, the Public Prosecution Service and the probation service have made arrangements on the form and content of the probation advice. The Public Prosecution Service and the probation service regularly consult in order to coordinate the working arrangements further. In addition, in individual cases, the probation service and the responsible public prosecutor can always consult as well, for example about special forms of supervision or treatment.

In the Netherlands, probation advice is requested digitally using a standard form.⁴ This application form contains the following information:

- The details of the criminal case;
- The suspect's details;
- The date of the court hearing and the type of court hearing (single or multiple);
- The purpose of the application.

The application form can also be used to draw attention to certain subjects, such as the possibility of electronic tagging, or application of the juvenile justice system. The arrangements have been made with the probation service about delivery times on a national level.⁵ For example, with regard to an advisory report for a court hearing, it has been agreed that the report needs to be applied for no later than ten weeks before the date of the hearing. The advisory report is subsequently issued two weeks before the court hearing. The probation service issues it by uploading it to a digital system. If this deadline is not feasible for the probation service, it will consult with the public prosecutor. The public prosecutor ensures the advisory report is distributed to the court and the lawyer. In principle, therefore, the advisory report is issued to all the parties to the proceedings two weeks before the court hearing.

Content of the probation advice

In the request for a probation advice, the probation service will at least be provided with information on the charges and the interrogation of the suspect. For the purpose of the advice, the probation service has a conversation with the suspect about the suspicions against them. In order to get a complete and reliable picture of the suspect, it is important that the probation service talk to others about the suspect as well. With the suspect's consent, the probation service may contact the references from their environment, such as the family members, friends, or a professional who knows the suspect well. In addition, the probation service may request information on the suspect from the police, the judicial authorities or a health care institution without the suspect's consent.

In-depth investigation

If necessary, the probation service can have a so-called in-depth investigation carried out in order to gain more insight into the issues or to assess the likelihood of the suspect reoffending. The public prosecutor or examining magistrate can draw attention to this as well. Such an in-depth investigation may consist of:

⁴ See Appendix 1. Application for probation advice

⁵ Collaboration agreement of 12 May 2021 between the Public Prosecution Service and the three probation organisations (3RO)



- A personality assessment;
- An investigation into psychiatric problems;
- An intelligence test (IQ test);
- An investigation into the influence of addiction on criminal behaviour.

The in-depth investigation is carried out by a behavioural expert. The behavioural expert's report sets out the issues that exist. It also states whether a treatment is necessary and – if so – what kind of treatment. This may include clinical care, outpatient care or sheltered accommodation. The duration and intensity of the treatment is estimated. Indicators have been agreed for the carrying out of an in-depth investigation. An in-depth investigation can be carried out if – for example – it concerns a serious violent crime, a sex offence or offences against people, or if there is a suspicion of a mental disorder.

The advice

On the basis of all the information obtained, the probation service issues a recommendation. This advice is drawn up according to a fixed model. The probation advice consists of a fixed cover sheet, followed by the conclusion and a substantiation based on a number of themes. Often, the advice is accompanied by suggestions on possible special conditions. These conditions are standardised and agreed with the Public Prosecution Service and the judiciary.⁶ The probation advice contains the following topics:

- What the suspect has told the probation officer about the offence and how the suspect views the offence.
- A description of their personal situation.
- The probation worker's professional judgment of the criminal case. The probation worker does not provide an opinion on whether the accused is guilty or not, as that is for the judge to decide.
- An assessment of the likelihood of the suspect reoffending.
- Advice on what will be required to prevent the suspect from reoffending.

An important part of the Dutch probation advice is the risk assessment. The probation service assesses the risk of recidivism. The probation service makes this risk assessment by means of the RISC offender assessment system. The probation service uses this system to identify the risk factors and protective factors, and to assess the likelihood of recidivism and formulate advice on the special conditions in a structured manner. The questions in the RISC are based on – among other things – scientific theories on how criminal careers are built up and ended.⁷ The probation advice makes no mention of any evidence, as that is not up to the probation service. The advice is discussed with the suspect and their reaction is included in the probation advice, so that the judge can take note of that as well.

⁶ Perspectives for action OM – probation

⁷ <https://www.reclassering.nl/over-de-reclassering/wat-wij-doen/risc>



The use and function of probation advice

In the Netherlands, the probation advice forms part of the case file, along with the official police report and the criminal record. The probation advice shows how the suspect came to commit offences to begin with, and what measures should be taken to prevent him from reoffending in the future.

The public prosecutor uses the probation advice to determine the demand in the criminal case. Although sentencing guidelines have been laid down for most offences, probation advice can be used to better tailor sentencing. For example, if, in a criminal case involving benefit fraud the advisory report shows that the suspect has significant health issues and it is also clear that the likelihood of recidivism is limited, the public prosecutor is more likely to demand a sentence that is lower than the guidelines prescribe. In this way, the personal circumstances of the suspect can be taken into account to a greater extent. In such case, a fully suspended prison sentence can be demanded instead of an unconditional prison sentence, as the guidelines prescribe.

For the judges probation advice is of great importance in reaching a fair verdict in a criminal case. Below are some quotes from the Dutch criminal court judges about the value of probation advice:

“I would not know how to punish someone fairly without probation advice.”

- “For me as a judge, the reports are extremely useful as much more than the police’s social interrogation these offer insight into a suspect’s backgrounds and problem areas, particularly with regard to whether the suspects have debts or addictions, whether they are employed or have daytime activities or not, and their housing situation. That saves a lot of time at the court hearing because, as far as the personal circumstances are concerned, I don’t have to find out all that myself. In addition, this information may very well be more reliable than what a suspect says in court, because the probation service has the opportunity to check the facts. The probation service’s advice is also a good starting point at the court hearing, especially concerning special conditions such as debt assistance or aggression management training. However ‘punishing’ a well-founded advice is valuable as well.”
- “Recently I had a suspect who, in view of the thefts he had been charged with and his criminal record was once again up for a substantial number of months’ imprisonment. However, precisely because of the probation advice, I decided against sending him to prison. Since coming out of detention at the end of the previous year (having been sentenced for offences committed before this most recent detention), he had received intensive counselling from the probation service, had a roof over his head again, had been abstinent from alcohol and had a daytime activity that would probably result in paid work. In addition, no new offences had been added to his criminal record. The probation service indicated that while an unconditional prison sentence may have been appropriate, it would probably mean losing everything that had been built up over the preceding seven months. Long story short: my verdict was a hefty community punishment order, along with a suspended prison sentence. Without the probation advice, I probably would not have done that.”
- “In preparing for the court hearing, I use the probation advice to form a picture of the suspect. What is his background, and what are his problems? Has he had counselling before and how did that go? It ensures that you are not starting from scratch during the court hearing and can ask specific questions about the suspect’s personal circumstances and future plans, and any punishment to be imposed. It also means that a suspect cannot just say anything he likes and paint a better picture of him.”
- “In chambers, the probation officer’s advice carries a lot of weight, but is obviously not decisive in the punishment and the modality. It matters whether the probation service has recently seen a positive change in the suspect, and some problem areas have already been resolved. If a suspect now has a job



that he did not have before, is open to being counselled where this was previously not the case, and a solution to debts appears to be in the cards, this obviously leads to a different punishment than in the circumstances in which the probation service indicates that the situation is actually hopeless, and that, while the suspect is giving socially desirable answers, he is not open to being counselled and is not intrinsically motivated to change. With regard to any conditions to be imposed and the guidance from the probation service, the probation service's advice is of great importance and the proposed conditions are often adopted one to one."

Number of advisory reports in 2019 and 2020

In 2019, the probation service issued 19,404 advisory reports for the court hearing. In 2020 there were 16,822 advisory reports.⁸ Of course 2020 was a different year due to the Covid pandemic, with therefore fewer reports issued. By comparison: in 2019, the criminal courts settled 85,000⁹ criminal cases. In 2020 this number was 75,800 criminal cases.¹⁰ An advisory report was issued in almost a quarter of these cases. Probation supervision is recommended to prevent recidivism. In 2020, the probation service carried out 15,395 supervision orders.

Use of probation advice from the serbian and dutch perspective

in order to illustrate how the probation service can be involved in the disposal of a criminal case, we will provide a case study, in which the role of the probation service will be explained from both the Serbian and the Dutch perspective.

Markus, a 24-year old young man, is working in the electronics store of his parents. He means to take over the store when his parents retire. Unfortunately, his parents die in a car accident, and Markus is forced to take over the store at this young age. Markus is sad about the sudden loss of his parents; he starts to drink alcohol, and becomes depressed. After a while, he becomes desperate and does not know how to deal with everything on his own. To release him from all these problems and to get out of this situation, Markus sets the store on fire. Fortunately, there is a fire alarm, which prevents the fire from becoming a major disaster. The fire is extinguished, preventing any danger to people or goods. Markus is arrested for arson. Does the probation service become involved, at what moment and how?

The Netherlands

In a case as serious as this, the public prosecutor decides that Markus is to be placed in pre-trial detention. The police inform the probation service of the fact that Markus is being held in pre-trial detention. In this phase, the probation service will examine whether the pre-trial detention can be suspended and whether there are specific problems at home.

After the police report has been submitted, the public prosecutor takes a decision on the prosecution. In view of the gravity of the offence, Markus will be summoned to appear before a panel of three criminal judges. For the court hearing, the officer digitally requests an advisory report of the Dutch Probation

8 Reclassering Nederland Annual Report

9 <https://www.rijksoverheid.nl/documenten/rapporten/2020/10/27/tk-bijlage-criminaliteit-en-rechtshandhaving-2019>

10 Annual Report Public Prosecution Service 2020



Service. In this application, the prosecutor may also include the specific questions or concerns. In this case, for example, there is a question of whether Markus could receive counselling in connection with his new life situation. In the advisory report, the probation service will discuss which interventions and/or conditions it considers necessary, and what the various options for imposing sanctions mean for behavioural change, reintegration and the likelihood of recidivism. In this case, the probation service will most likely recommend imposing community service and a partially suspended prison sentence, under the condition that he is supervised by the probation service. If necessary, the public prosecutor can summon the probation officer to explain the advice at the court hearing, but this is usually not necessary.

The Republic of Serbia

In the given example, the public prosecutor in Serbia would institute criminal proceedings against Marcus (in most cases, for the afore-mentioned actions) for the criminal offence of causing general danger from Article 278, paragraph 1 of the CC (Official Gazette RS, 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/19), envisaging a prison sentence of 1 to 5 years (Causing of General Danger, Article 278).

In the context of the given example, this would be considered a simple crime of causing general danger, and not some of the more serious forms of the same criminal offence. In addition, mindful of all the circumstances of the concrete case, namely: that a person in question is prone to depression and alcoholism, as well as the fact that there is a grounded suspicion that a person under the influence set fire to a building in a city area inhabited by a large number of people, the prosecutor would submit a motion to the court to order detention. On the motion by the public prosecutor the court would (in most cases) order detention for Marcus, pursuant to the provisions of Article 211, paragraph.1, item 3 of the CPC due to the existence of particular circumstances indicating that in a short period of time the defendant will repeat the criminal offence.

Bearing in mind that Marcus is a person who consumes alcohol and is prone to depressive moods, the public prosecutor would also order expert examination by an expert psychiatrist. After presenting his findings and opinion about Marcus's mental state, the expert psychiatrist could propose to impose some of the legally prescribed security measures. Taking into account that according to the given example Marcus is not insane but that he consumes excessive amounts of alcohol and is prone to depression, the expert psychiatrist could propose a security measure of compulsory alcohol addiction treatment stipulated by Article 84 of the CC. This security measure is imposed by the court together with a criminal sanction.

The court will impose the security measure of compulsory alcohol addiction treatment stipulated by Article 84 of the CC on a perpetrator who has committed a criminal offence due to addiction to alcohol abuse and if there is a serious risk that he may continue committing criminal offences due to this addiction. If the security measure of compulsory alcohol addiction treatment is imposed together with a prison sentence, it is carried out in a penitentiary institution or in an appropriate medical or other specialized institution and lasts as long as there is a need for treatment, without exceeding the term of imposed prison sentence. If the security measure of compulsory alcohol addiction treatment is imposed together with a fine, suspended sentence, court admonition or remittance of punishment, it is carried out at liberty and may not exceed two years.

Bearing in mind that for the criminal offence of causing general danger from Article 278, paragraph 1 of the CC a prison sentence of one to five years is prescribed, Marcus could be sentenced to im-



prisonment. However, there is a legal possibility of imposing house arrest, suspended sentence and suspended sentence with protective supervision together with the security measure of compulsory alcohol addiction treatment.

According to the CC of the Republic of Serbia, community service sentence may be imposed only for criminal offences punishable by imprisonment of up to three years or a fine. If the criminal proceedings against Marcus were conducted for the criminal offence of causing general danger under Article 278, paragraph 1 of the CC, it would be impossible to sentence him to community service because this criminal offence is punishable by one to five years of imprisonment.

The sentence and the security measure are imposed by the court after the trial. The court decides on the type of criminal sanction based on the personal data about Marcus, in accordance with the sentencing rules prescribed by law (Article 54 of the CC).

The court gets personal data about the defendant (family circumstances, personal situation, employment, social status, financial standing) from the defendant himself. The provision of Article 85 of the CPC stipulates that when the defendant is interrogated for the first time, the court will ask him to state his name and surname, names and surnames of his parents, his family circumstances, professional qualifications, employment, the property owned, etc. Based on the defendant's defence, as well as the findings and the opinion of the expert psychiatrist and all the evidence in the case file, the court will decide whether to sentence Marcus to prison or impose an alternative sanction.

The Probation Service, through its probation officers, supervises the execution of the measure of home detention, as well as the supervision over the execution of the ban on approaching, meeting and communicating with a certain person, execution of the sentence of house arrest, execution of the suspended sentence with protective supervision and the execution of the community service sanction.

Should the court sentence Marcus to house arrest or impose a suspended sentence with protective supervision (Article 71 of the CC), the execution of these criminal sanctions would be under the supervision of the probation officer and the Probation Service, in accordance with Articles 20–37 of the Law on Enforcement of Non-custodial Sanctions (Official Gazette RS, 55/2014, 87/2018). The probation officer would supervise Marcus's behaviour and submit reports to the court on whether Marcus complies with the measures imposed by the court ruling.

Should the court impose a suspended sentence (without protective supervision)¹¹, the Probation Service will not monitor the behaviour of Marcus during the suspended sentence. The Serbian law does not prescribe the supervision of the offender's behaviour during the suspended sentence imposed on the basis of Article 63 of the CC. Moreover, the compliance with the security measure of compulsory treatment for alcoholism at liberty and the behaviour of Markus during the implementation (respect of treatment rules, progress achieved, behaviour, etc.) are not within the competence of the Probation Service. Regarding these criminal sanctions, the Probation Service has no competences at any stage of the criminal proceedings, nor does the court or the public prosecutor's office request their opinion or report on the defendant's personality and behaviour.

As for detention, the decision to order and subsequently extend the detention is made by the court upon the motion by the public prosecutor. The offender and his defence counsel have the right to ap-

¹¹ The data of the Statistical Office of the Republic of Serbia show through its records that more than 50% of adult perpetrators of criminal offences are sentenced to suspended sentence (without protective supervision) every year. The data of the Directorate for the Enforcement of Criminal Sanctions of the Ministry of Justice show that in 2020 only 19 suspended sentences with protective supervision were submitted for execution in the whole country.



peal against the decision ordering or extending the detention. On the basis of the overall situation in the case file, namely the offenders defence, witness testimonies, expert witness statements and all the evidence offered in the case file, the court assesses whether in that particular case there is one or there are more legal reasons for ordering detention under Article 211 of the CPC. In addition, the court also assesses whether legal conditions for imposing a milder measure for ensuring the presence of the offender have been met.

Should the court deem it justified to impose house arrest on Marcus (the legal term being “prohibition of leaving a dwelling” from Article 208 of the CPC), on the basis of Article 17 of the Law on Enforcement of Non-custodial Sanctions, the Probation Service in that case supervises the execution of the measure of house arrest through the probation officer.

The analysis of the given example and a brief overview of the possible actions of the court and the public prosecutor lead to a conclusion that the legislation and jurisprudence of Serbia do not recognize advisory reports of the Probation Service during the criminal proceedings and prior to imposing criminal sanctions. The Probation Service has rights and obligations prescribed by law only in the stage of enforcing non-custodial sanctions prescribed by the Law on Enforcement of Non-custodial Sanctions. The probation officer does not submit an opinion or report on the personality of the offender to the court and the public prosecutor before the detention measure or the type and severity of the criminal sanction have been decided.

CONCLUSION

In the Netherlands, the probation advice has been a standard part of a case file for many decades, and it has proven its usefulness in practice. The probation advice enables the public prosecutor to demand a punishment that is appropriate in view of both the gravity of the case and the suspect's personal circumstances. The probation officer's advice enables the judge to tailor the punishment to the individual's needs and punish the offence committed, as well as to offer the accused a form of support to prevent recidivism. This is much more conducive to the safety of society.

In Serbia providing the judicial authorities with high-quality information and assessments would be an important element of correct and fair judicial proceedings. It would be beneficial for Serbia if advisory reports on the personality of the defendant are received from the Probation Service and that the law allows the prosecutor or judge to use the data thus obtained before deciding on the type and amount of the criminal sanction. The functions of an advisory reports should be to provide courts with objective information about the offender, and about the suitability of various sentencing options, contribute to the fairness of the decision by the court as perceived by the offender.

REFERENCES

1. Andrews, D.A., Bonta, J. and Wormith, J.S (2011). The Risk-Need-Responsivity (RNR) Model : Does Adding the Good Lives Model Contribute to Effective Crime Prevention?. *Criminal Justice and Behavior*, Vol. 38(7). 735-755.
2. Bergeron, J., (2017), European Parliament Committee on Civil Liberties, Justice and Home Affairs, Report on prison systems and conditions, 6 July 2017 (2015/2062(INI)), A8-0251/2017, p.15



3. Boone, M. and M. Moerings (2007). *Growing Prison Rates' in: M. Boone and M. Moerings (eds.) Dutch Prisons*, 51-76. The Hague: BJu Legal publishers.
4. Cabinet Office (2011) *Modernising Commissioning: Increasing the role of charities, social enterprises, mutuals and cooperatives in public service delivery*, London: Cabinet Office.
5. Corstens, G.J.M. (2009) *Het Nederlandse Strafrecht*. Deventer: Kluwer.
6. Clobusa, F. (2018). *An introduction on the Dutch probation practice*. Matra Rule of Law Training Programme, Veenhuizen, Netherlands.
7. CPT (2008) Report to the authorities of the Kingdom of the Netherlands on the visits carried out to the Kingdom in Europe, Aruba, and the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in June 2007. Strasbourg: Council of Europe. Available online at: <https://www.refworld.org/docid/47a86f912.html> (last accessed 19 July 2020).
8. Fox, C., Fox, A., Marsh, C. (2014). Personalisation in the criminal justice system: what is the potential?. *Criminal Justice Alliance*. March 2014.
9. Franklin, T.W., Franklin, C.A., Pratt, T.C., (2006) "Examining the empirical relationship between prison crowding and inmate misconduct: A meta-analysis of conflicting research results", *Journal of Criminal Justice*, 34, 401-412, p.405.
10. Heard, C., Ford, M. (2015). Alternatives to prison in Europe. United Kingdom, *European Prison Observatory*, Alternatives to detention, Rome.
11. Jacobs, M., M. von Bergh and A.M. van Kalmthout (2006). Toepassing van Bijzondere Voorwaarden bij Voorwaardelijke Vrijheidsstraf en Schorsing van de Voorlopige Hechtenis bij Volwassenen. *The Hague: WODC*.
12. Junger - Tas, J (1994): *Alternative sanctions: myth and reality*, European Journal on Criminal Policy and Research, Vol.2.
13. Lappi-Seppälä, T., (2012). Explaining national differences in the use of imprisonment ", in: S. Snacken, E. Dumortier, (Eds.), *Resisting punitiveness in Europe? Welfare, human rights and democracy*, Oxon: Routledge.
14. Prison Population Projections 2014 – 2020 England and Wales. (2014). MOJ Statistics Bulletin.
15. Stevens, L. (2013). The Meaning of the Presumption of Innocence for Pre-trial Detention. An Empirical Approach ", *Netherlands Journal of Legal Philosophy*.
16. Stevens, L. (2009). Pre-trial detention: The presumption of innocence and Article 5 of the European convention on human rights cannot and does not limit its increasing use. 165-180. *European Journal of Crime, Criminal Law and Criminal Justice*.
17. Tak, P.J.P. (2008) *The Dutch Criminal Justice System*. Nijmegen: Wolf Legal Publishers.
18. Tigges L. (2018). *The Dutch Probation in European Perspective*. Matra Rule of Law Training Programme - Detention and Alternative Sanctions, The Hague, October 8th, 2018.





THE FUTURE AND THE ROLE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE IN SLOVENIA

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Abstract: Article 86 of the Treaty on the Functioning of the EU mentions the rules regarding the establishment of the European Public Prosecutor's Office, an institution that will have to be completely independent of any government and designed to prosecute fraud involving fraud of European funds. Based on activities related to the appointment of two European delegated prosecutors, the State Prosecutorial Council sent the proposal to the Ministry of Justice on 3 December 2021. The Government of the Republic of Slovenia was also informed of the proposal and expressed interest in annulling the entire appointment procedure. According to the State Prosecutor General Drago Šketa, the latter could constitute an arbitrary interference with the independence and autonomy of the State Prosecutor's Office, and an illegal and unconstitutional decision. Appointment procedures must be regulated by law and carried out transparently, on the basis of objective criteria in impartial procedures without any discrimination.

Keywords: legislation, European Union, European delegated prosecutor, independence, public prosecutor's office.

INTRODUCTION

The protection of the financial interests of the European Union has been one of the main priorities in the Republic of Slovenia in recent years, as it is considered that these are the funds that have been given to us and must be spent in every way possible. The awareness that the financial resources from various European Union funds are in fact our own resources has encouraged the development of mechanisms to control the allocation and use of European financial resources at national level. The misuse of European funds is often also a crime committed with a special form of intent and a motive for obtaining illegal material gain. The Republic of Slovenia adopted the Convention on the Protection

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of the European Communities' Financial Interests Act (2007), including its protocols. With the signing of the Treaty of Lisbon, which was incorporated into our legal system by the Act on Ratification of the Treaty of Lisbon, which amends the Treaty on European Union and the Treaty establishing the European Community, the three-pillar order of the European Union was abolished. Therefore, from then on the common policy took place within the framework of the European Union, which also acquired the status of a legal entity. Interinstitutional cooperation at international and national level is crucial to the fight against fraud to the detriment of the European Union (Rep, 2021).

THE IDEA OF ESTABLISHING A EUROPEAN PUBLIC PROSECUTOR'S OFFICE

The first idea to create a European form of FBI appeared around 1989. This body should be independent and autonomous, and should take care of the European budget, which the Member States were not protecting well enough. The idea did not take effect, so over time, Eurojust was set up, which represents the coordinating body and not the law enforcement authority. The prosecution of criminal offenses was considered to be the responsibility of the Member States and not of the European Union (hereinafter: EU), so the Member States did not want to hand over the "power" (Rep, 2021).

Three years ago, however, the European Commission made a proposal again for the European Public Prosecutor's Office (hereinafter: EPPO). The European Commission has obtained the statistics from European Anti-Fraud Office (hereinafter: OLAF) which showed that Member States do not sufficiently prosecute criminal offenses that threaten the financial interests of the EU. The Member States have referred cases of such offenses to the OLAF, which however, had only an administrative role, and therefore referred the cases back to the Member States. There was a statute of limitations, which in turn made some cases obsolete, and only 10% of cases have been shown to be successful. It is therefore necessary to establish a European institution of law enforcement and indictment. From the first ideas about the EPPO to date, however, there have been changes in the legal framework (Quirke, 2007). The Criminal Code of the Republic of Slovenia enables the prosecution of all criminal offenses, which are also envisaged by the Corpus Juris. At the same time, in conjunction with the Corpus Juris, the Commission proposed the adoption of the EPPO (Rep, 2021). If market opening and globalization contribute to reducing inequality, at the same time this process is dangerous, as criminal cases move more easily and exploit differences and litigation. To effectively combat this, we must not be limited to national borders, but need to devise new measures to remove all obstacles and threats and reduce international crime. Article 86 of the Treaty on the Functioning of the European Union mentions the rules concerning the establishment of the EPPO. The article provides that, in order to combat infringements affecting the EU's financial interests, the Council may, by means of regulations adopted in accordance with a special legislative procedure, establish the EPPO from Eurojust. The EPPO is a decentralized unit of the EU judges with exclusive competence to investigate, prosecute and charge the perpetrators of crimes against the EU budget (European Parliament, 2014). In 2000, a proposal to set up the EPPO was made by the European Commission in Nice. It was primarily rejected by the European Council. The basic purposes of setting up the EPPO are to unify the powers to investigate and prosecute perpetrators of crimes against the EU's financial interests. Currently, there is no uniform policy for the prosecution of fraud, as it is left to the competent authorities of each of the Member States (Vukelić, 2013). As the Community institutions and the Member States were aware of the importance of effective protection of financial interests in the Community and as the protection did not go as planned despite many years of effort, the Commission proposed a Directive of the EP and



the European Council on the Protection of Legal Interests in the Community. The starting point for the proposal is the Treaty establishing the European Union. The basis for the decision was the sharp increase in damage caused to the European budget through fraud and financial crime, which led to a situation that required priority treatment of legal instruments for the protection of financial interests (Proposal for a Directive of the European Parliament and the Council of the criminal law protection of the Community financial interest, 2001).

The EPPO is appointed by the Council in agreement with the European Parliament, and the pre-appointment procedure will be based on a call for tenders, on the basis of which the Commission will draw up a list of candidates. An individual seven-member body, consisting of former judges of the Court of Justice of the EU, members of national supreme courts, public prosecutors' organizations and renowned legal experts, will give an opinion on each candidate. The European Public Prosecutor will be responsible for the exercise of the powers of his office to the European Parliament, the Council and the European Commission, with general responsibility for the exercise of his powers (Gorkič, 2013). However, the structure of the European Public Prosecutor is decentralized, as he is expected to exercise his powers in all Member States and his procedural position will still depend to a large extent on national arrangements – both at the investigation stage and beyond. It is therefore inevitable that a prosecutor with knowledge of national law appears before the courts of the Member States, which is made possible by a decentralized structure. European Delegated Prosecutors will be members of the EPPO, but also members of national prosecutors' organizations, and, when acting as members of the Office, will be responsible for conducting investigations and representing prosecutors in cases falling within the remit of the EPPO. Thus, the proposal for a regulation adopted the so-called two hats system. The European Delegated Prosecutor will be a prosecutor who will be able to act either as a domestic prosecutor, national prosecutor or as a member. The decentralized model, however, brings a distinctly monocratic, hierarchical structure to the office. The Office will be externally represented by the European Public Prosecutor, all actions of the Office members will be considered the actions of the European Public Prosecutor and the latter will have clear powers to give general and specific instructions to the European delegated prosecutors. The European Public Prosecutor is an independent legal entity and all those who make up the EPPO may seek or not seek instructions from others (Member States, EU bodies or institutions, etc.). The Office also operates fairly independently in drawing up and adopting its own budget, leaving the final approval to the bodies responsible for the EU's general budget. Regarding the implementation of the budget, the Office of the European Public Prosecutor is under the supervision of the European Anti-Fraud Office and the European Court of Auditors (Gorkič, 2013).

(NON)SELECTION OF DELEGATED PROSECUTORS: SLOVENIAN CASE

The EPPO became operational on June 1, although until then only Finland and Slovenia had not nominated delegated prosecutors out of the 22 participating EU Member States. Finland, meanwhile, has already reached an agreement with the EPPO, while Slovenia has not. The Government of the Republic of Slovenia has not been acquainted with the proposal of the State Prosecutor's Council for the appointment of two European delegated prosecutors until May 2021. Therefore, the public call, on the basis of which two candidates were selected, was unsuccessful, as it was no longer eligible. Candidates for European Delegated Prosecutors, Tanja Frank Eler and Matej Oštir, only received a mail from the government and were therefore officially informed that the government would not send their names



to the EPPO. As explained in the administrative court, the candidates have 30 days from the service of the administrative act to file a new lawsuit. The Administrative Court dismissed the candidates' first lawsuit on the grounds that they had filed it prematurely, as they had not yet received the government's decision. It is not known how the then Minister of Justice Lilijana Kozlovič commented on the matter. Kozlovič has always argued that changes to the prosecutor's law will not affect the open procedure (Žerjavič, 2021). Both candidates were neither confirmed nor named. Prosecutors Tanja Frank Eler and Matej Oštir filed a lawsuit and a request for an interim injunction in the event that European delegated prosecutors were not appointed. Both filed a lawsuit against the government's decision taken on May 27, 2021. More than a month ago, the Administrative Court rejected the first lawsuit and the request for an interim injunction in the event that European delegated prosecutors were not appointed, the reason being that the plaintiffs filed the lawsuit prematurely, as they had not yet received the government's decision not to be informed about the appointment of European delegated prosecutors (Slovenian Press Agency, 2021).

According to media reports, the General Secretariat of the Government prepared a decision by which the government stopped and annulled the entire process of appointing European delegated prosecutors, and at the same time issued a new call for applications. According to the assessment of the General State Prosecutor Drago Šketa, the government's annulment of the entire process of appointing European delegated prosecutors could represent an arbitrary interference with the independence and autonomy of the State Prosecutor's Office. The government's decision would be illegal and unconstitutional, as it changes the tender conditions retrospectively, Šketa said. A response was also made in the Public Prosecutor's Council, noting that the proposal was drafted in accordance with the law in force at the time, which transposed the provisions of the EU Council Regulation on enhanced cooperation in connection with the establishment of the EPPO. The Council reiterated that both proposed candidates met all the conditions prescribed by the law and other regulations in force at the time of the decision, which were set out in the published public tender. The candidates also met the conditions brought into Slovenian law by the Act Amending the Public Prosecutor's Office Act, adopted following the drafting of a proposal by the State Prosecutorial Council for the appointment of two European delegated prosecutors (A.Č., S.K., P.Ž., 2021). All proceedings must be initiated, conducted and completed in accordance with regulations, the State Prosecutor's Council rightly expected that the proceedings in question would be completed legally, taking into account the legal powers of individual actors in the proceedings, as well as the constitutional prohibition of retroactive legal acts is also the opinion of the President of the State Prosecutor's Council Tamara Gregorčič (Supreme State Prosecutor's Office, 2021).

On July 9, 2021, the Ministry of Justice published a new call for candidates for European Delegated Prosecutors in the Official Journal. The summons was published on the basis of Articles 71c and 71d of the Public Prosecutor's Office Act. The Ministry of Justice has received two applications for a repeated tender for European delegated prosecutors from Slovenia, the ministry confirmed to STA. Prosecutors Matej Oštir and Tanja Frank Eler, who had already been selected in the first call, applied. Oštir and Frank Eler confirmed before media that they had also applied for the repeated tender. The State Prosecutor's Council selected them after the first tender; however, the government did not take note of the proposal, but instead annulled the procedure. According to the government, the State Prosecutor's Council should propose three candidates for each position, i.e. a total of six candidates, while the State Prosecutorial Council proposed only two. The Ministry has already stated that it wants and strives for constructive cooperation of all stakeholders for the appointment of delegated prosecutors as soon as possible. If the government repealed the process of appointing European prosecutors, this, according to Attorney General Šketa, could be unconstitutional. The Council of State Prosecutors, which is responsible for the choice between the registered candidates and the submission of the proposal to



the government, warned when the repeated call was published that it was illegal. According to the Council, in the absence of an interpretation of the legal provisions by the court, they would follow the government's arbitrary interpretation of the regulations and thus confirm its illegal decision-making (M.Z., K.T., 2021). The prosecutors' association believes that the government is only delaying the appointment with the new procedure, as the government is now expecting six candidates, and the deadline for submitting candidacies is 15 days after the announcement of the call. The State Prosecutor's Council warns that the new call is illegal. Article 71c of the State Prosecution Service Act stipulates in the fifth paragraph that the Public Prosecutor's Council must draw up a list of three candidates for the appointment of a European prosecutor, which the Ministry of Justice then forwards to the government for submission to the competent EU institution. This means that he has to draw up a list of three candidates for both available positions, a total of six. As he announced, in the absence of an interpretation of the legal provisions from the court, he would follow the government's arbitrary interpretation of the regulations by re-deciding, thus confirming its illegal decision-making. This would undoubtedly raise doubts about the legitimacy of the appointment of European delegated prosecutors in such a repeated procedure, which could in turn jeopardize the successful prosecution of cases within the competence of the EPPO in Slovenia. The State Prosecutor's Council has already informed Chief Prosecutor Laura Kövesi of the matter. In a press statement, the President of the State Prosecutor's Council, Tamara Gregorčič, once again pointed out that the government's decision to annul the procedure was illegal, and consequently the last published public call was also illegal (Slovenian Press Agency, 2021).

In a statement for Slovenian Press Agency, the Supreme State Prosecutor Mirjam Kline from the Association of State Prosecutors warned that there was no basis for three names to be on the candidate list twice. The position of the Public Prosecutors' Association is that the first tender, which was annulled, was legal, in accordance with the Public Prosecutor's Office Act, a regulation of the EU Council and in accordance with the Constitution, she emphasized. According to Mirjam Kline, the Association of State Prosecutors expects the selected candidates to file a lawsuit, because this is obviously the only way to establish through a court decision that the government's move to annul the already completed tender procedure was illegal and that the procedure was led by the Public Prosecutor's Council, in full compliance with the Public Prosecutor's Office Act and a regulation of the EU Council, she stressed. According to the Public Prosecutor's Council, the government arbitrarily annulled the already completed call without any legal basis, six months after the end of the call, when it should have only read the names of the two candidates and sent them to the EPPO. Kline points out that the selection of candidates for European Delegated Prosecutors can only be made by the Public Prosecutor's Council on the basis of current legislation (Felc, 2021). After the media reported the intention of the Government of the Republic of Slovenia not to get acquainted with the proposal of the State Prosecutor's Council regarding the appointment of two European delegated prosecutors, the Supreme State Prosecutor's Office annulled the procedure. Such a decision of the Government of the Republic of Slovenia would be arbitrary, it would interfere with the independence and autonomy of the State Prosecutor's Office, which is also ensured through appointment procedures, which must be regulated by law and carried out transparently and on the basis of objective criteria. The EPPO is an institution that must be completely independent of the government and is intended to prosecute crimes related to fraud in the use of European funds, said Prosecutor General of the Republic of Slovenia regarding complications in appointing European delegated prosecutors (A. P. J., G. C., K. T., 2021). In the case of the adoption of a decision to annul the selection procedure, in our opinion it is an illegal decision, contrary to the Constitution of the Republic of Slovenia, as it changes the tender conditions retrospectively. It should not be overlooked that both proposed candidates for European Delegated Prosecutors meet all the conditions set out in the call and the law, and the procedure was carried out correctly and legally. The latter also derives from the proposal of the Public Prosecutor's Council, from the proposal of the Min-



istry of Justice, the opinion of the Government Office for Legislation, the opinion of the Office of the European Prosecutor General and the opinion of Mr. Šketa (Felc. 2021).

European Chief Prosecutor Laura Codruța Kövesi also responded to the statement of the Prosecutor General of the Republic of Slovenia, expressing concern over the situation and stating her belief that the Slovenian government would avoid interfering with the independence of prosecutors. The new tender has further complicated the appointment of prosecutors, warns former Minister of Justice Aleš Zalar. The European Union will not get delegated prosecutors from Slovenia for a long time, which is a specific concern. European Commissioner for Justice Didier Reynders has again called on Slovenia to appoint delegated prosecutors, as it is the only one of the 22 participating countries that has not yet appointed any prosecutors. Calls for the appointment of Slovenian candidates from Brussels have been coming since the end of May 2021, when the former Minister of Justice Lilijana Kozlovič resigned due to the situation (M. Z., K. T., 2021). In June 2021, after the end of the informal meeting of the EU justice ministers in Brdo, Slovenia, the Slovenian government was again criticized for not appointing European delegated prosecutors. European Justice Commissioner Didier Reynders has made it clear that they will take action if the government does not appoint prosecutors quickly. At present, they can work for a certain extraordinary period through a Slovenian prosecutor in the College of the EPPO. However, it is important that the Slovenian authorities act very quickly. The importance of the Prosecutor's Office for the protection of the European Union budget was also emphasized. In June, the Ministry of Justice published a new call for candidates in the Official Gazette. However, the state prosecutor's council warned that the call was illegal. As they reported, if the court did not clarify the statutory provisions, it would take into account the government's arbitrary interpretation of the regulations by re-ruling and thus confirm its illegal decision-making (Felc, 2021).

In its report on the rule of law in Slovenia, the European Commission also draws attention to unjustified delays in the appointment of state and European prosecutors and to the deteriorating situation of media freedom and pluralism. "If this policy continues, sooner or later there will be sharper assessments than those experienced by Hungary and Poland," warns former constitutional judge Lojze Ude. Lawyer Rajko Pirnat believes that not naming European prosecutors is just the tip of the iceberg (Mlakar, 2021).

CONCLUSION

The EPPO was set up to increase the level of protection of the European Union's financial interests. This institution of enhanced cooperation represents more of Europe and is an important opportunity to fight corruption and act to the detriment of European Union funds. The EPPO can start operating without Slovenian European prosecutors, but this may mean that the level of protection of the EU's financial interests in Slovenia will decrease. The very way of selection procedures so far represents a very serious interference with the justice, the rule of law and the independence of prosecution. The new public call for nominations for the appointment of two European delegated prosecutors is already considered unsuccessful by law. However, the primary procedure for the nomination of candidates by the Ministry of Justice was carried out legally, in accordance with national legislation and the EU Council Regulation on the EPPO. Compliance with applicable law and its procedures ensures legal certainty and thus the rule of law. The process of appointing two European delegated prosecutors from Slovenia has been going on for several months, because the candidates proposed for this position by the State Prosecutor's Council, Matej Oštir and Tanja Frank Eler, are allegedly disruptive for the Prime Minister. The government has never been informed of the proposed candidates, although the Euro-



pean Commission has repeatedly called on Slovenia to take action, as the EPPO was expected to start operating on June 1. According to the first prosecutor in the country, the government's annulment of the entire procedure represents an arbitrary encroachment on the independence and autonomy of the state prosecutor's office. The European Commission has issued a second Rule of Law Report, which aims to review key changes in the EU and the situation in the Member States and to contribute to promoting a strong political and legal culture of the rule of law throughout the EU. In this report, the unjustified delay in the appointment of state prosecutors is pointed out and it is summarized that, since the end of July 2020, the State Prosecutorial Council has submitted the names of 29 candidates to the Minister of Justice, who then proposed them to the government for appointment or promotion. By June 2021, only 14 of these had been nominated or promoted, while there were no clear reasons for not deciding on the remaining 15 candidates. The untimely appointment of European Delegated Prosecutors is also a cause for concern, stressing that in line with the Council of Europe's recommendations, the recruitment of public prosecutors should be carried out through fair and impartial procedures, including safeguards against any approach representing the interests of certain groups. However, they are governed by well-known and objective criteria, such as qualifications and experience, which the state prosecutor's office has always pointed out.

REFERENCES

1. A.Č., S.K., P. Ž. (2021). Janša would review the process of appointing prosecutors, Šketa sharp because the process stopped. *Delo*. Accessed on June 2. 6. 2021 <https://www.delo.si/novice/slovenija/sketa-razveljavitev-postopka-imenovanja-tozilcev-bi-lahko-bila-nezakonita/>
2. P. J., G. C., K. T. (2021). The Public Prosecutor's Council is announcing a lawsuit over the government's complication with European prosecutors, *RTV SLO*. Accessed on June 4, 2021 <https://www.rtvsllo.si/evropska-unija/drzavnotozilski-svet-napoveduje-tozbo-zaradi-vladnega-zapleta-z-evropskimi-tozilci/582372>
3. Convention on the Protection of the European Communities' Financial Interests Act (2007). Official Gazette No. 19/07 – International Contracts, No. 4/07.
4. European Parliament. (2014). *About the Parliament*. Accessed on June 2, 2014 http://www.europarl.europa.eu/aboutparliament/sl/displayFtu.html?ftuId=FTU_1.5.5.html
5. Felc, M. (2021). Government procrastination is already causing problems in organizing work. *Delo*. Accessed on June 1, 2021 <https://www.delo.si/novice/slovenija/vladno-zavlacevanje-ze-povzroca-tezave-pri-organizaciji-dela/>
6. Gorkič, P. (2013). Evropski javni tožilec: zdaj gre (zares) zares, *Pravna praksa*, 34, 22.
7. M. Z., K. T. 2021. New call for selection of delegated prosecutors, the State Prosecutor's Council declared it illegal. *RTV SLO*. Accessed on June 4, 2021 <https://www.rtvsllo.si/slovenija/nov-poziv-za-izbor-delegiranih-tozilcev-drzavnotozilski-svet-ga-je-oznacil-za-nezakonitega/587099>
8. Mlakar, L. (2021). Pirnat on the Brussels report: This is just the tip of the iceberg. Ude: If this continues, there will be assessments as received by Hungary and Poland. *Delo*. Accessed on June 1, 2021 <https://www.vecer.com/slovenija/odzivi-pirnat-o-porocilu-bruslja-to-je-samo-vrh-ledene-gore-ude-ce-se-bo-to-nadaljevalo-bo-prislo-do-ocen-kot-sta-jih-doživeli-madžarska-in-poljska-10248250>



9. Proposal for a Directive of the European Parliament and the Council of the criminal law protection of the Community financial interest (2001). European Parliament. Accessed on May 1, 2021 <https://www.europarl.europa.eu/sides/getDoc.do?reference=A5-2001-0390&type=REPORT&language=EN&redirect>
10. Rep, (2021). Possibility of abuse or protection of EU financial interests in Slovenia? 12th International Scientific Conference 30 YEARS OF INDEPENDENT MACEDONIAN STATE, Ohrid, Republic of North Macedonia, 15–17 September, 2021. Faculty of Security – Skopje.
11. Slovenian Press Agency (2021). The Ministry of Justice has issued a new call for the selection of delegated prosecutors, Accessed on June 9, 2021 <https://www.sta.si/2921571/ministrstvo-za-pravosodje-objavilo-nov-poziv-za-izbor-delegiranih-tozilcev>
12. State Prosecution Service Act. *Official Gazette* No. 54/21.
13. Vukelić, M. (6. 8. 2013). Over money fraud in the EU with the European Public Prosecutor. *Delo.si*. Accessed on May 26, 2021 [http://www.delo.si/novice/slovenija/nad-denarne-](http://www.delo.si/novice/slovenija/nad-denarne-goljufije-v-eu-z-evropskim-tozilcem.html)
14. [-goljufije-v-eu-z-evropskim-tozilcem.html](http://www.delo.si/novice/slovenija/nad-denarne-goljufije-v-eu-z-evropskim-tozilcem.html)
15. Žerjavčič, P. (2021). Deep concerns about European delegated prosecutors from Slovenia, *Delo*, Accessed on June 9, 2021 <https://www.delo.si/novice/slovenija/globoke-skrbi-glede-delegiranih-tozilcev-iz-slovenije/>
16. Quirke, B. (2007). OLAF: The fight against EU fraud. *Journal of Financial Crime*, 14 (2), 178–189.

TOPIC II

POLICE ORGANIZATION – STRUCTURE AND FUNCTIONING





LEGISLATIVE FRAMEWORK AND CRIMINAL OPERATIONAL ASPECT OF COMBATING NEW FORMS OF COMMUNITY VIOLENCE¹

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Abstract: *The paper presents the legislative framework and the criminalistics-operational aspect of the fight against new forms of violence in Serbia. It is primarily about domestic violence, then peer violence and violence at sports events. The social response to the challenges, risks and threats posed by new forms of violence in the community first included normative-legal activity. The legal framework for the fight against new forms of violence in the community included the adoption of special laws and bylaws, which were pointed out in the paper. On that basis, the criminalistics-operational response of the police and law enforcement agencies, judicial bodies and other relevant entities was further upgraded. The paper also points out the activities of the RS Ministry of the Interior in the fight against forms of domestic violence, peer violence and violence at sports events. In the concluding remarks, proposals were made for improving the legislative framework de lege ferenda, strengthening multi-agency and multi-sectoral cooperation, and accepting the good practice of the developed countries in the context of our application for the EU accession.*

Keywords: *organized crime, legislative framework, institutional mechanisms, international cooperation, Serbia and EU.*

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INTRODUCTION

After the democratic changes at the end of 2000, the average of long-awaited reforms in all areas of social life was launched in Serbia. Among them, one of the most important was the area of interior, police reform and other services within the security sector. In a broader sense, police and intelligence service reform was part of the EU Administrative Space Project (Kavran, 2004), which highlights the lawful work of law enforcement agencies, benefits the community and controls the work of these agencies.

The issue of the new model of organization and the way the police work as the most numerous institution in the security sector was especially important. The traditional model was completely closed, centralized and inconsistent with the needs of modern society because it could not respond to new challenges, risks and threats (Nikač, 2019, 31-36). Among them, new forms of violent behaviour that cause great public anxiety, such as domestic violence, peer violence and violence at sports events, have an important place. Under the influence of the developed countries of the EU and the USA, a new model of organization and manner of the policing was adopted in the RS Ministry of the Interior (MoI), called *community policing*. Building on this model, in the function of combating crime and its most severe forms, it has been affirmed as the leading model of criminal-intelligence policing - Intelligence Led Policing (Leštanin et al, 2018, 241-254; Djurdjevic, Lestanin, 2017, 3-16).

In the fight against crime in the community, a multi-agency approach and cooperation between the police, the so-called 'line policing'³ and local police with each other, with other bodies and institutions is important. Starting from the specifics of domestic violence, peer violence and hooliganism, the cooperation of the police with external bodies and institutions such as the Social Work Centers, schools, professional sports and other associations is especially important. International police and criminal cooperation is also needed, which refers to the suppression of hooliganism at sports events in the country and abroad. The media and the community (local self-government) have a significant role in combating these forms of crime, as they should affirm the values and condemn all occurrences of violence in the community.

THE FIGHT AGAINST DOMESTIC VIOLENCE

As a phenomenon, domestic violence has been known since ancient times and has long been accepted in many cultures, even considered a family matter over which the community has no and must not have influence (Nikač, 2017, 217-232). Such an approach has been around for a long time as a consequence of the ruling patriarchy and the leading role of the male gender in society. Within the family, men had power and control over women and children, economically and otherwise affected their lives, introduced prohibitions and restrictions. Corporal punishment of women and children persisted for a long time, and even marital rape in England until the 1970s (Ajduković, 2000, 11-15).

With the development of modern society, changes are taking place and domestic violence is no longer just a family matter, but an issue that is in the focus of interest of the civil public. After World War II, the situation changed in favour of expanding and further protecting of the rights of women and children, primarily at the international level by adopting important documents under the auspices of the League of Nations - UN, CE and EU.

3 Line policing is a form of police work that is directed from the central to the local levels divided into lines of police of general jurisdiction, traffic police, criminal and border police.



a) The most important document in this area is the Convention on the Elimination of All Forms of Discrimination against Women - CEDAW (from 18 December 1979). Then the Optional Protocol for the Convention on the Elimination of All Forms of Discrimination against Women was adopted (from 06 October 1999), which was ratified by the SFRY and accepted by Serbia as a successor state (Law on Ratification CEDAW, OG-International agreements 11/81). Among the most important international documents for combating domestic violence and protecting the rights of women and children are the Recommendation 19 of the Committee on the Elimination of Discrimination against Women, the Declaration on the Elimination of Violence against Women, the Beijing Declaration and the Platform for Action and Human Rights Commission Resolution 2003/45 (Božić, Nikač, 2018, 464-473).

The 1989 Convention on the Rights of the Child is an important document for the further affirmation of children's rights, the protection from domestic violence and the realization of other rights of the youngest. The former SFRY accepted and ratified the Convention by a special law, and then took over Serbia as a successor (Law on Ratification Convention on the Rights of the Child, OG-International agreements 12/93,20/97). With its decisions, the European Court of Human Rights affirmed the solutions from the Convention and took the legal position that domestic violence is a violation of fundamental human rights (Van Bueren, 2007, 121).

The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 2011) is the most important document that comprehensively protects the rights of women, children, the elderly and partners. The Istanbul Convention has contributed to raising awareness of this problem of modern society and highlighted social support for victims of domestic violence. Serbia has ratified the Convention and incorporated legal solutions into national legislation (Confirmation Law of the Convention on preventing and combating violence against women and domestic violence, OG-International agreements 12-13/13).

b) At the national level, Serbia has adopted several important laws and regulations in the field of protection against domestic violence. The initial act is the Family Law OG 18/05,72/11-state laws and 06/15), which also regulates the issue of (protection from domestic violence, in Article 197 and further in Chapter IX. Domestic violence is defined as behaviour by which a family member endangers the physical integrity, mental health or tranquility of another family member (paragraph 1), while paragraph 2 lists specific forms and actions of acts of domestic violence: causing bodily harm, causing fear by threatening to kill or inflicting bodily injury on a family member or a person close to him, forcing sexual intercourse or sexual intercourse with a person under the age of 14 or with an incapacitated person, the restriction of freedom of movement or communication with third parties, insult and other insolent, reckless and malicious behaviour. The following are measures to protect family members from violence, such as: moving out of a family apartment or house regardless of the legal basis of ownership or rent, ban on approaching a family member (distance), ban on access to the place of residence or work of a family member, ban on further harassment of a family member (Article 198). The duration of measures for protection against domestic violence is a maximum of one year, which includes time spent in detention or during deprivation of liberty.

The Criminal Code (OG br.85/05,88/05 – corr.107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 i 35/19; further: CC) provides for two criminal offenses as protection from domestic violence in Article 194, Domestic Violence and Article 114, paragraph 1, item 10 Aggravated Murder.

The basic forms of Domestic Violence issues include the use of violence, the threat of attacking life or body, insolent or reckless behavior that endangers the peace, physical integrity or mental state of a family member, for which a prison sentence of 3 months to 3 years is prescribed. The following are qualified forms of felony that include the use of weapons, dangerous tools or other means that can



cause bodily injury or serious damage to health (punishment 6 months to 5 years), then when the commission of the crime caused serious bodily injury or serious damage to health or the injured party is a minor (imprisonment from 2 to 10 years) and the most serious case when a family member died as a result of the commission of a felony (imprisonment from 3 to 15 years) and if the family member is a minor of at least 10 years. Imprisonment from 3 months to 3 years cumulatively with a fine is prescribed if the perpetrator violates the protection measures from the Family Law.

The Aggravated Murder consists of taking the life of a member of his family whom he previously abused. In this crime, it is necessary to have a history of abuse in any form. A sentence of imprisonment of at least ten years or life imprisonment is prescribed, so that this form of crime does not become outdated.

Other regulations in this area include the Prohibition of Discrimination Law (OG 22/09, 52/21) and the Gender Equality Law (OG 52/21), which affirm the equality of people in the community regardless of: gender, race, ethnicity, skin colour, language, religion, political belief, social background, property status, education, marital status, age, health status, sexual orientation. It provides for an equal right to protection in cases of domestic violence, legal and other assistance to victims and mitigation of the consequences of violence.

The Prevention of Domestic Violence Law (OG No. 94/16) was adopted with the aim of uniformly regulating the organization and conduct of state bodies and institutions in the fight against domestic violence, providing urgent and effective protection and support to victims of domestic violence. Prevention of domestic violence includes activities that reveal the potential immediate threat of domestic violence and measures to eliminate it. Physical, sexual, psychological and economic violence are cited as forms of domestic violence. The broader notion of a victim is accepted, which includes a current or former spouse or partner, a person with whom the perpetrator is in blood relations (in the direct line and side of the second degree) or a legal relative or father-in-law or adoptive parent, adoptee, foster parent or foster child or to another person with whom he lives or has lived in a joint household (Article 3).

c) The most important subjects of combating domestic violence are state bodies and organizations that have inherent competence: the police, public prosecutor's office, courts (general competencies, misdemeanor court) and Social Work Centers (Articles 7-11). Specially licensed policemen work together with the representatives of the prosecution and social services within the Groups for Coordination and Cooperation (Articles 25-26). The institutions of child and social protection, upbringing and education, health care, bodies for gender equality, local self-government and associations have a significant role (Gačević, Nikač, 2015, 75-92). The procedure for the prevention of domestic violence envisages the application of complementary norms of criminal law - the Criminal Procedure Code (CPC) or the Misdemeanors Law, depending on the legal qualification of the offense (Nikač, Božić, 2018, 13-21). Policemen have an important role in the fight against domestic violence because, as a rule, they are the first in contact with the victim and the suspect, after domestic violence has been reported. The observation is followed by operational policing, which includes talking to the actors and potential witnesses, bringing the (potential) suspect to the police, assessing the risk and, if necessary, taking urgent measures. These are the measures of temporary removal of the (potential) perpetrator from the apartment and temporary ban on contact and approach to the victim of violence, which is imposed by an authorized policeman and lasts 48 hours from delivery with the possibility of court extension for up to 30 days (Article 17). The competent public prosecutor who manages the procedure is informed about everything throughout the procedure pursuant Article 5 i Article 43 of the CPC (OG 72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 03/19).



THE FIGHT AGAINST CHILDREN AND PEER VIOLENCE

Violence against children and peer violence as its modality are unfortunately very present in modern society in which the race for earnings, better living conditions and career advancement is dominant, which leads to the alienation of the person and neglect of children and youth. The long-standing unfavourable social, economic and other circumstances in Serbia have exposed citizens, especially children and youth, to an increased risk of crime and violence. The current situation indicates that there has been an increase in community violence and new forms in the form of domestic, peer and violence at sports events.

Of particular concern is peer violence among children and young people, which has lasting consequences for children and young victims, both in adolescence and later in adulthood. Children appear in a dual role: a) as bullies who abuse others, and b) as victims who are injured and intimidated by acts of violence. The victims suffer the consequences in the form of poorer success in school and other manifestations, while bullies have a higher risk for the future because they continue their criminal career.

a) Serbia, like other countries in transition, has encountered this problem and the issue of a social response to the growing peer violence has been raised. According to the RS MoI, in the first period, from 2003 to 2007, about 7,300 events, occurrences and incidents were recorded that indicated a violation of the safety of students, staff and school property (www.mup.gov.rs). In mid-2005, the RS government initiated the Baseline Framework for a National Anti-Violence Strategy prepared by a multi-sectoral governmental and non-governmental sector working group. The National Strategy for Prevention and Protection of Children from Violence has been adopted (OG No. 122/08) and the Action plan for the implementation of the Strategy (11 March 2010). The development of a safe environment, the establishment of a national system of prevention and protection of children from all forms of abuse, neglect and exploitation were highlighted as general goals (Nikač et al., 2009). Furthermore, the National Strategy for Youth (OG No. 55/08) and the Action Plan for the implementation of the Strategy were adopted (OG No. 07/09).

The legislative framework for the protection of children from violence is based on the RS Constitution, which treats children's rights as a constitutional category and guarantees the right to free personal development. According to the Constitution, human life is inviolable (there is no death penalty), physical and mental integrity is inviolable, and no one can be held in slavery or in a position similar to slavery. All forms of trafficking in human beings as well as forced labour are prohibited, while sexual and economic exploitation of disadvantaged persons is considered forced labour. According to age and mental maturity, children enjoy human rights, they are protected from physical, psychological, economic exploitation or abuse. Children under the age of 15 cannot be employed at all, while those under the age of 18 cannot work in jobs harmful to health or morals (RS Constitution part II, OG No. 98/06).

The Fundamentals of the Education System Law (OG 88/17, 27/18-state laws, 10/19 and 06/29) prohibits physical violence and insulting the personality of children, guarantees the right of students to protection from discrimination and violence and contains penal provisions. Special emphasis is placed on the procedures for the protection of children and safety in schools from physical violence, insults to students (Article 7) and other unacceptable behaviours.

The Labor Law (OG No. 61/05, 54/09, 32/13, 75/14, 13/17-CC, 113/17 and 95/18-authentic interpretation) prescribes that an employment relationship may be established with a person who is at least 15 years old, while a person under 18 years of age may enter into an employment relationship with



the consent of a parent (adoptive parent, guardian) if health is not endangered and employment is not prohibited. Particularly difficult jobs follow and those with increased risk, working longer than full time, night work. In Articles 24-29, the elements of establishing an employment relationship and the necessary conditions are further elaborated.

Criminal legislation contains several laws that protect the rights of children and minors in a special way. The CC defines the terms children and juveniles according to age - a child is a person under 14 years of age and a juvenile is a person under 18 years of age (Article 112, paragraphs 8-10), as well as prescribes a wide range of crimes that can be committed to the detriment children and minors. The CPC prescribes the procedure for reporting on suspicion that a felony has been committed *ex officio* and provides for rules for the protection of the injured person, which is important for the protection of the interests of children and juveniles. The Law on Juvenile Delinquents and Criminal Protection of Juveniles (OG 85/05) is a special regulation passed to protect the personality of minors as injured parties and witnesses in criminal proceedings, it provides for licensed participants in the proceedings (judges, prosecutors, policeman and proxies) in cases of prosecution of perpetrators (group of 27 criminal offenses).

b) The criminalistics-operational response presupposes preventive measures to prevent violence and eliminate the causes of this phenomenon. The school is one of the most important subjects in the process of prevention of goals against children and peer violence because it is an educational institution, which has a reputation and status in the community. We add that the school followed social changes, adapted to the trends and needs of the community, social classes and people (Arsić et al, 2010, 164). Like adults and children, they seek attention, even if negative, in the form of insults, anger or punishment, which is better than neglecting and not noticing (Spasenović, 2008). The primary goal is the timely detection of problems in achieving social relations between students and providing assistance to schools, psychologists and other services.

In Serbia, the National Platform for Prevention of Violence in Schools called *I Keep You* was adopted, according to which the School Team for Protection against Discrimination, Violence, Abuse and Neglect (Protection Team) is formed, which according to the director's decision consists of the experts we have already mentioned. Based on relevant information, the Team makes an assessment of violence that includes an analysis of the intensity, degree of risk, duration and frequency, consequences, number of participants, age and characteristics of students and other elements. In relation to the level of violence and abuse, specific intervention measures and activities are taken at school, and then outside the school in cooperation with external entities. The Platform lists several forms of violence: physical, psychological, social, digital, sexual, child and student abuse, violent extremism, human trafficking, exploitation, neglect and deliberate non-compliance (www.mup.gov.rs).

After the introduction of the concept of Community policing, the Ministry of Interior launched several significant actions to prevent violence in schools and educational programs. The MoI, independently or in cooperation with others, especially with the Ministry of Education, organizations and institutions, initiated and implemented a large number of preventive projects and programs to protect children and minors from violence and crime. Among the better-known actions (projects) are: Action 'School', Central action of intensified traffic control of selective content 'School', Action of intensified control of banning the sale and dispensing of alcoholic beverages to minors, Preventive activity among school children and youth and 'Drugs is zero - life is one'. The current 'School Policeman' program, which preceded the introduction of a licensed policeman in the protection of students and schools, is especially important today. The 'School without Violence' program is the forerunner of today's programs and was launched in 2007 in cooperation with the UNICEF (Nikač, 2012). Recently, new pro-



grams and actions have been launched, such as the 'Graduation' program (2018-2021) and the subject 'Basic of Child Safet', which have been well received and helped prevent violence and other negative phenomena in schools (Nikač, Leštanin, 2019, 33-50).

The MoI further adopted a Special Protocol on the Conduct of Police Officers in the Protection of Minors from Abuse and Neglect (11 October 2006). Among other bodies in the suppression of violence against children, the public prosecutor's office, courts (general jurisdictions, misdemeanors), Social Work Centers, and the Protector of Citizens' Rights have an important role. A particularly important institutional mechanism in the protection of children's rights and the fight against violence against children is the Council for the Child Rights formed by RS Government in 2002 (Government Decision No. 560-7228 / 2002-1), while in 2018 the Decision on the formation of the Council for the Rights of the Child (OG 03/18) was adopted.

THE FIGHT AGAINST VIOLENCE AT SPORTS EVENTS

The phenomenon of violence at sports and other public events gained importance in the early 1970s in Great Britain, and then in other Western countries. The culmination of the violence took place in 1985 in Brussels at the famous 'Heysel' stadium in the final match of the European Champions Cup between Juventus and Liverpool. On that occasion, a total of 39 (Italian) fans were killed in the clashes and riots, and there was a large number of the injured. The tragedy occurred when the English fans started a conflict with the Italian at the stadium, when one of the stands gave way and collapsed, and many fans lost their lives due to the trampling. All countries and the UEFA reacted to the tragic event, while the English clubs were punished with a five-year ban from playing in European competitions. The British government has also reacted and proposed a number of changes to national criminal law aimed at sanctioning hooliganism at sporting events. Criminal law was tightened during the Thatcher government and good results were achieved in combating hooliganism, and the measures of the British government became a model for all other countries. (Otašević, 2015).

In the former Yugoslavia, sport violence culminated in the famous match between Dinamo and Red Star in 1990 at the stadium in Zagreb, when there was an eruption of nationalism and the clashes of fans that were the introduction to the civil war and the collapse of the common state. After the disappearance of the 'external enemy' and the creation of new states in this area, hooliganism was transformed, appeared in a new form and with the flare-up of old antagonisms between the domestic clubs Red Star and Partizan and their fans. There has been an even greater polarization and abuse of fans of these clubs, especially young sympathizers and often with political connotations (Nikač, Milošević, 2011, 31-37). The situation did not change significantly even after the social changes in 2000, so fan 'performances' were still present, with political and non-sports messages. In recent times, we have witnessed vulgar messages to some government officials, a significant increase in criminal activities of hooligan groups and their leaders with elements of organized crime and an increase in violence, such as the case of the Velja 'The Trouble' clan accused of the most serious crimes (http://www.tok.jt.rs/html_tok/pocetna_cir.htm). In short, violence at sporting events and public events has remained a 'vent pipe' for the accumulated social, economic and other unresolved problems in the community.

a) At the legislative level, the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches has been adopted at the international level (Law on Ratification European Convention OG-International agreements 09/90). The Convention was adopted in order to prevent and combat violence and misconduct of spectators at football matches, sports and



other events (Article 1). The Convention provides for a number of measures to prevent and combat violence and misconduct, such as: a) the use of means for protection of public order in stadiums and surroundings, b) cooperation and exchange of information between police forces, c) the adoption of laws in accordance with the Convention to prosecute those suspected of violence or misconduct, e) the responsibility of the organizers for the organization of sports events and the behaviour of fan clubs, engagement of the police service, travel and escort of fans, e) coordination and organization of travel (Articles 3-4). Further security measures are prescribed, such as: the separation of fans, the control of ticket sales, the control of alcohol intake, pre-match precautions, the exclusion or prohibition of access to matches and stadiums to persons under the influence of alcohol or drugs, the control of bringing firecrackers and similar devices to stadiums, cooperation liaison officer for joint actions. The Convention affirms the measures to popularize sports ideals, fair play, mutual respect, activism (Articles 5-8), while a Standing Committee (Articles 9-10) has been formed for its implementation.

As part of the initiated social reforms in Serbia, the Law on Prevention of Violence and Misconduct at Sports Events was adopted in 2003 (OG 67/03, 101/05-state laws, 90/07, 72/09-state laws, 111/09, 104/13-state laws, 87/18), which is the most important national legal source for the fight against hooliganism (Nikač, 2010, 233-256).

The law prescribes a number of measures for the suppression and prevention of violence at sports events, which are categorized by character as: preventive measures, measures at sports events, measures at high-risk sports events and measures of the competent state authorities (Articles 7-18).

The CC prescribes as a felony in Article 344a – a violent behavior at a sports event or public gathering, which reads:

Whoever violently assaults or physically attacks participants of a sports event or a public gathering, performs violence or damages assets of greater value upon arrival or departure from a sports event or a public gathering, brings in a sports facility or casts on the sport ground or among the spectators objects, pyrotechnic means or other explosive, flammable or harmful substances that can cause bodily injury or endanger the health of participants in sports events, damaging the sports facility, its equipment, devices and installations, their behaviour or slogans on sports events causing national, racial and religious hatred, or intolerance based on some discriminatory principle that results in physical violence with participants in sports events, shall be punished by imprisonment from one to five years and fined.

The following are qualified forms for committing the basic form of a felony in a group (imprisonment for 2-8 years), where the leader is especially punished by imprisonment for 3-12 years, if there is a riot in which a person was seriously injured or damaged property of higher value is envisaged imprisonment for 3-12 years. A special form of this felony is committed by an official or responsible person who does not take security measures when organizing a sports event or public gathering in order to prevent or stop disorder, and as a result the life or body of a large number of people or property of greater value is endangered. Imprisonment from 3 months to 3 years cumulatively with a fine is threatened. Imposing a security measure prohibiting attendance at certain sports events is mandatory.

Among other legal sources in this area, we remind you of the previously adopted National Strategy for Combating Violence and Misconduct at Sports Events from 2013 to 2018 (OG 63/13).

b) The criminalistics-operational response includes the activities of the police, judicial and other bodies in the suppression of violence and misconduct at sports and other public events.



Based on The Police Law (OG 06/16, 24/18, 87/18), the police monitor, among other things, the state of public order and peace in the community and, in this regard the state and movement of crime and other phenomena. The General Police Directorate, 'lines policing' and local police administration have the inherent authority to maintain public order, as well as stable public order and peace at sports events. Competent police services monitor the state and movement of phenomena and potential challenges, risks and threats to public order, analyze events and make security assessments for individual events, places and entities. Security assessments are also made in the regular course of events to assess the condition and movement of certain phenomena, carriers and potential damage. Based on that, the police take concrete measures and actions to protect public order, life and property of citizens as well as other universal values.

The police in the field gather initial intelligence about the perpetrators, cases, means and other elements of criminal acts related to violence at sports and public events. Members of the police maintain contacts with persons from the criminal milieu who must be registered, in accordance with the issued procedures and bylaws on operational policing. The data are further checked, recycled and the police try to valorize them in preventive and repressive actions in practice. The police cooperate with intelligence agencies, communal militia and other services in collecting data of importance for combating violence at public events. Police cooperation with public companies, club managements, fan groups and leaders and other actors is significant. General police officers in uniform are engaged in this task - uniformed officers, constables, sectoral policeman, traffic police and others, forensic operatives, detectives, operational analysts, etc.

Institutional mechanisms for combating violence on sports fields and cooperation in this area were first established at the international level. Specifically, the European Center for the Fight against Hooliganism was established with its headquarters in the Hague, and the representatives of the RS MoI are participating in its work. One of the first decisions of this body was the classification of rioters into three categories - A, B and C, while today the current classification of fans into 'risky' and 'non-risky' (the Council Resolution concerning an updated handbook with recommendations for international police cooperation and measures to prevent and control violence and disturbances in connection with football matches with an international dimension, in which at least one Member State is involved). At the national level, the most important institutional mechanism is the National Football Information Center (NFIC), which operates within the RS MoI, the General Police Directorate, and the Police Directorate. The same department exists within the PD within the the City of Belgrade PD, while within the local PD there are sections in Novi Sad, Kragujevac and Nis. In other centers, the work is performed by an officer for this area who is connected to the headquarters in Belgrade (www.mup.gov.rs). NFIC has good cooperation with other bodies in the system of the MoI and other services in the intelligence community, then with the authorized bodies in Serbia and especially with the National Council for the Prevention of Negative Phenomena in Sports.

CONCLUSION

In addition to economic, political and other social problems, the community has faced an increased crime rate and its new forms. One of the most dangerous types is crime with the elements of violence and especially newer forms that were not known in this area. These are domestic violence, violence against children and its modality peer violence, as well as violence at sports events. In response to new forms of violence in the community, our state reacted in accordance with the possibilities, using the mechanisms and procedures of a complex (bureaucratic) system.



In the area of domestic violence, the adoption of the Law on Suppression of Domestic Violence has gone further, in the implementation of which there is too much engagement of members of the police who perform tasks that exceed the capacity of the service. It is more expedient for judicial and other professional bodies to be more involved in the suppression of this form of violence, and for the state to use economic measures to eliminate the causes and consequences of domestic violence. With regard to violence against children and peer violence, we are of the opinion that progress has been made in practice and that good steps have been taken, especially by engaging the police in the implementation of programs such as e.g. 'School policeman'. We believe that multisectoral cooperation with other departments should be strengthened in order to ensure the safety of children, and we suggest greater involvement of the private security sector, whose members mainly provide security in schools. Regarding the suppression of violence at sports events and other public events, we are of the opinion that good results and cooperation of all entities have been achieved in the past period, with the emphasis on the responsibilities of clubs as organizers and participants of events. In practice, the problem is the illegal connections of individuals from state structures with people from clubs, as well as with people close to them from the criminal milieu who are involved in the infrastructure of clubs.

To recapitulate, we are of the opinion that good results have been achieved in protecting members of the community from domestic violence, peer violence and violence at sports events. It is necessary to monitor the application of the legislative framework in practice and possibly amend some of the solutions, because, for example, in the case of domestic violence, there are provisions in the Family Law and the Law on the Suppression of Domestic Violence. In the suppression of peer and violence at sports events, the good practice of our bodies and developed countries should be taken into account, of course with respect for the specifics of our community.

REFERENCES

1. Arsić, R., Đorđević, S., Kovačević, J. (2010). Metodika rada sa decom sa posebnim potrebama. Leposavić: Učiteljski fakultet u Prizrenu.
2. Ajduković, M. (2000a). Određenje i oblici nasilja u obitelji, Društvo za psihološku pomoć, Zagreb.
3. Ajduković, M. (2000b). Obilježja žrtvi i počinitelja obiteljskog nasilja, Društvo za psihološku pomoć, Zagreb.
4. Božić, V., Nikač, Ž. (2018). Fight against domestic violence in Republic of Croatia and the Republic of Serbia, 36th International Scientific Conference on Economic and Social Development – "Building Resilient Society", Book of Proceedings, Zagreb, 2018.
5. Confirmation Law of the Convention on preventing and combating violence against women and domestic violence, OG-International agreements 12-13/13
6. Constitution of the RS, OG 98/06.
7. Council Resolution concerning an updated handbook with recommendations for international police cooperation and measures to prevent and control violence and disturbances in connection with football matches with an international dimension, in which at least one Member State is involved
8. Criminal Code (OG No. 85/05, 88/05–corr. 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 and 35/19).
9. Criminal Procedure Code (OG 72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 03/19).



10. Djurdjevic, Z., Lestanin, B. (2017). Intelligence-Led Policing in the Ministry of Interior of the Republic of Serbia, in *Thematic conference proceedings of international significance "Archibald Reiss Days"* (3):3-16
11. Family Law OG 18/05, 72/11-state laws and 06/15).
12. Fundamentals of the Education System Law (OG 88/17, 27/18-state laws, 10/19 and 06/29)
13. Gačević, G., Nikač, Ž. (2015). Akciono planiranje policije u okviru prevencije nasilja, Projekat Nasilje u Srbiji-oblici, činioci, kontrola, Zbornik radova 2, KPA, Beograd.
14. Government Decision No. 560-7228 / 2002-1.
15. Government Decision on the formation of the Council for the Rights of the Child (OG 03/18).
16. Kavran, D. (2004). Evropski upravni prostor, reforma i obrazovanje državne uprave, Pravni život br. 09/04, Beograd.
17. Labour Law (OG No. 61/05, 54/09, 32/13, 75/14, 13/17-CC, 113/17 and 95/18-authentic interpretation)
18. Law on Juvenile Delinquents and Criminal Protection of Juveniles (OG 85/05).
19. Law on Prevention of Violence and Misconduct at Sports Events was adopted in 2003 (OG 67/03, 101/05-state laws, 90/07, 72/09-state laws, 111/09, 104/13-state laws, 87/18)
20. Law on Ratification CEDAW, OG-International agreements 11/81.
21. Law on Ratification European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches OG-International agreements 09/90)
22. Law on Ratification Convention on the Rights of the Child, OG-International agreements 12/93, 20/97.
23. Leštanin, B., Božić, V., Nikač, Ž. (2018). Pravni okvir za uspostavljanje kriminalističko obaveštajnog modela prema standardima EU, Istraživački centar Banja Luka i Institut za uporedno pravo Beograd, Zbornik Međunarodne konferencije „Usaglašavanje pravne regulative sa pravnim tekovinama (Acquis Communautaire) EU - stanje u BiH i iskustva drugih”, Banja Luka.
24. Nikač, Ž. (2019), Policija u zajednici. KPU, Beograd.
25. Nikač, Ž. (2017), Borba protiv nasilja u porodici u Republici Srbiji u funkciji zaštite prava na život, Kopaonička škola prava, 30. susret, Udruženje pravnika Srbije, Pravni život br. 9, Tom 1, Beograd.
26. Nikač, Ž., Božić, V. (2018). Pravni okvir za zaštitu žrtava nasilja u porodici, PP Intermex, Pravni informator br. 3/18, Beograd.
27. Nikač, Ž., Gačević, G. i Zečević, O. (2009). Projekat „Nasilje u školama i njegovo sprečavanje i suzbijanje“, Izveštaj istraživanja, MUP RS, Direkcija policije, interno.
28. Nikač, Ž. (2012). Koncept policije u zajednici i početna iskustva u Republici Srbiji, KPA, Beograd.
29. Nikač, Ž., Leštanin, B. (2019). Koncept PUZ u funkciji razvoja i demokratizacije društva, Naučni skup sa međunarodnim učešćem: Pravo u funkciji razvoja društva, Pravni fakultet Priština, Zbornik radova, Tom II, Kosovska Mitrovica.
30. Nikač, Ž., Milošević, G. (2011), Fight against violence at sporting and public events in Serbia – legislative solutions and actions of the Police, Međunarodna konferencija „European Union – area of freedom, security and justice“, Police Academy Alexandru Ioan Cuza, Bucharest, Romania, Zbornik radova, Vol. I.



31. Nikač, Ž. (2010). Borba protiv nasilja i nedoličnog ponašanja na sportkim manifestacijama, sa osvrtom na ulogu MUP RS, XXII međunarodni seminar prava Nasilnički kriminal: etiologija, fenomenologija, prevencija, Institut za kriminološka i sociološka istraživanja, Palić.
32. Police Law (OG 06/16, 24/18, 87/18).
33. Otašević, B. (2015). Nasilje na sportski priredbama, JP Službeni glasnik, Beograd.
34. Spasenović, V. (2008). Vršnjački odnosi i školski uspeh. Beograd: Institut za pedagoška istraživanja.
35. Special Protocol on the Conduct of Police Officers in the Protection of Minors from Abuse and Neglect (11 October 2006).
36. Van Bueren G. (2007). Child rights in Europe, Council of Europe.
37. <http://www.mup.gov.rs/wps/portal/sr/>
38. http://www.tok.jt.rs/html_tok/pocetna_cir.htm

EXPECTATIONS OF THE LECTURERS OF THE UNIVERSITY OF PUBLIC SERVICE FACULTY OF LAW ENFORCEMENT

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Abstract: All lecturers at the University of Public Service Faculty of Law Enforcement strive for excellence. The preparation of selected students can be achieved with a select, quality teaching staff. It is in the organisational interest of the Ministry of the Interior to have well-prepared law enforcement professionals who can perform full professional duties in a short time. The training of the cadets is a responsible educational task. In order to ensure that the teaching community meets the high standards expected, the University of Public Service continuously monitors the performance of its teaching staff and has developed a complex system to measure it. The study will present the general and specific requirements for lecturers and the measurement methods for their fulfilment as a good practice that can be successfully adapted to other law enforcement training institutions in other countries.

Keywords: performance measurement of lecturers, excellence in teaching, general and special requirements, good practices.

INTRODUCTION

The University of Public Service Faculty of Law Enforcement is in a special and unique position in the Hungarian higher education system, as it is the only institution in the country that offers basic and master level training for law enforcement officer candidates. The lecturers of the University of Public Service consider their work, teaching and research as a kind of important social service. A significant part of the lecturers work as professional law enforcement officers. In addition to the general and specific requirements for professional police officers, the lecturers fully meet the general requirements for

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university lecturers. The duties of a university lecturer are therefore twofold: to fulfil the professional requirements of a professional officer and to meet the requirements of the various grades of lecturer.

The National University of Public Service Faculty of Law Enforcement operates in a close-knit, innovative and creative community, effectively contributes to the implementation of the university's strategic ambitions, and by meeting the Ministry of Interior's expectations at a high level, ensures the continuous supply of Hungarian law enforcement professionals.

The responsibility of lecturers is particularly important in the education and training system. Lecturers are responsible for preparing future generations of law enforcement officers through training and education methods. However, the results of this training will only be measurable years from now, but all lecturers must strive for the best performance, because that is what will determine their effectiveness.

Overall, the students who have graduated from the Faculty of Law Enforcement, both full-time and part-time, as officers and future law enforcement leaders are expected to shape the forces of the future into the professional and general preparation they received at the Faculty.

The professional and pedagogical skills of the trainers are determining. Training of the teachers has become an important strategic issue. This applies in particular to leaders in initial training, since the primary socialisation of officer candidates takes place during the initial training.

A BRIEF INTRODUCTION OF THE DUTY OF NEW LECTURERS

The life of a university lecturer is not easy. It is constantly challenging. Even for those who just started as a beginner lecturer, there are specific requirements to meet. The law enforcement bodies provide the necessary staffing conditions on the basis of the Act on the employment of professional staff.

Annex I to the Rules of Organisational and Operational Rules of the University of Public Service is the Employment Rules, which fixes in detail the provisions relating to each category of work. Accordingly, for teaching assistants the condition for employment is to start doctoral studies.

Assistant lecturer

Conditions of employment as an assistant lecturer at the University:

- a) have started doctoral studies;
- b) has the necessary qualifications for high-quality teaching and practical training in the discipline in which the subject is taught, preferably in one of the following languages: English, German, French, Spanish, Italian, Russian or Chinese;
- (c) publishes in one of the following languages: English, German, French, Spanish, Italian, German, Russian or Chinese;
- (d) continuously strive to meet the requirements of the post of Adjunct Professor;



- (e) participate in the public professional life of the institution;
- (f) obtain a doctor's degree within ten years from the date of his/her employment as a lecturer.²

Master teacher

The Faculty also has the possibility to employ "experienced" teachers with more professional-practical experience. Due to the closed nature of the teaching career path (teaching degrees are linked to qualifications and teaching experience), it is more difficult for the older generation to meet the expectations, and the university management has therefore created opportunities for the employment of master teachers.

Pursuant to Section 28 § (6) of the Nftv., a Master's degree and at least ten years of professional experience and knowledge are required for employment as a master teacher, as well as the person's suitability for practical training of students.

Conditions of employment as a master teacher at the University

- a) have a Master's degree;
- b) can provide evidence of at least 10 years of professional experience and knowledge;
- c) be able to provide practical training for students;
- d) demonstrates by his/her activities, the knowledge of the discipline in which the subject is taught;
- e) has the ability to prepare the subject matter independently and to provide high-quality teaching;
- f) has experience of teaching in higher education or adult education.³

In addition to the master teachers, the Faculty needs a large number of practical lecturers to meet the educational needs in order to achieve the professional (law enforcement) socialization goals, and thus the teaching posts have been created. Pursuant to Article 34(1) of the Nftv., a teacher's post is open to persons with higher education and professional qualifications (university degrees are not required for these posts.)⁴

The specialised trainer

The conditions of employment as a specialised trainer at the University:

- a) have university degree;
- b) have five years of professional experience in the field of teaching.

² A Nemzeti Közszerzői Egyetem Szervezeti és Működési Szabályzata II: kötet. Foglalkoztatási Követelményrendszer 1. számú melléklet. Foglalkoztatási Szabályzat 17.§. 1.. https://www.uni-nke.hu/document/uni-nke-hu/Foglalkoztat%C3%A1si_Szab%C3%A1lyzat_hat%C3%A1ly_2020.04.25-t%C5%91l.pdf (A letöltés időpontja: 2021.08.01.)

³ uo. 21.§. A letöltés időpontja: 2021.08.01.

⁴ 2011. évi CCIV. törvény a nemzeti felsőoktatásról 34§. 1. <https://net.jogtar.hu/jogszabaly?docid=a1100204.tv> (A letöltés időpontja: 2021.08.01.)



The practical lecturer

The conditions of employment as a trainee teacher at the University:

- a) have an appropriate professional qualification;
- b) five years of professional experience in the field of teaching.⁵

From what has been described, if you want to play a role in the education of officer candidates at the Faculty of Law Enforcement, you must also meet the specific requirements set by law. Preparing to meet these requirements is a serious and time-consuming task, sometimes the result of years or decades of hard work.

Selection process and good practice of beginner lecturers

At the Faculty of Law Enforcement, the filling of teaching posts due to generational changes will determine the future and effectiveness of the teaching departments in the long term. In principle, it is in the interest of the organisations to recruit for beginner teaching posts professionals who are able and willing to meet the high standards and who see teaching and education as their profession.

Qualifying as a lecturer requires a whole person, with other well-defined requirements in addition to those discussed in the previous section. To mention just the most important of these: a constant desire to learn, a keen awareness of professional problems and new developments, excellent professional preparation, a harmonious personality, a realistic self-image and self-assessment, a strong inner motivation, a sense of pedagogy, didactic knowledge, empathy, the ability to work independently and effectively, a sense of self-determination, and an interest in and receptiveness to scientific activity.

Selecting talented students

During the years of study at university, the professional skills and personal qualities of students in law enforcement bachelor and master programmes are mostly revealed during their studies. The lecturers and class instructors form a realistic image about the graduates. It is the joint responsibility of the Faculty, the group leaders and the college tutors to monitor the students' progress. Already during their studies, it is possible to identify a pool of outstanding candidates who achieve outstanding academic results. They are involved in scientific student groups early in their schooling, or even take on a demonstrator role in a department relevant to their training programme. They are involved in the work of the specialised colleges, in the basic training of undergraduate students, in the training of undergraduate, and in the management, organisation and leadership of the day-to-day life of student sub-units. They should be capable of carrying out academic work, possibly leading to an academic title.

It is an organisational interest that the activities of these students are brought to the attention of the Faculty management during their school years.

⁵ uo. 33.§ 34.§. (A letöltés időpontja: 2021.08.01.)



Process for evaluation of applications for teaching posts

The content of most of the applications for lecturers is fixed, but it is usually specific to the professional profile of the department. A practical difficulty is that departments specialise in teaching certain professional areas, so that the vacant teaching posts in a department are filled by applications from a professional officer with expertise in the field. In an optimal case, this may be only a few persons (in which case the results of the preparatory recruitment work of the departments in the field of human resources policy can be clearly visible).

In the evaluation of applications, it is advisable to appoint 2-3 experienced lecturers from the department in order to evaluate the applications, conduct preliminary interviews of candidates, and carry out tests in the given subject area. The opinion of the departmental meeting will be an important and decisive factor in the selection of the candidate, as he/she will be working within the departmental community. Candidates must present themselves at the departmental meeting or at the department where the new member of staff will be working.

If the application is successful, the task is to prepare the staff to learn about the teaching process and to take on the role of a lecturer. To ensure the success of this activity, it is advisable to appoint a faculty mentor with appropriate experience who will assist the mentored person in all aspects of the teaching process for at least one full academic year.

Possible content of methodological training for new trainers

It is advisable to organise an in-service training course for young trainers of at least two weeks' duration. The training should be conducted by the best experts in the Faculty and should be interactive, consisting of theoretical and practical parts, with a role for on-the-job training and independent learning.

The areas of preparation of new trainers

The subjects covered in the training of new trainers are: general information, pedagogical and didactical knowledge, IT and scientific knowledge.

Most importantly, the content of the pedagogical module:

- Preparing for the classes,
- Student motivation, assessment systems, good practices,
- Using e-learning systems in practice (Moodle, Microsoft Teams and others - practical sessions),
- Visualisation in practice (Power Point, Prezi),
- Methods of conducting different types of activities (lectures, seminars, group activities, practical exercises, methods of conducting combined activities at grade level, methods of conducting field and field activities),
- Teaching practice (four sessions of observation and discussion of the whole lesson with the experienced teacher/mentor),
- Teaching practice (two sessions with prior mentoring in a real environment and on a real professional topic).



The process of preparing young teachers for the workplace

The literature on preparing a new workforce for the workplace provides a detailed description of the integration process, which can take up to a year in total. The following dates can be crucial for the integration of the employee and should be a priority for managers.

The aim of the first workday is to introduce the new employee and establish contact with his/her direct colleagues and leader. It is accepted practice for the new employee and his/her leader to discuss the tasks and the main duties of the job with the mentor.

The tasks for the first month should be defined jointly by the leader and the mentor for the new employee. The mentor should continuously monitor the performance of the new employee on a day-to-day basis. They should agree on the next tasks to be carried out at regular intervals, and at the end of the month their performance should be evaluated in the presence of the leader in a completely frank atmosphere, including any negative aspects if necessary.

As a workplace leader or mentor, we need to give the new employee more and more autonomy over time, and at the same time constantly evaluate his/her performance and activities. Any failures or mistakes should be pointed out in a spirit of helpfulness, as it is in the manager's interest to ensure that the new employee fits in as quickly as possible and performs well in his or her position.

CONCLUSIONS

- The Faculty of Law Enforcement is in a unique and special position in the Hungarian higher education system.
- The new lecturers are also professional law enforcement officers who have to meet the general requirements for university lecturers.
- Because of the specific nature of the training provided by the Faculty, particular emphasis is placed on the excellent preparation and responsibility of the lecturers.
- The results of the work carried out will take years to measure and will be reflected in the organisational culture of the law enforcement organisation in the long term.
- It may be good practice to select potential candidates for future lecturer posts during the school years.
- New lecturers can be effectively prepared to meet the requirements to the maximum extent possibly in the years following graduation.
- The evaluation of applications is a well-regulated process.
- The preparation of young lecturers requires careful attention, and recruited young colleagues should be prepared in an organised way for their teaching duties.
- For young trainees, a mentoring scheme should be in place for at least one year.

Overall, the importance of the process of selection and on-the-job integration of young officers is being enhanced, because if it is successful, the responsible task of training and educating law enforce-



ment officers will continue to be in good hands. With the entry and development of new lecturers, the necessary high level of professional skills and knowledge will be transferred, and law enforcement agencies will continue to be satisfied with the training of officers graduating from the Faculty.

REFERENCES

1. *A biztos jövő egyeteme – Intézményfejlesztési terv 2020-2025.* 4.0. 4. o. Forrás: https://www.uni-nke.hu/document/uni-nke-hu/TERVEZET%204_0%20Int%C3%A9zm%C3%A9nyfejleszt%C3%A9si%20Terv%202020-2025.pdf (A letöltés időpontja: 2021.08.15.)
2. *A Nemzeti Közszerzőgálati Egyetem Szervezeti és Működési Szabályzata* II: kötet. Foglalkoztatási Követelményrendszer 1. számú melléklet. Foglalkoztatási Szabályzat 17.§. 31.§. 33.§. 34.§.1..
3. https://www.uni-nke.hu/document/uni-nke-hu/Foglalkoztat%C3%A1si_Szab%C3%A1lyzat,_hat%C3%A1ly_2020.04.25-t%C5%91l.pdf (A letöltés időpontja: 2021.08.01.)
4. Roy MAUER: *New Employee Onboarding Guide. Proper onboarding is key to retaining, engaging talent.* <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/new-employee-onboarding-guide.aspx> (A letöltés időpontja: 2021.08.10.)
5. 2015. évi XLII. törvény a rendvédelmi feladatokat ellátó szervek hivatásos állományának szolgálati jogviszonyáról <https://net.jogtar.hu/jogszabaly?docid=a1500042.tv> (A letöltés időpontja: 2021.08.18.)
6. 2011. évi CCIV. törvény a nemzeti felsőoktatásról. <https://net.jogtar.hu/jogszabaly?docid=a1100204.tv> (A letöltés időpontja: 2021.08.01.)





THE ROLE OF ORGANIZATIONAL UNITS OF THE SERBIAN POLICE DIRECTORATE IN THE SYSTEM OF DISASTER RISK REDUCTION AND EMERGENCY MANAGEMENT

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Abstract: Emergency situations caused by natural and other disasters in the Republic of Serbia are becoming more frequent. The primary strength of the disaster risk reduction and emergency management system in the response phase are the professional fire and rescue units of the Sector for emergency management. Respecting the principle of gradual use of operational staff, in a situation when professional fire and rescue units do not have sufficient capacity to react, members of organizational units of the Police Directorate join them. The floods are characteristic because of the engagement of members of the Gendarmerie, Helicopter unit, special police units, as well as members of the police of general jurisdiction and traffic police. The engagement of members of the Gendarmerie and the Helicopter unit when forest fires occur is of great benefit and represents a significant operational assistance to professional fire and rescue units. In cases of international rescue assistance sent to the Republic of Serbia, the role of members of the border police is also recognizable. In addition to the operational part, the role of the organizational units of the Police Directorate is reflected in the preventive phase through engagement in various field exercises with the aim of increasing systemic operational efficiency and effectiveness.

Keywords: police directorate, organizational unit, emergency management, system, operational cooperation

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INTRODUCTION

Before talking about the role of the organizational units of the Serbian police Directorate in the system of disaster risk reduction and emergency management, some of the unknown terms must be precisely defined as well as to provide key current solutions with the already published works in the field of disaster studies and the literature review.

The system of disaster risk reduction and emergency management is part of the national security system and is an integrated form of management and organization of the subjects of this system to implement preventive and operational measures and perform tasks of protection and rescue of people and goods from disasters, including recovery measures (Law on Disaster Risk Reduction and Emergency Management).

Forces of the system of disaster risk reduction and emergency management are: emergency management headquarters, civil protection units, fire and rescue units, Service 112, Police, Serbian Army, Serbian Red Cross, Serbian Mountain Rescue Service, Voluntary fire association of Serbia, Association of radio amateurs of Serbia, commissioners and deputy commissioners of civil protection, citizens, associations of citizens and organizations whose activities are of special interest for the development and functioning of the system (Law on Disaster Risk Reduction and Emergency Management).

The Police Directorate of the Ministry of the Interior of the Republic of Serbia is organized into what many consider a seventh sector of the Ministry. It is responsible for the performance of police duties, which are, together with the competences and powers, governed by the Law on Police. The organization of the headquarters of the General Police Directorate is composed of functionally (diagonally) connected organizational units, with a well-established hierarchical structure of police stations and substations, so that they perform tasks within their scope, covering the entire territory of the Republic of Serbia (Kekic et al, 2021).

Police forces should have different roles before, during and after natural and man-made disasters. In this regard, emergency management must be defined as a separate segment of the system where the role of Serbian Police Directorate is primarily reflected. Emergency planning management refers to the coordination and management of resources and responsibilities pertaining to the mitigation of, preparedness for, response to, and recovery from an emergency. The four phases of disaster management are mitigation, preparedness, response, and recovery (OmniSci, 2021).

Moreover, the literature recognizes the role of police forces in the emergency management. During a disaster, police officers not only have to continue to keep the community safe from possible looting, destruction of property, and theft that may occur, they also have to be prepared to evacuate citizens, render advanced life saving techniques, and keep points of dispensing sites secure. Additional duties also include the delivery of food, water, and blankets to those who have been displaced by the disaster (Herron, 2015). During emergencies, disasters, and catastrophes, law enforcement organizations have primary responsibilities to provide the necessary functions that ensure public safety. Traumatic events such as natural disasters impart short- and long-term effects on the personal lives of those responsible for carrying out these operational tasks. The behaviour exhibited by law enforcement personnel during these extreme events has implications on organizational resilience (Adams, Anderson, 2019). The police, as a state body and law enforcement agency, are primarily responsible for the protection of public order and peace, as well as for combating crime. In that sense, the role of the police in emergency situations could be observed. However, the role of the police in emergencies is much broader than that. It includes not only the realization of the basic function of the police, but also a whole range of other activities, such as protection and rescue in emergency situations, elimination of the consequences



of emergency situations, identification of victims, enabling the work of other services, etc. (Šikman, Amidžić, 2014). In the process of response to natural disasters, the police certainly represent one of the most important intervention and rescue services, which has an indisputable role in dealing with the consequences of natural disasters, the number and severity of which increases every year (Cvetković, 2016).

When it comes to theoretical research, the focus is on the not so rich literature that describes the role of the police in the system of disaster risk reduction and emergency management. Then, the theoretically defined phases of the system of disaster risk reduction and emergency management are taken into account in order to make connection with different police forces. All phases are taken into account, so that the emphasis of the role of the police would not be exclusively on the reactive part. In the next part of the paper are pointed out those organizational parts of Serbian police Directorate that have a role in the system of disaster risk reduction and emergency management. Finally, practical examples of engagement of organizational parts of Serbian police Directorate in emergency situations are pointed out with suggestions and recommendations for improvement.

GENERAL ROLE OF THE POLICE IN THE SYSTEM OF DISASTER RISK REDUCTION AND EMERGENCY MANAGEMENT

Police forces are extremely important when there are natural or man-made disasters. In most cases, it is a matter of securing locations where the consequences for the population or material and cultural goods are visible. However, police forces should also be engaged in search and rescue operations when it comes to rubble, evacuation during floods, extinguishing forest fires from land or from the air. Modern conditions mostly than before bring new forms of emergency situations. Current global situation with the COVID - 19 pandemic reflects the need to engage police forces. In addition to engaging the police forces in the part of responding to emergency situations, members of the police should be engaged in the preventive part. Events such as earthquakes, floods, storms, tsunamis, landslides often pose a major challenge to police officers. Although most police organizations in the countries around the world has certain plans and procedures for dealing with natural disasters, they are often not adequately tested (Skogan, Frydly, 2004).

While functions of local police are well defined for internal emergency, same is not true for natural or other disasters. But wherever earthquake or flood occurs, the police get involved from the beginning (the role of the police in disaster/emergency, 2020). Police forces should be engaged during different phases of emergency management. The role of police during mitigation and preparedness phase consists of:

- Emergency traffic plan,
- Detail communication plan,
- Identification of building,
- Security plan,
- Resource mapping,
- Training (Ibid).

Role of police during response phase consist of:

- Search and Rescue (SAR)
- Deployment of resources,
- Restoration of communication system/liasoning with rescue teams,



- Prevention of commission of cognizable offences including all offences against property, human body and public tranquillity,
- Security during relief distributions/relief management,
- Camp management,
- Emergency transportation and traffic regulation,
- Coordination with various agencies,
- Casualty information/ disposal of dead,
- Family liaison officers,
- Media management,
- VIP security,
- Crowd management (Ibid).

Role of police during recovery phase consist of:

- Restoration of critical infrastructure,
- Safe exit of the personnel involved in disaster management,
- Feedback/assessment,
- Contingency planning (Ibid).

During mitigation and preparedness phase the police must be involved in the emergency response planning process. This means that responsible institutions for planning process have to recognize the importance of police forces and their engagement during natural and other disasters. It is recommended that police officers from different areas should be actively involved in the planning process. In this part we must not forget that various police forces are involved during emergencies. After the planning process part, in the preparedness phase, it is necessary to include the police forces in the part of training and exercises. Exercises and trainings are necessary in order to check the defined plans and determine possible shortcomings in order to further eliminate them. Given the direct/indirect role and importance of police activities, it can be said that the shortcoming research on police preparedness and response in natural disasters, is a serious problem given that more efficient police can evacuate more people, save far more lives and improve public relations. In contrast, an ineffective police response during a natural disaster can prevent evacuation officers, hamper the great search and rescue efforts, but also greatly undermine public confidence in the police (Deflem, Sutphin, 2009).

The next phase refers to the response to natural and man-made disasters. When it comes to search and rescue, certain parts of the police have the equipment and are well trained to react in case of earthquakes, floods and other risks. Police forces also have certain mechanization and means of transport that can be used in the event of a mass evacuation. When it comes to communication, the means of communication used by the police are easily adapted to the communication systems used by other subjects and forces involved in responding to natural and man-made disasters. The safety of locations where protection and rescue operations are carried out is the responsibility of the police. Namely, it is a common occurrence that the crime rate increases with the appearance of certain catastrophes. There are examples in practice that immediately after an earthquake or flood, opportunities are used, in the first hours when chaos usually reigns in the affected territory, for thefts and illegal confiscation of valuables that are in someone else's property. The police have the main role to immediately secure the endangered territory, which in some cases is not an easy task, having in mind that it can be a large area. In addition, it is important not to allow access to unauthorized persons where rescuers are working on. The evacuation of a large number of people often requires that all the necessary conditions for care must be provided, which includes accommodation, food, sanitary and hygienic conditions, medical and psychological assistance. When an earthquake occurs, such conditions cannot be provided in masonry buildings, but camps and tent settlements should be erected. Then the police have a role to provide such spaces. One of the expected consequences is traffic jam caused by damage to roads



or simply by fear and panic that occurs among the population who are trying to get to a safe place as soon as possible. In order to primarily ensure the passage of rescue teams to the places where they will perform their activities, the traffic police is involved in order to regulate key roads and provide escorts to the rescue forces. During emergencies, occurs heightened need for security for country's political leadership. The protection of these persons is raised to higher level during emergencies, and security during transport and the provision of escorts is implied in order to reach the endangered territories as soon as possible or meetings of the headquarters for emergency management where decisions are made on search and protection actions. Generally speaking, there are tasks that the police will undertake regardless of the natural disaster. However, each natural or man-made disaster will be carried with certain specifics to which police officers will have to adapt. Tasks can be ordinary and routinized, but also specific. For example, examples of the specific tasks would be: providing food and water, conducting patrol and stage activities in changed conditions (with or without protective equipment) such as floods, earthquakes, landslides, extreme temperatures, etc., identity checks, deprivation of liberty and bringing people with the help of protective means and auxiliary equipment and appropriate means of transport, etc (Cvetković, 2016).

After the response phase follows the phase of recovery and the establishment of the same living conditions as before natural or man-made disaster. During this phase police forces have a minimal role. They must continue to secure the endangered and affected parts in order to avoid criminal actions during the repair of the damage. Police management, both at the local and higher levels, will be involved in the assessment of the forces required and the time required to normalize life in the affected area. In addition to the police, many other intervention and rescue services will be involved in eliminating the consequences of natural and man – made disasters, which will generally have the same goals: saving and protecting human lives; alleviating suffering; controlling a natural disaster by limiting its escalation; warning the public and businesses, advising and providing information, etc (Mlađan et al, 2012).

ORGANIZATIONAL UNITS OF SERBIAN POLICE DIRECTORATE INVOLVED IN THE SYSTEM OF DISASTER RISK REDUCTION AND EMERGENCY MANAGEMENT

Organizational units of the Serbian police Directorate in the seat are:

1. Anti-Trafficking Coordination Office,
2. Bureau of the Police Director,
3. Criminal Investigations Directorate,
4. Directorate for International Operational Police Cooperation,
5. Uniformed Police Directorate,
6. Security Unit Protecting Specific Persons and Facilities,
7. Protection Unit,
8. Traffic Police Directorate,
9. Border Police Directorate,
10. Administrative Affairs Directorate,
11. Operations Centre



12. Gendarmerie,
13. Special Anti-Terrorist Unit,
14. Helicopter Unit,
15. Coordination Directorate for Kosovo and Metohija (Kekić et al, 2021).

The Serbian police Directorate also comprises of Police directorate for the city of Belgrade as well as 26 regional police directorates. Grouping of positions was done during the classification for the organizational units of the Serbian police Directorate in the seat. Organizational units at the headquarters of the Police Directorate, the Police directorate for the City of Belgrade and regional police administrations are formed so that they are working and functionally connected with appropriate organizational units and jobs in a way that they perform related police tasks at the central, regional and local level (the Ministry of the Interior, 2021).

This kind of organizational structure of the Serbian police Directorate suggests that this is a hybrid organizational structure. Territorial differentiation of a regional police directorate coincides with administrative territorial structure. Namely, the area of one police station is equal to the administrative territory of one municipality (Stevanović, 2019:134-144). When it comes to organizational units of the Serbian police Directorate that are engaged in the system of disaster risk reduction and emergency management must be pointed out Police directorate for the city of Belgrade and 26 regional police directorates, uniformed police Directorate, Helicopter unit, Traffic police Directorate, Border police Directorate, Operations centre, Gendarmerie, Special Anti-Terrorist Unit, Security Unit Protecting Specific Persons and Facilities. Other organizational units may be engaged sporadically, but those listed above have priority at different phase of emergency management.

Police directorate for the city of Belgrade and 26 regional police directorates consist of partly similar organizational units as those in the headquarters Serbian police Directorate. Bearing in mind the gradualness as one of the basic principles in emergency management, will react first Police directorate for the city of Belgrade and 26 regional police directorates. This part refers to the organizational units that are responsible for police affairs of general jurisdiction and traffic police. The purpose of the work of the traffic police is the organized functioning of road traffic and the protection of citizens and material values in the process of transportation. The traffic police monitor compliance with regulations related to road safety (the Ministry of the interior, 2021). When a natural or man-made disaster occurs and if the assessment is such that there is a need to engage traffic police, the first to react are members of the traffic police within the police Directorate for the city of Belgrade and 26 regional police directorates depending on the endangered territory. Their role is to close sections in order to prevent the movement of certain roads that have been damaged due to earthquakes, floods or some other danger. Also, to them can be assigned the role of escorting forces that are engaged in order to save and protect people, material and cultural goods in order to get to the location as quickly as possible. Moreover, escorting of VIP convoys during emergencies should be one of tasks of traffic police within the Serbian police Directorate. A similar engagement procedure applies to the police of general jurisdiction. In the part of securing the endangered territory and not allowing access to unauthorized persons, members of the police units for general jurisdiction within the police Directorate for the city of Belgrade and 26 regional police directorates will be engaged. Border police, as an organizational unit in the Ministry of interior of the Republic of Serbia performs duties related to control of crossing and securing the state borders; duties related to movement and sojourn of foreigners; it participates in procedures of acknowledging asylums; it performs normative and legal tasks, controlling legality of work and doing logistic duties; as well as other duties as prescribed by law (Integrated border management Strategy in the Republic of Serbia, 2017). When the consequences of natural or man-made disaster



exceed the capacity of the affected state, the assistance of the international community is sought. The role of the Serbian border police is to ensure unhindered crossing of the state border in coordination with the customs administration and other competent institutions. Helicopter Unit is an air support unit of the Serbian Police. Its purpose is to provide aerial surveillance, reconnaissance, border patrol, VIP Transport, medevac, search and rescue and aerial firefighting (Ministry of the Interior, 2019). In cases when evacuation is done from inaccessible terrains or during floods, members of Helicopter unit within the Serbian police Directorate have a significant engagement. On the other hand, in cases of forest fires and fires in the open space, for the purpose of aerial fire-fighting capacities Serbian police Helicopter unit are engaged. The Gendarmerie is a special police unit at the headquarters of the Serbian police Directorate. The internal organization and formation of the Gendarmerie has changed several times since its formation. Currently the Gendarmerie consists of:

- Gendarmerie Command (headquarters in Belgrade),
- Diving unit (headquarters in Belgrade), has a diving and nautical platoon,
- Four detachments of the Gendarmerie: in Belgrade, Novi Sad, Nis and Kraljevo (the Ministry of the Interior, 2021)

Members of Serbian Gendarmerie should be engaged when it is necessary to evacuate people endangered by floods, especially members of diving unit, as well as in situations of inaccessible terrain. Also, engagement of Gendarmerie is visible when there is an additional need for forces to extinguish forest fires and open space fires. Operations centre should coordinate engagement of police forces during natural or man-made disaster with National centre 112 which is organizational unit of Sector for emergency management. Furthermore, it is necessary to mention the role of Special anti-terrorist unit as well as Security unit protecting specific persons and facilities. Special anti-terrorist unit should be engaged only when there is special need for rescuing and evacuating people who are endangered due to flood or earthquake. Security unit protecting specific persons and facilities, as a part of Serbian police Directorate, should be engaged for protection VIP persons during emergencies.

In this part, the education of future Serbian police officers should also be pointed out. During their schooling they have the opportunity to gain the basic knowledge of emergency management. At the University of criminal investigation and police studies in Belgrade there is a special scientific field of security in emergency situations within the Department of security sciences. There are several different exams through which students at different levels of study can acquire knowledge about safety in emergency situations. Moreover, as a separate part of master academic studies exist study program with name Managing security risk in natural disasters (the University of Criminal Investigation and Police Studies, 2021).

REAL ENGAGEMENT OF THE SERBIAN POLICE DIRECTORATE IN THE SYSTEM OF DISASTER RISK REDUCTION AND EMERGENCY MANAGEMENT

In the previous period there were examples of engagement of organizational units of Serbian police Directorate in different phases and segments. During the third week of May, exceptionally heavy rains fell on Serbia which were caused by a low-pressure system ('Yvette') that formed over the Adriatic. Record-breaking amounts of rainfall were recorded more than 200 mm of rain fell in western Serbia in a week's time, which is the equivalent of 3 months of rain under normal conditions. Because of the flooding, some 32,000 people were evacuated from their homes, out of which 25,000 were from Obrenovac. (World bank group, 2014). Such a natural disaster initiated the engagement of various



parts of Serbian police Directorate. The government established a “Floods Emergency Headquarters” within the Sector for Emergency Situations in the Ministry of the Interior, together with crisis centres in each of the flood-affected municipalities/districts/cities. The headquarters office was staffed by central and municipality operational crisis management teams made up of staff from the sector, the fire and rescue services, the police and gendarmerie, and the military. The police, the Serbian army, gendarmerie and firefighter and rescue units played key roles in evacuating affected populations and providing humanitarian relief assistance to areas most in need, and coordinated closely with the municipal emergency headquarters in the planning and execution of such tasks (World bank group, 2014). The summer of 2021 was marked by forest fires and open fires both in Serbia and in other countries. The helicopter unit of the Ministry of the Interior of the Republic of Serbia firstly was engaged on few different locations at territory of Serbia in order to assist extinguishing wildfires. After that, the same organizational unit of Serbian police Directorate was departed to Greece, where its members provided assistance in extinguishing wildfires that had been burning in that country. Members of this unit, before Greece, were in North Macedonia for almost the whole past week, where they also helped in extinguishing wildfires, and before that they provided their help on mountain Stolac above Višegrad (Telegraf, 2021).

These are just some of the examples of Serbian police engagement in the event of a response on natural or man-made disasters.

CONCLUSIONS

Finally, the role and activity of the Serbian police during natural or man-made disasters have been raised much in recent years. The growing number of emergencies declared due to earthquakes, floods, forest fires and other risks leads to the need to engage various organizational units of Serbian police Directorate, both at the local level and from the headquarters. In addition, pandemic caused by virus COVID-19 showed also need for police engagement, especially because epidemics and pandemics are considered as natural disasters.

It is very important that the engagement of Serbian police forces is coordinated by the competent emergency management headquarters. In such cases there is a full effect of the significance use of police forces in some of the phases of the emergency management system. On the contrary, bearing in mind that the role of the Serbian police Directorate in the system of disaster risk reduction and emergency management is not the primary role in the security system, it may happen that the required level of efficiency and effectiveness is not achieved. This is supported by the need to involve the police force as often as possible in various forms of exercises and training to respond to natural or man-made disasters.

REFERENCES

1. Adams T. and Anderson L. (2019). *Policing in Natural Disasters: Stress, Resilience, and the Challenges of Emergency Management*. Philadelphia: Temple University Press.
2. Cvetković, V. (2016). The role of the police in natural disasters. Accessed on October 12, 2021. https://www.academia.edu/11135820/uloga_policije_u_prirodnim_katastrofama
3. Deflem M. and Sutphin S. (2009). „Policing Katrina: Managing law enforcement in New Orleans“ *Policing: A Journal of Policy and Practice*, 3(1): 44.



4. Government of the Republic of Serbia. (2017). Integrated border management Strategy
5. Kekić, D. et al. (2021). Ministry of Internal Affairs and Police Organization in the Republic of Serbia. Global perspectives in policing and law enforcement. *Lexington books – edited by Jospeter M. Mbuba*.
6. Law on Disaster Risk Reduction and Emergency Management, Official Gazette of RS, 87/2018
7. Herron, V. (2015). The role of police during a natural disaster. Accessed on October 15, 2021. <https://www.linkedin.com/pulse/role-police-during-natural-disaster-vernon-herron>
8. The Ministry of the Interior. (2021). Accessed on August 15, 2021. <http://www.mup.gov.rs/wps/portal/sr/direkcija-policije/nadleznost>
9. The Ministry of the Interior. (2021). Accessed on August 18, 2021. <http://www.mup.gov.rs/wps/portal/sr/direkcijapolicije/ojdpp/Uprava+saobracajne+policije>
10. The Ministry of the Interior. (2019). Presentation: Search and rescue.
11. The Ministry of the Interior. (2021). Accessed on August 21, 2021. <http://www.mup.gov.rs/wps/portal/sr/direkcija-policije/ojdpp/Zandarmerija>
12. Mlađan D., Cvetković V., Veličković M. (2012). Emergency management system in the United States. *Vojno delo*, 64(1), 89-105.
13. Role of police in disaster/emergency. (2020). SOP for Police during Natural Disaster. Accessed on August 10, 2021. <http://bipard.bihar.gov.in/ebooks/Research/SOP.pdf>
14. Skogan, W. and Frydyl, K. (2004). Committee to Review Research on Police Policy and Practices, Fairness and Effectiveness, *Policing: The Evidence*, National Academies Press. Washington, DC.
15. Stevanović, O. (2019). *Bezbednosni menadzment*. Beograd: Kriminalističko-policijski univerzitet.
16. Šikman M. and Amidžić G. (2014). Jurisdiction and the role of the police in emergency situations in the Republika Srpska. *Bezbednost*, 56 (3), 129-147.
17. Telegraf. (2021). Serbian police helicopter unit takes off for Greece to help put out fires burning for 6 days. Accessed on August 25, 2021. <https://www.telegraf.rs/english/3374531-serbian-police-helicopter-unit-takes-off-for-greece-to-help-put-out-fires-burning-for-6-days>
18. OmniSci. (2021). Disaster management phases. Accessed on August 5, 2021. <https://www.omnisci.com/technical-glossary/emergency-management>
19. University of criminal investigation and police studies. (2021). Accessed on August 23, 2021. <http://eng.kpu.edu.rs/studies/graduate/art-mas-managing-security-risk.html>
20. World bank group, et al. (2014). Serbia floods 2014: Serbia RNA report.





THE USE OF TECHNOLOGIES IN ACHIEVING REAL-TIME SITUATIONAL AWARENESS DURING POLICE INTERVENTION

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Abstract: Decision-making and discretion in police interventions should be based on relevant and objective information. Complexity, level of risk, unpredictability, and uncertainty are some of the features of police interventions in which police officers need to decide how to act in a few seconds. In limited timeframe, the police officer should find and select all available information relevant to make the decision. Decision-making gets complicated and more challenging in police interventions where there is a risk of police officers getting injured and where they need to use force. The psychological pressure such situations create can negatively affect officers' situation awareness or their ability to observe and choose among pieces of information essential for decision-making. Consequently, relevant information may not reach the police managers who are expected to react to every change in the situation with an adequate decision.

The problem of loss or lack of situational awareness in complex and risky police interventions has long been noticed. In order to maintain situational awareness during interventions and timely get the necessary information, body-worn cameras, unmanned aerial vehicles (UAVs) for live coverage of events from the police intervention scene and geographic information systems (GIS) to integrate data from the field could be used. These technologies allow managers in police headquarters to follow all events during the police intervention "live", to be familiar with the deployment and status of engaged resources at all times, notice problems, and accordingly make decisions even before receiving (or in case of delay) information via the radio communication system. Having in mind the importance of situational awareness in complex and risky interventions for decision-making, the paper points to the possibilities of using body-worn cameras, UAVs, and GIS to ensure situational awareness during interventions.

Keywords: police intervention, decision-making, situational awareness, body-worn cameras, UAVs, GIS.

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INTRODUCTION

The diversity of modern police tasks and the high level of uncertainty and unpredictability of the occurrence and development of security issues and events suggest the complex conditions in which a police system operates. In most activities taken by the police (for example, arresting dangerous persons, police raids, hostage situations, police pursuits, etc.), the success of engaging police officers often depends on several factors interacting in environment which is partially or entirely out of decision maker's control. It is not uncommon to have police interventions analyzed and considered in the media, especially in cases of police use of force, when, in the public's opinion, they were not based on sound decisions. In this regard, it becomes clear that the success and development of a police organization largely depend on the quality of the decisions made in it.

Decision-making which occurs in the absence of knowledge or information about the nature of the problem and possible solutions, is the most difficult type of decision-making but also a recognizable police practice feature. As minimizing uncertainty increases the ability to make quality decisions, police action is characterized by the need to gather and analyze available information constantly. When performing complex security tasks, the available time for decision-making can be very short – from a few seconds to a few minutes. During that period, it is necessary to collect and process all available information for decision-making. In this regard, having situational awareness of events at and around the place of intervention becomes a critical decision-making factor.

Situational awareness in a complex and dynamic system such as the police organization can be crucial for its efficient functioning (Matthews, Strater & Endsley, 2004). As decisions are not made only by field police officers, the necessity of having situational awareness is even more pronounced among those far from the scene – police managers in the police headquarters². Police managers' decisions regarding the scope and manner of engaging available resources and the way police intervention should be carried out will largely depend on the information they receive from the field. As a rule, they are informed by the field police officers via radio through the chain of command. However, the nature, dynamic and complexity of police intervention can negatively affect officers' ability to observe, select and transmit relevant information. In other words, stress, psychological pressure, adrenaline, or simply the dynamics of the situation, where events alternate, will limit the flow of information from the field to police managers. Lack or delay of information from the field will negatively affect the situational awareness of police managers and thus the quality of decisions they make. In such situations, additional channels of information are needed. The use of body-worn cameras, UAVs, and a GIS makes it possible to inform police managers in real-time. By using such technologies, police managers (in the headquarters) get the opportunity to follow all events during the police intervention "live" and, based on that, to gather information about events on the scene and make appropriate decisions on time. Considering the above, the paper points out the importance of these technologies for establishing situational awareness and better decision-making in a police organization.

THE ROLE OF SITUATIONAL AWARENESS OF POLICE OFFICERS IN DECISION-MAKING

Complexity, level of risk, unpredictability, and uncertainty are the hallmarks of police interventions in which police officers are expected to react quickly and sometimes make decisions about their actions

² The police headquarters are made up of police chiefs and experts of various profiles.



in a matter of seconds. However, faced with threats, attacks, use of force, and the like, they will not always be able to get the big picture and make a rational decision about their actions. Certain police interventions, such as domestic violence, responding to active shooters, barricaded suspects, hostage rescue situations, hooligan fights, and the like, can lead to cognitive changes in police officers' perception, reasoning, and response³. This can be a significant obstacle to the efficient utilization of available information potential.

The results of a Belgian police survey on the conduct of police officers in interventions using police coercion show that due to the presence of fear and stress, police officers lost awareness of the situation or were unable to objectively assess the situation and decide on the use of firearms. It was noted that police officers shot at suspects who wanted to surrender. According to the research results, fear and stress accompany complex police interventions and cause the lack or loss of police officer situational awareness (Verhage, Noppe, Feys & Ledegen, 2018).

Situational awareness refers to the cognitive processes of perceiving and understanding the environment, essential for making timely and effective decisions. Endsley and Kiris believe that people who have lost awareness of the situation may be slower to discover problems and perceive information in their environment (Endsley & Kiris, 1995). The concept of situational awareness has its roots in late last century aviation when an increasing number of mistakes made by pilots and cabin crew were noticed, and efforts were made to develop their better awareness of the situation. A review and analysis of over 200 plane crashes found that it was the lack of situational awareness that caused the accidents (Stanton, Chamber & Piggott, 2011).

Limited awareness can be described as a situation where cognitive blindness prevents a person from seeing, seeking, using, or sharing very important, easily accessible, and observable information relevant to decision making. For example, police interventions in which there is a possibility of using force, firearms, injuries to police officers, can cause a lack or loss of situational awareness. In such situations, police officers may not utilize the information they observe as they are unaware of its significance (Epli, Ribo, & Samerfeld, 2012: 69). As a result, this information remains unused, and police action is characterized by risk and uncertainty.

In crisis decision-making process, one of the critical factors is developing and maintaining situational awareness (Klein, 2000). In this regard, it is necessary to look for alternative sources of information. One of the solutions is the use of modern technical solutions that allow gathering information in real-time.

THE ROLE OF BODY-WORN CAMERAS IN POLICE DECISION-MAKING

Police organizations have followed the intensive development and possibilities of technological innovations in this century by implementing technologies that improve processes and modes of working, efficiency, performance, speed of reaction, trust of citizens, transparency, protection of human rights,

³ In extreme situations, there may be changes in the perception, opinion, emotions and behavior of a police officer who is under stress (or extreme stress). Depending on the characteristics of the situation, some of the following symptoms may develop in such conditions: overwhelming information and lack of information; rapid heartbeat, rapid breathing, muscle cramps and dizziness; sounds are not registered or are registered very poorly; fine hand motor skills deteriorate; the emergence of "tunnel vision", reduced close and peripheral vision; reduced ability to act (Bertilsson, et al., 2020).



and the like. Thus, the last decade has been marked by the modernization of police organizations around the world using modern technologies, including body-worn cameras.

Estimates say that introducing police body-worn cameras in the daily police work will influence the behavior of police officers by improving their communication, regularity and lawfulness of actions taken, reducing the number of citizen complaints, increasing police work transparency, accepting responsibility in case of using excessive force. The use of body-worn cameras improves police officers' safety, the quality of services provided, and the measures and actions taken (Blitz, 2015).

Police body-worn cameras are introduced into police work to record police officers' actions during police interventions (Sousa, Miethe & Sakiyama 2015). However, in complex and risky police interventions often carried out by specially trained police units (e.g. SWAT), body-worn cameras can be given another purpose, i.e., they can be used for "live" coverage of events from the police intervention site. Timely information from the police intervention site is an essential factor for decision-making.

In this way, police body-worn cameras become the command staff's "eyes and ears". By transmitting the "live" image, following the events in front of and around the police officers, the command staff can observe the course of events, learn about the difficulties and obstacles in the course of the police intervention, etc. In addition, audio transmission of police officers' communication can indicate the state of situational awareness, current "psychological pressure", intentions in further actions as well as actions of suspects, especially when they use firearms and other deadly weapons.

However, when special police units are equipped with body-worn cameras some problems may arise with recording and "live" transmission of police interventions. Recording of events during police intervention depends on the camera position on the police officer's body. For example, police units in Serbia have different purposes and use different uniforms, equipment, and weapons to perform their tasks, which affects the choice of the place on the police officer's body to put the camera. This is especially pronounced among special unit members due to the specific protective equipment and weapons they use. The camera on the police officer's body should be put in a place from which the police officer can record the entire space in front of him in an unhindered and unobstructed manner. In police practice, different solutions have been noted when it comes to the camera's position on the police officer's body. Cameras are positioned on the police officer's chest, shoulder, and protective helmet. All modes of wearing a camera can affect the smooth recording of police intervention to a greater or lesser extent. For example, capturing the space in front of a special unit police officer with a camera on his chest is not possible in cases when he keeps the rifle in a ready state. Then, for the most part, the camera would record the police officer's hands and rifle. However, mounting the camera on the weapon barrel eliminates this shortcoming, but the question arises as to what the camera will record when the weapon is not in the ready position or when the weapon is replaced (for example, taking a short instead of a long weapon).

While police worldwide are looking for the best solution, one of the ways to overcome this problem may be to prescribe or standardize a certain place on the police officer body, depending on the type of police intervention. The other way may refer to a combination of different solutions. For example, with some police officers, the camera should be placed on the helmet, with other team members on the shoulder, with others on the chest, with others camera can be mounted on the weapon etc.

Another problem related to using body-worn cameras during special security tasks is to preserve the image resolution in bandwidth to the headquarters. Modern body-worn cameras have a high recording resolution, with a higher quality image ensuring noticing important facts. However, in interventions with a large number of police officers, the high resolution of recording is automatically reduced



in the transmission channel. This comes to the fore in a situation where, for example, the intervention takes place in rural conditions, without the possibility of access to commercial communication channels or in basements and similar premises where there is a problem of signal coverage. Therefore, when planning interventions involving a large number of police officers, one should be aware of the technical possibilities of the bandwidth and accordingly equip the optimal number of police officers with body-worn cameras (e.g., only those whose position in the tactical deployment allows a quality view of the situation) to avoid significant image quality degradation.

THE ROLE OF UNMANNED AERIAL VEHICLES IN DECISION-MAKING DURING POLICE INTERVENTION

During the last decade the use of UAV attracted huge popularity worldwide. With constantly decreasing cost of UAV, they are becoming more common in police practice. Before the introduction of UAVs in the police, police officers could receive air support only from helicopters. Today, there is opportunity for every police officer to have their own air support in the trunk of their police car (Shinnamon & Cowell, 2019: 5). Ready for immediate take-off at any time, the police drone can be quickly on site without involving any greater resources. Compared to helicopters, UAVs are more affordable in terms of purchase and use, offer a broader range of uses (greater operational flexibility), are easily portable and can be ready in just a few minutes, can be used in risky situations (risky for the pilot and/or aircraft) or beyond the technical capabilities of a helicopter⁴ and can help perform police affairs that traditionally do not involve the engagement of helicopters such as crime scene recording (Milić, Milidragović, 2019). Most often law enforcement agencies are using them in hostage negotiation, crime scene investigation, search and rescue missions, active shooting scenarios, apprehension of dangerous criminals, border protection with drones searching for illegal crossings and traffic monitoring.

Planning complex and risky police tasks requires a high level of information. However, due to new or unforeseen circumstances, interventions may take place contrary to the plan. This leads to the information deficit that should be overcome as soon as possible to make quality decisions in response to new circumstances. Enabling real-time video surveillance, recording certain persons, buildings, phenomena, and processes in space, and transmission of live video signals have made UAV an essential tool in planning and executing complex and risky police interventions (Milojković, 2015: 7). The use of UAVs in complex security tasks comes to the fore both before and during the intervention. Using UAVs after the intervention usually comes down to recording a crime scene in order to record all traces and evidence.

COLLECTING INFORMATION BEFORE POLICE INTERVENTION (RECONNAISSANCE)

Gathering information about the task is the first action taken after receiving the order for the task. Police officers strive to gather the necessary information about the space, the layout of the facilities in it, access roads, the specifics of each facility, and other characteristics, thus avoiding the occurrence of unforeseen circumstances. The complexity and riskiness of events such as hostage situations, anti-terrorist actions, or deprivation of liberty of persons in urban areas require a covert way of collecting

4 For example, the use of firearms at the drone, surveillance of the area endangered by atomic, biological and/or chemical substances and the like.



data. Small and silent UAVs, equipped with high-resolution cameras or thermal cameras, are sometimes the only option for safe and covert data collection in these and similar situations.

COLLECTING INFORMATION DURING INTRVENTION

Speed and mobility in the airspace, silent approach and recording of the space and objects in it, as well as the possibility of real-time transmission of the recording become significant features of UAVs supporting the police during the intervention. By observing from above, UAVs can limit the risk of exposure of police officers and thus prevent injuries or loss of officers' lives. By collecting and transmitting video recordings of events in real time, through a safe communication channel, the police leadership obtains the necessary information for the timely response of police officers in accordance with the new (emerging) circumstances.

Aside from their abilities to capture and transmit video, UAVs can be equipped with onboard microphone and integrated speaker that allow for officers to have two-way communication with a suspect or hostage. The microphone allows officers to hear footsteps or a suspect's communication while remaining undetected helping them to locate, isolate and communicate with suspects. In case suspects try to flee the scene, UAV can inform police pursuit about suspect's movement. Having this in mind, deployment of more than one UAV during police intervention is recommended. While one continues scene surveillance, other(s) could be diverted to police pursuit or could provide scene coverage from different side, angle and/or altitude.

Recently UAVs started to be equipped with an armature, capable of breaking tempered, automotive, and most residential glass. This feature could be used to enter a building during active shooter situations without ever physically sending people inside or to make the way for injection of stun grenades, tear gas containers etc.

When utilized for special police intervention UAVs must remain idle with full video and audio transmission for up to 10 hours. Many UAVs commonly used today in police practice only have flight duration of about 30 minutes. While more powerful batteries are still rare in police practice, good alternative could be tethered UAVs. Tethered UAVs receive power over a thin, long-range cord, which provides unlimited flight time.

THE ROLE OF GEOGRAPHIC INFORMATION SYSTEM IN DECISION-MAKING

Spatial data are vital for decision-making in all spheres of life, including the police. With the greater availability of spatial data, tools for their collection, processing, analysis, and presentation are also being developed. These are geographic information systems – GIS. By allowing the decision-maker to assimilate a large amount of data from different sources, GIS technology becomes a critical decision-making factor in the police. Virtually everything police do happens at some location in space. Therefore, GIS can provide valuable assistance to police officers in assessing the situation, preparing and making a decision and monitoring its enforcement, reporting and analyzing the execution of the task, or measures and actions taken. In this way, GIS becomes a vital decision-making factor at all police organization levels.



In a broader sense, GIS is a “smart map” tool that allows users to organize data, make interactive queries, and get answers about what is going on in the field. In this regard, GIS can play a significant role in achieving and maintaining situational awareness while performing high-risk tasks.

When intervention starts, command staff need accurate and comprehensive information about what is happening and where it is happening and how different stages of operational plan are moving forward. Police intervention is dynamic set of activities, where different things may happen simultaneously on different locations, but may impact each other (e.g. if police officer face obstacle on one location, he/she may require additional resources – backup from another location). As an intervention unfolds, command staff need immediately accessible and actionable information to make the best decisions at the right time. Interactive map can show area of interest, its geography, road infrastructure, tactical resource assignments and many other spatial data relevant to particular police intervention. As the situation evolves, map can be easily updated and these updates can be seen by all officers involved in police intervention. Showing where officers are, what situation they are facing and anticipating possible problems before they can occur are indicators of situational awareness existence. Maintaining situational awareness requires collaboration, information sharing, and a unified view of incident information. Web GIS makes this possible.

Seeing what is happening in real time is a critical advantage during police intervention. GIS allows integration with live information or video feeds (e.g. body-worn cameras, public cameras, cameras mounted on UAV, GPS pings, social media feeds etc.) to effectively monitor changing conditions.

In order to ensure quality intervention monitoring and effective deployment of resources, particularly useful are *operations dashboards*. By displaying intuitive and interactive data visualizations on a single or multiple screens, they facilitate achieving situational awareness. By using different data filters, they can be easily tailored to each phase of the particular intervention.

CONCLUSION

Decision-making in police organizations should be based on timely and accurate information. Unfortunately, dynamic, complex, risky, and uncertain police interventions often entail the inability of police officers, both those on the front line and those in the headquarters, to spot and select important information for decision-making. The absence of such information carries the risk of making mistakes, and mistakes in the police sphere can result in the loss of human life.

Lack or loss of situational awareness is one of the police intervention problems. Aware of this problem, police worldwide are taking various activities to overcome it – from organizing various mental and tactical training in simulated conditions to implementing modern technical means. Body-worn cameras, UAVs, and geographic information systems are becoming important tools in crisis events that should ensure decisions are made based on current and accurate information from the scene of police intervention. Body-worn cameras should provide a frontline officer perspective, UAVs should give situation overview from an aerial perspective, while real-time GIS and operations dashboard provide the ability to simultaneously integrate, analyze, and display these and many other data in order to achieve situational awareness. Equipping the Serbian police with these technologies should contribute to its efficiency. For it to happen, it is necessary to consider the possibilities of these technologies and anticipate possible problems of their implementation. This paper makes a modest contribution to the achievement of this goal.



REFERENCES

1. Bertilsson, J., Niehorster, D.C., Fredriksson, P.J., Dahl, M., Granér, S., Fredriksson, O., Mårtensson, J.M., Magnusson, M., PA Fransson, P. A & Nyström M. (2020). Towards systematic and objective evaluation of police officer performance in stressful situations, *Police Practice and Research*, 21 (6): 655–669.
2. Blitz, M. J. (2015). *Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats*.
3. Washington, DC: American Constitution Society.
4. Endsley, M.R. & Kiris, E.O. (1995). *The Out-of-the-Loop Performance Problem and Level of Control in Automation*. Accessed on June 3, 2021. <https://pinopsida.com/misc/endsley1995.pdf>
5. Epli, F., Ribo, O. & Samerfeld, E. (2012). *Proces donošenja odluka u policiji*. Beograd: Kriminalističko-poliicijska akademija.
6. Klein, G. (2000). *Analysis of situation awareness from critical incident reports*. In M. R. Endsley & D.J. Garland.
7. Matthews, M. D., Strater, L. D., & Endsley, M. R. (2004). Situation awareness requirements for infantry platoon leaders. *Military Psychology*, 16, 149–161.
8. Milic, N., Milidragovic, D. (2019). *The possibilities and challenges of UAV implementation in serbian police*. In: Zbornik radova: „Dani Arčiblada Rajsa“, Kriminalističko-poliicijski univerzitet, Beograd, pp. 45–58.
9. Milojković, B. (2015). Optimizacija modela malih bespilotnih letelica za potrebe policije. *Bezbednost*, 57 (3): 5-27.
10. Shinnamon, D. L. & Cowell, B. M. (2019). Building and managing a successful public safety UAS program: Practical guidance and lessons learned from the early adopters. *National Police Foundation*. Washington, DC.
11. Sousa, W. H., Miethe, T. D. & Sakiyama, M. (2015). Body Worn Cameras on Police: Results
12. from a National Survey of Public Attitudes. *Research in Brief*. Center for Crime and Justice Policy. Accessed on June 5, 2021. https://jobs.unlv.edu/sites/default/files/page_files/27/BodyWornCameras.pdf
13. Stanton, N. A.; Chambers, P. R. G. & Piggott, J. (2001) Situational awareness and safety. *Safety Science*, 39. 189–204. Accessed on May 22, 2021. https://bura.brunel.ac.uk/bitstream/2438/1804/1/Situation_awareness_and_safety_Stanton_et_al.pdf
14. Verhage, A., Noppe, J., Feys, Y & Ledegen E.(2018). Force, stress and decision making within the Belgian police. The impact of stressful situations on police decision making. *Journal of Police and Criminal Psychology*, 33, pp. 345–357.



POLICE AND POLITICS

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Abstract: Police are one of the most important state bodies and their importance is seen in the nature of jobs confided by state to the police as a specific expert body. Having in mind that the police secure citizens and their property, society as a whole, everyone is interested for security to be at the top level. Police are the body of executive government and the executive government depends mostly on police and police organization. Police organization direct executive government bodies to act, police included. Also, it is clear that professional and politically independent police can provide the needed security to citizens and the state.

Keywords: politics, police, security, professionalism, political organization, state.

INTRODUCTION

Various state assignments are accomplished through state administration. In accordance with that, state administration has a wide variety of activities and their forms. One of the basic activities of bodies of state administration certainly is the implementation of laws and regulations and general acts of the National Assembly, Government and President of Republic. Therefore, older term “law execution” is now replaced by “law implementation”. Police are one of the state bodies that daily implement wide variety of regulations (law and bylaw) that often reach the sphere of human rights and liberties.

The state administration of the Republic of Srpska (further on, RS), as well as Bosnia and Herzegovina, still has not completed the transition process, meaning the administration bodies did not reach the goals expected in the developed democratic societies. Besides the lack of organizational nature, the issues of oversized political influence over the state administration work are still expressed. Such influence of politics on all spheres of administration is such that the most important thing is to achieve

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such influence without negative reflections on entire state activity. Having in mind the role and activity of police, which is in interest sphere of every citizen, we can deduce that police as a specialized state body, may be the focus of such influence.

ON POLICE

The foundation of police is the product of the eternal aspiration of society in every form to achieve personal and collective order, peace and security. Police have been since its beginnings a very important instrument of society that prevents violation of relations established by norms of a community. In performing these activities, vital interest for each community is the police with significant authority to apply the means of force. The authorization to apply force says a lot about the significance of police, as police are the only body with such power, which may be specially given also to military or judicial police. (Jovicic, Setka, 2018:31) The police, along with the army, make the core of each state and holds monopoly of physical force. However, since the basic function of police is organizing and sustaining inner social order and peace, while army has functions of defending state in wartime, we can say police are closer to judiciary than military. (Pusic, 1973:173)

The term “police” derives from the ancient Greek city-state – polis, and it covers entire state activity within each polis, other than judiciary and military. Up until 17th and 18th century, police had different meaning, closer to the Greek word “polythea”. It was a very developed state administration with the role to take care of both state and population interest. The police activity was to provide security and well-being to population and only well modeled state was considered the one with such organized police. (Jovicic, 2021:15)

The foundation of police and the development of their basic functions has been the thing of historical development of human society, as we can see in historical facts. Police begin with the beginnings of state and represents the system of special bodies within administration and under administrators and their task is to maintain public order in the state. In performing everyday duties in the state, police act preventively and repressively. What citizens expect from police is prevention, which brings them to the first place in the system of the Ministry of Interior Affairs. The Ministry’s organization is subordinated to prevention of unlawful behavior and the increase of efficiency in clarification of performed unlawful acts in order to raise the level of general security in the state. (Tulezi, 2000:9-11)

During the 19th century, an interior differentiation of state administration appeared between functions of improving the development of society and its welfare and suppressing the dangers for the state and society from within. Ever since, the term “police” has not covered entire state administration but only its function of removing the interior dangers in the state. Thus began the process of fast differentiation of state administration that is not finished even today. The interior administration divided into multiple departments. Therefore, what once was the general interior administration now is narrowed down to interior affairs and only keeps memory of its previous width with such name. (Pusic, 1973:179)

Since different periods and different countries shaped state administration differently (and police as well), it is necessary to emphasize that the term “police” must be differentiated from the wider concept of maintaining public order and peace, although modern society regularly looks at those term as equal. The term “police” refers to a certain type of social institution while the maintenance of public order and peace represents a process of social functions. Police organizations and personnel may have various forms but a kind of keeping public safety and order is proven to be the universal need of each social system. (Cooper, 2009:992)



So, by the end of 19th century, the interior administration divided into multiple departments with police separating its functions. The functions of police are maintenance of public order and peace and suppressing crime. Today the term “police” has various meanings in our country and around the world. Definitions mostly put police organization and its functions on the first place. So, organization wise, police represent state body with its organizational elements. Police are one of the most important state bodies and their importance is seen in the nature of jobs confided by state to the police as a specific expert body. Our law system defines police as the body of state administration that provide the needed security to citizens and the state. They keep public safety by prevention and repression of crime as well as other activities under their jurisdiction. (Talijan, Arandelović, Velimirović, 2001:26)

It can be said that the basic function of police as state body is tied to the term of public order. Maintenance of public order covers: 1) prevention of violation; 2) repression against the violators; 3) creation and sustainability of stabilization of public order. Public order covers the system (political institutions, human and civil liberties, functionality and realization, mutual relations) founded by the constitution and legal regulations of one state. Public order is therefore equalized with constitutional order, i.e. system of public institutions, relations and rights of constituents and those protected by law. Every unlawful activity against this constitutional order represents a threat to public order. The majority of such unlawful activities are criminal acts that are followed by administrative penalties and measures of protection. Under protection of public order, we can enlist any removal of any threat to normal functionality of the constitutional order (enabled through judiciary). Therefore, police act through “management of maintenance of public order”. The protection of public order encapsulates forceful law execution, support for constitutional order, protection of human lives and property from both delinquents within population and natural disasters, such as fire or flood. (Jovicic, 2021:17)

Depending on whether police are observed historically or in modern context, the very term of police can be determined historically and in modern context. The content of that term changed throughout history and it used to mean something entirely different than it does today. Actually, what also changed was the role and the organization of police. The modern meaning of term “police” is defined in various ways. There are significant difficulties, because of different organizational models, but also because of different assignments for police in some countries. Having all of that in mind, we can define police as a specially organized service (or multiple services and their personnel) for maintenance of public order, prevention and repression of crime and execution of law. (Milosavljevic, 1997:7)

Police as a part of the Ministry of the Interior are tied to public order, i.e. human and civil liberties, political institutions and their functionality. The scope and volume of police actions depends mostly on political relations in our society, but also on the level of negative phenomena and security issues and dangers. The scope and increase of police actions are determined by the increase of state apparatus on one side and the demands for democratization and humanization of state authorities in general, on the other side. Regarding the police organization, there are multiple topics open in order to improve its efficiency: should police be singled out as special unit or merge it with the rest of state organization; should police organization be centralized (as a unified body) or decentralized (formation of local police units besides the state police); should police be given the power to apply some forms of discretionary authority or subordinate it to constant strict control; whether decentralization of police should lead to formation of auxiliary forces, i.e. communal, field, river, railroad, judicial, etc. (Jovicic, Setka, 2020:280-281)



ON POLITICS

Democracy is present in state development for over two millennia, both as a term and a form of political system. It became a part of political life and life in general, and to achieve democracy it is necessary to fulfill certain conditions or elements. The basic element necessary for the realization of democracy and political culture is the developed political conscience of citizens. For citizens to participate in political life of some community or state and influence the authorities as a true political factor instead of being just an object, they have to have enough knowledge and information on political scene. They should have the knowledge of their own interests and the interests of their social group and, of course, other social groups. Therefore, individual must have conscience on what is good for them and their community as well as other communities and groups. Without information on important processes influencing their everyday lives, citizens are unable to develop their will or correctly express their political interests. (Jovičić, 2018:83)

The term *politics* has its roots in the Greek term *politiká* (Πολιτικά, 'affairs of the cities'). We can today build on that meaning defining it as the set of activities that are associated with decision making and forms of power relations in groups and between individuals. Such tendencies may be local or world level and politics can be seen in different ways:

- Rational activity in modeling community or the elements of community
- Power relations and possibility to impose the will of political factors despite the resistance of other factors
- Institutions and establishments of political activity
- State as a fundamental institution of modern political era that translates social tendencies into law and power into government
- Articulation and representation of different or even conflicted interests in a community and influence on various types of behavior and choices within that community
- Consent creation and change of historical circumstances and modeling relations among people within community and between people and natural environment. (Radosavljevic, 2011:9)

Motives of participants in politics are recognized through the ideals their groups support as well as the methods they use for the achievement of their goals. That is why the analysis of ideals of participants in political life is the beginning of any political analysis. Not all political ideals are equally acceptable and therefore we have differences between the ideologists and those who accept or deny such ideals. That often depends on the circumstances in certain political communities. Ideals are often conflicted which provides wide options to choose from and from that stem different political activities. (Radosavljevic, 2011:9)

Every individual had a certain group of beliefs, opinions, values and interests in relation to political process. Political preferences come from deep rooted historical or cultural identities like ethnicity, religion or language. Different individuals and groups have different preferences which may lead to conflicts in political process. (Hix, 2007:149)

A variety of methods are deployed in politics, which include promoting one's own political views among people, negotiation with other political subjects, making laws, and exercising force, including warfare against adversaries. Politics is exercised on a wide range of social levels, from clans and tribes of traditional societies, through modern local governments and institutions up to sovereign states, to



the international level. In modern nation states, people often form political parties to represent their ideas. Members of a party often agree to take the same position on many issues and agree to support the same changes to law and the same leaders.

A new conception of political subjecthood emerged through the increased use of “subjects of the realm,” achieved by joining “subject” and “realm” directly in the discourse. Through this new articulation, a person became a political subject by virtue of being tied to the state rather than through giving personal allegiance to the ruler. These discursive articulations, however, could not break completely with former conceptions, as they had to nest on these in order to be legible. The fact that these discursive articulations were nested on pre-existing discourses is also what legitimated them. As such, the state’s discourse bears witness to the discursive innovation within the existing discourse. From owing allegiance to the ruler, political subjects were now tied directly to the state. This, in turn, had effects on the conception of the state. With its subjects tied directly to an abstract notion of the state, the state emerged as the site of a new type of power from which new modes of governance could be deployed to establish, define, and maintain, a political community, beyond securing the obedience and allegiance of the political subject. (Radosavljevic, 2011:11-12)

From the aspect of ordinary citizen, the most acceptable determination of politics is the skill of state management. That makes all activities of state administration a way to enable citizens to satisfy their needs. State-building is the process through which states enhance their ability to function. The structures of the state are determined by an underlying political settlement; the forging of a common understanding, usually among elites, that their interests or beliefs are served by a particular way of organizing political power. The quality of life influences the quality of state bodies and our citizens are then satisfied with realizing their basic human right and liberties. (Jovicic, 2007:7) International architecture for economic, political and development cooperation is based on assumptions about state capability and structure that do not take account of complex realities. The task of police as one of the most important bodies of state administration is to enable political will of the ruling political elite but only when it is in general interest.

THE INFLUENCE OF POLITICS ON POLICE IN BOSNIA AND HERZEGOVINA

As we are aware, political parties are formed with the aim to gain power and keep it for as long as possible. It is clear that it is impossible if political elites in power have no influence over executive state apparatus. Police, being one of the key components of behavioral influence in the society, through performing their activities also enable the government continuation. In every country political structure will eventually influence the work of police. In modern circumstances it is necessary to make such influence without disturbing professionalism of police in performing their activities and in order to fulfil police role prescribed by law.

However, cases where political organizations give police tasks that are not in accordance with professional standards are not rare. It is found in developed countries and especially expressed in countries where the role of police as the protector of every citizen on equal principles is not yet understood properly. Bosnia and Herzegovina (further on, BiH) with its general situation and political differences that burden the country for more than three decades is also one of the states where the political influence on operative work of police is expressed. Political elites are persistent in creating a different image.



An example of this is the article published in the *Assessment of police integrity in Bosnia and Herzegovina* (2015). Based on the interviews with police managers, a big issue is that the work of the police agencies is sometimes made too transparent and media presence is not often welcome in some sensitive cases. This occurs when it comes to arrests of high-ranking officials, politicians, etc., that are often done in the presence of the media, especially TV crews and afterwards broadcast to the public. This creates the situation that, in the eyes of the public, the arrested people are declared guilty in advance, i.e. before any trial and legal verdict. Later, if they are set free or acquitted of charges, the citizens have less confidence in police fighting corruption. However, we come to an important issue here: "How is it possible that media representatives are aware of the arrests if it is a confidential police action?" The problem of recording such actions is caused by the police, not the media. Therefore, we can claim that, to some extent, police contribute to declaring some individuals guilty in the eyes of the public.

Further on in this assessment it is said that, although both police and judicial institutions claim that they are independent and impartial, the influence of politics and the ruling structures is evident. It often happens that massive police operations and spectacular arrests of political leaders are conducted during election campaigns, while shortly after an election and formation of a new government, as a rule, either no investigation is conducted or cases are dismissed over a lack of evidence against the suspects. (Hadzovic, Djordjevic, 2015:6-7)

There have been some attempts of local governments aimed at depoliticization of police work, however, the influence of politics on police work still remains very strong, especially when it comes to identification and investigation of corruption and related cases. Over 80% of citizens of BiH consider that there is a pretty high influence of politics in police operational work. Activities aimed towards depoliticization and the improvement of professionalism of police organizations in BiH started in 2002. The institutions of police directors were established in BiH entities, while in the cantons the institutions of police commissioners were established. The duty of the police directors/commissioners was to organize police work in professional terms, unlike the ministers of the police, whose roles were primarily political. However, the members of the committee have the discretionary right of selecting candidates who meet the criteria. This is a moment where corruption can occur, i.e. the selection on the basis of suitability or other unprofessional criteria. Cases of political interference in these appointments can happen as the members of the committee might be influenced by a particular political party to select a preferred candidate. Although the independence of managers of police agencies from the executive branch or from political interference in the appointment and dismissal of key people in the police is theoretically ensured, the practice has recorded cases which were subject to arrangements of political elites as well as peer influences due to certain roles of professional members from the same institution in the selection process. (Hadzovic, Djordjevic, 2015:9-10)

Especially interesting is another data from the *Assessment*. The public opinion survey conducted by IPSOS showed that over 80% of BH citizens believe that politicians have complete or high influence on operating work of police while only 3% of them think there is no influence at all. The political influence on the functionality of police agencies (operative police work) is seen in directing specific police activities (action, investigation) in a way that individuals from political elites initialize them, direct them and/or influence their outcome. That is the hardest form of political influence on police and it is two-way: it directs police actions towards political opponents and it limits police actions towards individuals that are suitable or close to political elites. In practice situations occur that conflict the initialization of police actions, i.e. obstruction of initiative to start police activities in certain spheres and towards certain individuals. (Setka, 2017:506)



The influence on personnel policy in police agencies is what politicians use to enable their influence on the operative police work. Political parties make their first actions when coming to power to put politically suitable personnel in high positions within police agencies. When that is done, politics has a strong influence over operative police work through those personnel. So, in order to achieve influence over operative police work, they first must influence personnel policy. (Setka, 2017:508)

CONCLUSION

Police are one of the most important state bodies and their importance is seen in the nature of jobs confided by state to the police as a specific expert body. In performing these activities, vital interest for each community are the police with significant authority to apply the means of force. The profession of police officer includes allegiance to complex state system with clear rules, law and bylaw regulations and expressed marks of hierarchy. Members of police forces perform jobs of vital significance for each citizen and individual and that often puts them at risk of resistance, violence and other negativities within society.

By doing their job, police officers are obligated to adhere to law and regulations, including those that their duty is to disregard personal opinions, values and emotions in any specific situation. They are certainly in everyday risk of being physically or psychologically endangered but their obligation is to do their job by not damaging citizens, their property or personal security, no matter the different risks they can face in performing their everyday activities.

Since police job is a profession, and state performs these activities through their specialized body, it is necessary to protect citizens and state on an expected level and highest professional criteria. It also demands the influence of political elites to be taken down to the smallest margin. The higher level of professionalism is in any state work, police especially, the level of security and protection of citizens is higher as well.

As we said above, it is impossible to remove political influence in police work, but it is something that needs to be strived to. It requires hard work and building mechanisms that will minimize that influence for real, and not just declaratively as the case is with Bosnia and Herzegovina. Why is it impossible to exclude the political influence in police work? There are certainly many reasons, but we believe the most visible and important is that the topic of police is not only the topic of police activity or organization but also a very important political topic.

REFERENCES

1. Jovicic, D., (2007). The impact of transition on the work of state administration of the Republic of Srpska, with special reference to the police. Banja Luka.
2. Jovicic, D., (2018). Introduction to Law. Novi Sad.
3. Jovicic, D., Setka G., (2018). Organization and competence of the police. Banja Luka.
4. Jovicic, D., Setka G., (2020). Public Security. Banja Luka.
5. Jovicic, D., (2021). Control over the work of the police. Banja Luka.
6. Cooper, A., Cooper, J., (2009)., Encyclopedia of Social Sciences. Belgrade.



7. Milosavljevic, B., (1997). Science of Police. Belgrade.
8. Pusic, E., (1973). Science of Administration. Zagreb.
9. Radosavljevic, D., (2011). Contemporary political and legal systems. Novi Sad.
10. Talijan, M., Arandjelovic, D., Velimirovic, D., (2001). Organization and jobs of uniformed police officers. Belgrade.
11. Tulezi, J., (2000). Police and the Public. Zagreb.
12. Hadzovic, D., (2015). Djordjevic, S., Police Integrity Assessment in Bosnia and Herzegovina. Belgrade, Sarajevo.
13. Hicks, S., (2007). Political System of the European Union. Belgrade.
14. Setka, G., (2017). Influence of policy on the functionality of police agencies in Bosnia and Herzegovina. Belgrade.

THE ROLE OF INDEPENDENT CONTROL BODIES IN EXERCISING EFFECTIVE SUPERVISION OVER PUBLIC ADMINISTRATION

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Abstract: The Great Depression which the world faced in the 1930s imposed the need for the states to be better organized. The challenges of the time called for appropriate response. One of the solutions was found in establishing independent control bodies. These bodies were meant to ensure more efficient and more economical performance thanks to qualified personnel at their disposal. The United States started looking for the solution in establishing new bodies (agencies). The agencies were entrusted with broad powers, which gave rise to criticism that they acted outside the scope of the existing system of division of power. The wave of establishing independent bodies (agencies) later spread from the US to the European continent.

Since 2000, a large number of independent bodies have been founded within the legal system of the Republic of Serbia, following the example of other European states. The legal status of these bodies varies and the degree of their autonomy and independence depends on their organizational forms.

The role of science but also of the society as a whole is to point out the importance and necessity of the existence of independent bodies, especially in the states undergoing transition.

Keywords: independent control bodies, administration, control powers, regulatory powers, executive powers.

INTRODUCTION

There are several reasons for writing this paper. First of all, there is certainly the indisputable significance of the topic itself. Secondly, there is a need to provide an overview of the historical origin and significance of independent bodies. Thirdly, to offer the legal and professional public a concise over-

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view of the essence of these bodies, which have existed for about a century within some legal systems and which entered our national legal system only at the beginning of the 21st century.

The subject matter under review encompasses independent control bodies within the legal system of the Republic of Serbia. The intention of the paper is to offer viewpoints and conclusions that will represent scientific contribution to determining the position and role of independent control bodies and that will point out their significance in the control of administration within the legal system of Serbia. In fact, when we speak about independent control bodies, we refer to a theoretical construct originating from scholarly curiosity, aimed at clarifying insufficiently precise statutory terminology and at pointing out common properties and the role that such bodies have in our legal system (Milkov, 2014:25-28).

Standard forms of administration control are never sufficient. The need for additional forms of control over administration has resulted in the emergence of independent control bodies.

The process of introducing independent control bodies is part of a broader process. This process is a characteristic feature of modern political systems. Although, if truth be told, the term agency does introduce a certain confusion as regards terminology. It first originated in the US and denoted all administrative bodies. From there, it slowly spread to other countries. It adopted a narrower meaning in the Continental European legal system. Agencies were created with the aim of ensuring more efficient and economical performance, thanks to the highly qualified staff at their disposal, their specific organisational structure and funding, as well as their independent position in respect of other organs and bodies (Davinić, 2004; Davinić, 2018; Lončar, 2015:145-148).

AGENCIES IN THE LEGAL SYSTEMS OF THE US

The Great Depression of the 1930s resulted in the establishment of a significant number of agencies in the United States. The agencies were established primarily with a view to resolving myriads of problems accumulated in the society and they therefore employed experts from various areas of social life (Burnham, 2002: 196-197).

During the great economic crisis, the agencies were entrusted with broad powers. In order to restrict such broad powers, the Congress passed the Federal Administrative Procedure Act in 1946. This Act generally regulates the procedure in which agencies make regulations and decisions, as well as the procedure for their judicial control (Shapiro, 1994: 55-65).

In the second half of the 20th century, there was a wave of emerging new agencies making regulations and decisions that started to significantly influence the daily lives of American citizens. This period interrupted the process of deregulation of certain areas of social life. The process resulted in the simplification of procedures within agencies, the downsizing of administration as well as abolition of certain agencies whose work was no longer needed.

The definition of an agency is very broad and includes a large number of different organs and bodies in the legal system of the US (Pusić, 1954: 135). The Administrative Procedure Act defines agencies as "each authority (whether or not within or subject to review by another agency) of the Government of the United States". Regardless of the fact that Congress, courts, and the function of the US president should be exempted from this definition, it still remains broad (Funk, Seamon, 2001: 5).



If we wanted to classify all the agencies in existence within the US legal system into specific groups, we could say that there are, conditionally speaking, four types of agencies. The most important among them are the ones constituting administrative departments. They are headed by members of the presidential cabinet. The second type of agencies consists of administrative bodies within the departments. They are headed by officials appointed by the US President based on the opinion of and upon the approval of the Senate or the head of a department. The third group of agencies are outside specific departments. They are not part of the departments. Their heads are also appointed by the US President subject to opinion and approval of the Senate. The three abovementioned types of agencies are part of the executive branch. Therefore they are under control of the President of the United States who is, in fact, the head of the entire executive branch of the United States (Kagan, 2001: 2245-2385).

The fourth type of agency differs from the previous three. These are, in fact, independent regulatory agencies. They are neither within the administrative departments nor under immediate control of the President of the United States. They are headed by a group of people as a collegiate body, appointed by the President for a certain period of time. They can be replaced when there are specific reasons for that. Yet broader independence of this type of agency is to be understood conditionally, given the existence of a strong factual influence the US President in relation to them (Strauss, 2002: 133-135).

All types of agencies in the United States have a specific position since they integrate all three branches of government in their work. Therefore, some are inclined to claim that their position violates the principle of separation of powers. The basic principles of the American political system set out in the US Constitution are certainly the principle of division of powers into legislative, judicial and executive, as well as the principle of "brakes and balance" which should prevent any of these three powers from becoming independent and enable their mutual control. Agencies also had to find their place in such a system. However, their significance and specific position have led some analysts to consider them the fourth branch of the US government (Funk, Seamon, 2001: 24-25). It is clear that the establishment of these agencies was not provided for in the US Constitution. Hence the criticism that they operate outside the existing system of division of powers and that their functioning, which bypasses clear control by the legislative, judicial and executive branches, can result in the creation of a fourth branch of government (Strauss, 1984: 573-669).

The agencies have quasi-legislative powers, executive powers, as well as quasi-judicial powers. Yet their executive powers are not called into question due to their principled affiliation with the executive branch (Rosenbloom, 2003: 11-12).

The position and powers of the agencies in the United States gave rise to the doctrine of 'delegation' in American jurisprudence. This doctrine starts from a functional approach in the interpretation of the US Constitution. It was created, primarily, by the rulings of the US Supreme Court. The agencies are to be viewed as an important factor in resolving a large number of problems occurring in the society. This has resulted in the possibility for Congress to also entrust the agencies with the tasks (quasi-legislative and quasi-judicial) that – in their nature - belong to other branches of the government (Lowi, 1987: 295-296).

The delegation of these powers to the agencies has contributed to the existence of strong control over them by all three branches of government. Thus Congress has organisational and financial powers in relation to the agencies. It passes acts that establish agencies, determines their form and structure, transfers certain powers unto them and provides funds for their work. On the other hand, the President of the United States has broad personal powers in relation to the agencies. He appoints the heads of the agencies based on the opinion of and upon approval by the Senate, while he can independently appoint lower-ranking agency officials. The President exercises detailed control through executive



orders, the issuance of which is within his competence. In addition to this, members of Congress and the President have informal contacts with the management of the agencies, thereby directing the work of these organs (Breger, Edles, 2000: 1111-1294). The control exercised by Congress and the President over the agencies is, above all, a form of political control. On the other hand, there is also judicial control by the courts through which protection is provided to holders of such rights (citizens and organisations) as may have been violated or endangered by the agencies' activities.

As for the control exercised over the agencies by Congress, the US President and courts, it must be continuous and effective in accordance with the powers vested in these entities as representatives of all three branches of government. However, the control must not stifle the freedom that the agencies have in order to be able to successfully perform the complex functions for which they have been established. This freedom is only a framework within which the responsibility and independence of the agencies should come to the fore (Schoenbrod, 1999: 731-766; Wilson, 2000: 259-260).

Agencies in the US legal system are established in order to regulate various areas of social life. Therefore, their activities are manifested in various forms. Nevertheless, there are two basic instruments available to the agencies for the purpose of ensuring good quality performance of their functions. These are the enactment of regulations as general legal acts and decisions as individual legal acts (Becrmann, 2000: 4).

Apparently, despite the tendencies towards deregulation of different social areas, activities of the agencies will continue to have a major impact on the daily life of citizens and organisations in the US. Their existence will not lose importance or be called into question. Yet they still have to make efforts in order to achieve better results and justify their existence (Fox, 2000: 9).

The wave of establishing these bodies swept first the US and then Europe, and the phrase 'fourth branch of government' has been used to point out a special position of these bodies in the traditional system of state organisation. These independent bodies incorporate several functions of the government: legislative (adopting regulations), administrative (passing individual acts) and judicial (sanctioning) (Vasić, Jovanović, Dajović, 2014:99).

The leading roles in this process were played by Great Britain, Scandinavian states and France.

France saw the beginning of this process in early 1980s. However, unlike the situation in other countries, the American term 'agency' was immediately replaced by a number of different independent administrative bodies (*autorités administratives indépendantes*) that became part of the administrative system, having clear legal position. This was the case, for instance with the National Commission on Informatics and Liberty established on 6th January 1978, The Higher Audiovisual Council founded on 17th January 1989, National Commission for Communications and Liberties, founded on 30th September 1986, Commission on Access to Administrative Documents, established on 17th July 1978, National Committee for Control of Security Interceptions, established on 11 July 1991, etc. Yet over the past few years, there have been a number of bodies called 'agencies'. In order to determine their legal status in practice and thereby the question of control over the documents they adopt, the State Council adopted criteria for their determination on 11 September 2012 (*Conseil d'État, Étude Annuelle pour 2012, Les agences: une nouvelle gestion publique?*) (Chapus, 2001:347-373; Braibant, Strin, 2002: 81-86; Maillard Desgrées du Loù, 2011: 222-227).

INDEPENDENT CONTROL BODIES IN THE LEGAL SYSTEM OF SERBIA

Since 2000, a large number of bodies have been established within the legal system of the Republic of Serbia following the example of European states. The majority of the newly founded entities have been dubbed agencies. On the other hand, the legal status of these entities may vary, which makes it difficult to legally define them (Martinović, 2012: 391-400).

There are opinions in the national legal theory that the agencies were established due to an error in translation from the English language. The term should have been adjusted to our legal tradition. In such a situation we would not have agencies today, as there are none in the laws of Germany and Austria (Milkov, 2014: 25-31).

It was in this way that agencies found their place in our national legal system at the beginning of the 21st century. In addition to the agencies, though, other entities have been established within the legal system of Serbia under different titles (commissioner, ombudsman, etc.). However, there has been some terminological confusion in respect of their position, role and function. The terminological confusion is additionally compounded by the fact that the term 'agency' is used to denote a variety of bodies and organisations. In this sense, for additional clarification, let us note that the term agency may refer to:

- 1) An administrative body within a ministry (Military Intelligence and Military Security Agency within the Ministry of Defence);
- 2) A specialised organisation (Security-Information Agency; Republic Agency for Peaceful Settlement of Disputes);
- 3) A public agency (Business Registers Agency);
- 4) An independent regulatory body (Energy Agency);
- 5) An independent control body (Agency for Prevention of Corruption).

The degree of an agency's independence is related to the organisational structure of the agency. It will be the lowest with the administration bodies within the ministries and the highest with the independent control bodies.

An important question that arises concerns their legal basis. In this sense, the legal basis is the Constitution of the Republic of Serbia (Official Gazette of RS, No. 98/2006), Law on State Administration (Official Gazette of RS, Nos. 79/2005, 101/2007, 95/2010, 99/2014, 47/2018, 30/2018-other law), as well as Law on Public Agencies (Official Gazette of RS, No. 18/2005, 81/2005-correction, 47/2018) but also special laws by which they were established (e.g. Law on the Protector of Citizens, Law on State Audit Institution) and other acts.

Thus the Constitution, in Article 137 paragraph 3, stipulates that "according to the Law, particular public powers may (also) be delegated to specific bodies through which they perform regulatory function in particular fields or affairs". It refers to public agencies and independent regulatory bodies. The Constitution also, in Articles 96 and 138, directly regulates the position of two independent control bodies (the State Audit Institution and the Protector of Citizens).



Article 4 of the Law on State Administration stipulates that “certain state administration tasks may be conferred by law to autonomous provinces, municipalities, cities and city of Belgrade, public companies, institutions, public agencies and other organisations”.

The Law on Public Agencies specifies that public agencies are organisations established for developmental, professional or regulatory affairs of general interest (Article 1, paragraph 1) and that they are autonomous in their work (Article 4, paragraph 1). The founding rights in them are exercised by the Government on behalf of the Republic of Serbia (Article 8, paragraph 1). The Government appoints and dismisses the Chair and members of the Management Board (Article 16, paragraph 2 and Article 20, paragraph 1), as well as the Director of the public agency (Article 24, paragraph 1). Supervision over the work and activities of the public agency is performed by the competent ministry (Article 44 paragraph 1). Such legal solutions emphasize the fact that the public agencies perform a regulatory function in the sense that they are entrusted with the task of enacting regulations for the implementation of laws and other general acts of the National Assembly and the Government (Article 3 paragraph 1 item 1) but they cannot claim the status of independent bodies since they are subordinated to the Government in a hierarchical sense (Lekić, 2012: 360).

Independent bodies are characterized by true organisational and functional independence in relation to the executive branch of government. However, this does not mean that they are outside and above the law and all branches of government. In carrying out their activities, they are accountable to the National Assembly (legislative branch), to which they submit reports (regular and special) and which appoints and dismisses officials who head them.

It should be borne in mind that independent bodies themselves differ among themselves. Differences can be best seen if viewed from a functional standpoint. Thanks to this criterion it is possible to conclude whether an independent body performs regulation or control, or both of these functions.

The regulatory function implies the authority to adopt general bylaws and the control function implies the adoption of individual legal acts and the performance of administrative actions. However, this may also lead to confusion regarding the status and legal position of independent bodies (Šuput, 2015: 256).

Yet notwithstanding the existing uncertainties, the dominant powers of control are related to supervising the work of the following independent bodies:

- 1) Protector of Citizens (Official Gazette RS, No. 79/2005);
- 2) Commissioner for Information of Public Importance and Personal Data Protection (Official Gazette RS, Nos. 120/2004, 54/2007, 104/2009, 36/2010);
- 3) Agency for Prevention of Corruption (Official Gazette RS, Nos. 35/2019, 88/2019, 11/2021-authentic interpretation);
- 4) State Audit Institution (Official Gazette RS, Nos. 101/2005, 54/2007, 36/2010);
- 5) Commissioner for Protection of Equality (Official Gazette RS, No. 22/2009);
- 6) Republic Commission for Protection of Rights in Public Procurement Procedures (Official Gazette RS, No. 91/2019).

In addition to these, there are other independent bodies that exercise control powers within the national legal system (Cucić, 2020: 134-155).



Independent bodies are characterized by a number of important features. First, they are legally endowed with public authority to create policy in a certain area of social life in accordance with the goals established by the legally established goals. Second, they are independent of other state bodies. They are independent legal entities with the status of legal persons and their own scope of competence. They have functional independence, enjoy financial autonomy, etc. Third, they are not subject to the principle of traditional democratic legitimacy. They are not directly elected by the citizens. Therefore, the question that can be raised is whether their existence is justified in a democratic society. This shortcoming is to some extent justified and mitigated by the fact that the staff employed in the independent bodies possesses professional competencies, knowledge and skills that are required for lawful operation as well as the creation and implementation of political goals and measures in complex spheres of social life.

Legal theory distinguishes the concepts of independence and autonomy. Thus 'autonomy' is a term used to refer to the position and form, the objective state and position of the institution and the place of its function. 'Independence' relates to the action, the dynamism of decision-making of an institution. The independence of a body is a somewhat broader concept as compared to that of autonomy. Independence implies a greater degree of separation both in the functional and organisational sense in relation to other bodies (Milkov, 1981: 185-187).

However, in the current legal system of Serbia this distinction is not fully specified. The 2006 Constitution makes this distinction in such a way as to guarantee autonomy and independence to some state bodies in terms of their legal position. In this sense, Article 142 paragraph 2 stipulates that "courts shall be separate and independent in their work and they shall perform their duties in accordance with the Constitution, Law and other general acts, when stipulated by the Law, generally accepted rules of international law and ratified international contracts". Certain bodies are guaranteed only independence. Thus Article 138 paragraph 1 stipulates that "the Civic Defender shall be independent state body who shall protect citizens' rights and monitor the work of public administration bodies, body in charge of legal protection of proprietary rights and interests of the Republic of Serbia, as well as other bodies and organisations, companies and institutions to which public powers have been delegated". The Constitution guarantees the autonomy of public administration bodies by stipulating in Article 136, paragraph 1, that "the Public Administration shall be autonomous, bound by the Constitution and Law and it shall account for its work to the Government". Autonomy is also guaranteed to the State Audit Institution in Article 96 paragraph 1 of the Constitution in the way that "the State Audit Institution shall be the supreme state body for auditing public finances in the Republic of Serbia, autonomous and subject to the supervision by the National Assembly, to which it accounts for its work".

However, the laws governing the legal position of independent bodies do not differentiate between independence and autonomy. In general, these state bodies are defined as being at the same time independent and autonomous in performing tasks within their competence. For example, according to the Constitution, the Protector of Citizens is an independent state body and the Law on the Protector of Citizens stipulates that s/he is autonomous in performing tasks within their competence (Article 2, paragraph 1). The situation is similar with the State Audit Institution, which according to the Constitution is an autonomous state body, and the Law on State Audit Institution stipulates that it is an autonomous and independent state body (Article 3, paragraph 2).

The theoretical distinction between independence and autonomy has already been explained. As for statutory solutions, we find that the terminology used in the Constitution and statutes needs to be harmonized and that these concepts need to be precisely defined in future.



This inconsistency between constitutional and legal provisions can be explained by the fact that the Law on the Protector of Citizens and the Law on State Audit Institution were adopted before the 2006 Constitution. However, there was a failure to harmonize these provisions with the Constitutional provisions in the amendments to the laws that were passed after the adoption of the Constitution, although there was such an obligation.

The basic status characteristics of these bodies involves independence and autonomy. Their independence and autonomy are ensured in various ways, such as: the manner of election and dismissal of office holders in these bodies; financial autonomy; the right to legislative initiative, etc. Their independence and autonomy are limited by the system of control over them exercised by the National Assembly and the courts.

Independent control bodies have numerous control powers in relation to administrative entities. In the legal system of the Republic of Serbia, the subject under control by independent control bodies is very broadly defined. The subjects under control currently include: legality and regularity of the work of the administration; legality and regularity of spending of budget funds by budget users; achieving publicity in the work of administrative entities through the right to access information of public importance; exercising the right of citizens to equal treatment before the administration; protection of the right to access personal data on citizens; the existence of a conflict of public and private interest that may arise during the performance of the function, etc. (Vasiljević, Vukašinović Radojičić, 2019: 264-273).

The powers of the independent control bodies in exercising control over the work of administrative entities are mostly of a procedural nature and not of the meritorious one. They relate to the right to propose the dismissal of officials to the competent authority, as well as the right to initiate certain legal proceedings (criminal, misdemeanour, etc.). Regardless of the fact that these powers are of the procedural nature, their impact is still substantial in practice.

In addition to the above, an important power of the independent control bodies in exercising control over administrative entities is the possibility to point out certain instances of unlawfulness or irregularities occurring in the course of performing control within the annual report submitted to the National Assembly. The reports are the subject of attention not only of the National Assembly but also of a considerable part of the media, which in this way contribute to raising awareness about the importance of control performed by independent control bodies (Lončar, 2015: 145-158).

Naturally, the control over the work of administrative entities by the independent control bodies also refers to their control over the work of the police. In fact, the police are an important part of the state administration system. Also, the importance of such control should be kept in mind considering the powers that the police have at their disposal in carrying out tasks and duties. These powers often encroach on the domain of human freedoms and rights.

However, it should be kept in mind that the work of the independent control bodies is also subject to control. This control is, on the one hand, exercised by the National Assembly, and on the other hand by the courts. So, the control of constitutionality and the legality of the general acts of the independent control bodies, and also the control of their individual acts and actions that impinge on the constitutional rights and freedoms, when all other means of their protection are exhausted or have not been provided, can be exercised by the Constitutional Court. This constitutes the institute of constitutional complaint.

Another possibility of judicial control is performed through an administrative dispute, but it is not comprehensive. Thus the Law on State Audit Institution precludes the possibility of any judicial pro-



tection against acts passed by this independent control body (Article 3, paragraph 4). It is a separate question whether such a legal provision is in agreement with the Constitution of the Republic of Serbia and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

CONCLUSION

- 1) The wave of establishing independent bodies spread from the United States and swept European countries. Towards the end of the 20th century, this phenomenon also characterised transitional societies, and at the beginning of the 21st century it found its way into our national legal system.
- 2) There is no doubt that the states undergoing the process of transition are affected by numerous weaknesses related to the need to develop the state based on the rule of law. The role of independent bodies in this process is prominent and they are irreplaceable. The purpose of independent bodies and a number of other institutions is give their contribution to “healing” the societies over time, so that transitional countries could become truly democratic and based on the rule of law.
- 3) The constitutional and legal order of every country, including Serbia, should clearly define the relationship of these bodies with the legislative, judicial and executive branches in an environment where all of them together should ensure the rule of law.
- 4) The main reason for introducing independent control bodies into modern constitutional and legal systems, including the national legal system of Serbia, is reflected in the need to exercise control over entities holding administrative powers as places of real power and political influence. In order to give their contribution in the process of strengthening of the *rechtsstaat* and the principle of the rule of law, they must not be an extended arm of the executive political power in practice. In fact, some of the most important independent bodies need to exist precisely in order to control the executive branch of government (State Audit Institution, Agency for Prevention of Corruption, Ombudsman, etc.).
- 5) In the forthcoming period, it is vital to modify the legal framework by more clearly and accurately defining the place and role of these bodies and thus terminological confusion which we have pointed out above.
- 6) It must be borne in mind that every reform and introduction of new institutes initially faces resistance and miscomprehension. Let us remember that the famous English public law classic, Dicey, sharply criticised the concept of special administrative law and the specialised judiciary in France (Dicey, 1979:329-390). However, after more than 200 years of its existence, it is rightly pointed out today that “the Council of State is the bastion of civil liberties in France.” ... “Because of this the Council of State is also referred to as the guardian of the morality of administration” ... “Administrative law in France is one of the best protectors of citizens against the new despotism of the state administration. The Council of State has managed to establish administrative law that is a defender of civil liberties.” (Marković, 2002: 31-32).

We can only hope that the independent control bodies within the Serbian legal system will manage to achieve the same in a much shorter period of time.



REFERENCES

1. Becrmann, M. J. (2000). *Administrative law*, New York.
2. Burnham, W. (2002). *Introduction to the Law and Legal System of the United States*, St. Paul, West Group.
3. Braibant, G. & Strin, B. (2002). *Le droit administratif français*, Dalloz, Paris, 81-86.
4. Breger, J. M. & Edles, J. G. (2000). Established by Practice: The Theory and Operation of Independent Federal Agencies, *Administrative Law Review*, (52), 1111-1294.
5. Cucić, V. (2020). *Sprovođenje i kontrola postupka javnih nabavki*, Beograd, Službeni glasnik.
6. Davinić, M. (2004). *Koncepcija upravnog prava SAD*, Beograd, Dosije.
7. Davinić, M. (2018). *Nezavisna kontrolna tela u Republici Srbiji*, Beograd, Dosije.
8. Dicey, V. A. (1979). *An Introduction to the Study of the Law of the Constitution*, London.
9. Fox, F. William, Jr. (2000). *Understanding Administrative Law*, New York, Lexis Publishing.
10. Funk, F. W. & Seamon, H. R. (2001). *Administrative Law – Examples and Explanations*, New York, Aspen Law & Business.
11. Kagan, E. (2001). Presidential Administration, *Harvard Law Review*, (114), 2245-2385.
12. Lekić, B. (2012). Regulatorna tela u Srbiji, *Pravni život*, (10/2012).
13. Lončar, Z. (2015). Odnos organa uprave i nezavisnih državnih organa, *Pravni život*, (10/2015), Tom II, Beograd, 145-158.
14. Lowi, J. T. (1987). Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power, *American University Law Review*, (36), 295-296.
15. Maillard Desgrées du Loù, D. (2011). *Institutions administratives*, Presses universitaires de France, Paris, 222-227.
16. Marković, R. (2002). *Upravno pravo, opšti deo*, Beograd, Slovo.
17. Martinović, A. (2012). Pravna priroda agencija u pravnom sistemu Republike Srbije, *Zbornik radova Pravnog fakulteta u Novom Sadu*, (2/2012), 391-400.
18. Milkov, D. (1981). Samostalnost uprave i nezavisnost sudova, *Zbornik radova Pravnog fakulteta u Novom Sadu*, (1/1981), 185-187.
19. Milkov, D. (2014). Javne agencije u Srbiji - slučajna greška ili loša namera, *Zbornik radova Pravnog fakulteta u Novom Sadu*, (3/2014), 25-31.
20. Pusić, E. (1954). *Američka uprava*, Zagreb, Matica Hrvatska.
21. Rosenbloom, H. D. (2003). *Administrative Law for Public Managers*, Boulder, Westview Press.
22. Schoenbrod, D. (1999). Delegation and Democracy: A Reply to My Critics, *Cardozo Law Review*, (20), 731-766.
23. Shapiro, M. (1994). *APA: Past, Present, Future, Foundations of Administrative Law* (Peter H. Schulck), New York, Foundation Press.
24. Strauss, L. P. (1984). The Place of Agencies in Government: Separation of Powers and the Fourth Branch, *Columbia Law Review*, (84), 573-669.



25. Šuput, D. (2015). Neujednačenost statusnopravnog položaja regulatornih tela u Republici Srbiji, *Aktuelna pitanja savremenog zakonodavstva, Budvanski pravnički dani*, Beograd, 256.
26. Vasiljević, D. & Vukašinović Radojičić Z. (2019). *Upravno pravo*, Beograd, Kriminalističko-policijski univerzitet.
27. Vasić R. & Jovanović M. & Dajović G. (2014). *Uvod u pravo*, Beograd, Pravni fakultet Univerziteta u Beogradu.
28. Wilson, Q. J. (2000). *Bureaucracy, What Government Agencies Do and Why They Do It*, New York, Basic Books.

LEGISLATION

1. Constitution of the Republic of Serbia (Official Gazette of RS, br. 98/2006),
2. Law on State Administration (Official Gazette of RS, nos. 79/2005, 101/2007, 95/2010, 99/2014, 47/2018, 30/2018-other law),
3. Law on Public Agencies (Official Gazette of RS, no. 18/2005, 81/2005-correction, 47/2018)
4. Law on the Protector of Citizens (Official Gazette of RS, nos. 79/2005 and 54/2007),
5. Law on State Audit Institution (Official Gazette, nos. 101/2005, 54/2007, 36/2010 and 44/2018 – other law).
6. Law on Prevention of Corruption (Official Gazette of RS, nos. 35/2019, 88/2019 and 11/2021 – authentic interpretation)
7. Law on State Audit Institution (Official Gazette of RS, nos. 101/2005, 54/2007, 36/2010 and 44/2018 – other law)
8. Law on Free Access to Information of Public Significance (Official Gazette of RS, nos. 120/04, 54/07, 104/2009 and 36/2010)
9. Law on the Protection of Personal Data (Official Gazette of RS, no. 87/2018)
10. Law on Prohibition of Discrimination (Official Gazette, no. 22/2009)
11. Public Procurement Act (Official Gazette of RS, no. 91/2019)



THE ROLE OF PROCEDURAL JUSTICE IN THE WORK OF THE POLICE

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Abstract: Procedural justice is essentially an inherent part of every police action. It is a dynamic coefficient, a shaper of legitimacy and trust, and an elementary determinant of community satisfaction with the police. In my study, I intend to present the results of the most significant empirical research on procedural justice. I shed light on the significant correlation between procedural justice and the legitimate operation of the police. In the study, I will conditionally address the research methodology used to examine the existence or absence of procedural justice. The relationship between the police organization's internal systems, especially the fairness of the distribution system, is also an important criterion to be addressed in my study. Just as procedural justice affects a citizen-police relationship, so ethical, legitimate policing is in close nexus with the police organizational culture and the enforcement of internal procedural justice. These are essentially called "feedback loops," that is, the enforcement of procedural truth within a police organization can indirectly carry greater social support; however, they may also appear negatively, adversely affecting the organization's performance. Therefore, procedural justice elements must appear in the measurement of the efficiency of a police organization, just as special attention should be paid to the structure of police training.

Keywords: legitimacy, procedural justice, police, performance measurement, trust

INTRODUCTION

Procedural justice is intrinsic to every police action, a dynamic coefficient that shapes legitimacy and trust and an elementary determinant of community satisfaction with the police. Legitimacy and trust can be built if this ethos drives the everyday interactions of officers and citizens. If these traits are not present, they can easily and quickly erode. As a pioneer, Michael Lipsy identified this dynamic interaction in several public service professions, including the police officer and the prosecutor, judge, and

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social worker (Lipsky, 1980). Thus, it can be said that any modern police force is based on the rule of law. Procedural justice must be an indispensable, inherent element of all citizen-police interactions, whether it is a simple act or appears as a processing element of any police procedure. When we talk about human dignity, respect, and equal treatment, this is embodied in the form of procedural justice, in the way police officers communicate, interact and behave with citizens. The law and the law alone constrain police actions and procedures, but the human factor cannot be ignored, alongside the loopholes in the norms that justify police action. The culture of action, the choice of behavior, the general human attitude, the ability to think and act responsibly and maturely, independently of stereotypes, cannot be learned in school or taught in books. Only exemplary teachers and proper law enforcement training can develop attitudes in the individual that will accompany him throughout his future career. Nevertheless, it shapes and forms his decisions and determines his behavior and the quality of his conduct. The positive effects of police officer training with this approach have been demonstrated in the short and long term (Crean and Skogan, 2017).

It must be added that respect for and compliance with the law is a cornerstone of police work. Still, the stubborn adherence to the letter of the law, in its dry, cold, and inhumane form, threatens almost as much or has more damaging consequences than the consistent breaking of the law, even when used in the pursuit of effective and efficient procedural goals. And suppose a police officer makes an unfortunate mistake. In that case, the prosecution behaves not entirely honestly when it cites only the general argument of formal compliance with the law to justify the usual prosecution and conviction in such cases. Meanwhile, in Hungary, the police organization is not fundamentally sustained and operated by a set of values that regard the essential complement of procedural justice mentioned above as a critical element. Professional research on policing in the international arena - especially in modern and developed democracies - has addressed this issue for almost 40 years. As a result, a body of research literature has now been accumulated that has made the recognition of the role of procedural justice in evaluating police organizational and individual performance a particular element. It has also been used in the study of public satisfaction with the police. Its influence and impact on the subjective perception of safety are so often used and in vogue in our country. Unfortunately, in our country, despite the findings and lessons of empirical research in the international literature, a professional policy does not support the incorporation of procedural justice considerations either into the measurement of police organizational effectiveness or as a critical focus of internal control systems, not accepting the well-established and proven link between legitimate policing and procedural justice. Because, by reconciling these two aspects, procedural justice also promotes proper police functioning. Police officers must treat all persons under their control with respect and humanity, with due regard for non-discrimination. The police body camera can be an excellent tool for this purpose. A recent study in Turkey has shown that it has a beneficial effect on citizens' assessment of procedural justice (Demir et al., 2018). Of course, positive changes do not occur in the short term. Still, suppose the police adopt a procedural justice approach. In that case, they will undoubtedly produce more effective outcome indicators in the long run by more easily exploiting the explicit benefits of community support.

THE IMPACT OF PROCEDURAL JUSTICE ON POLICE LEGITIMACY

When people come into contact with the police through the actions of the police officer in charge, the fairness of such actions and fairness of their behavior have a significant impact on citizens' trust in the police. Along with their perception of the legality and professionalism of the police action itself, the quality of the culture of action that citizens subjectively experience also affects the extent to which they perceive police action as legitimate. Much social psychological research has shown the strength



and consistency of these empirical relationships (Harkin, 2015). Procedural justice is a matter of treating people with dignity and respect, allowing them to explain their situation and have their say heard. On the other hand, it makes them aware of what the police officer is doing or will do, and why, in a clear and tolerant style. This behavior should clarify that the police officer is taking their particular situation and problems into account. In this way, decisions will be made taking into account the law and individual circumstances. People who believe that the police are law-abiding are more likely to accept police decisions and comply with police requests and appeals, are also more likely to cooperate with the police, and are even more likely to adhere to the law. An abstract view of legitimacy includes both cognitive and affective elements. Police legitimacy can be seen as necessary for several reasons. Citizens who perceive the police as legitimate are more likely to comply with police orders, instructions, and requests in their interactions with the police. In police-citizen encounters, the fairness of the policy process will significantly facilitate the performance of police duties (Mastrofski, Snipes, and Supina 1996; McCluskey 2003; McCluskey, Mastrofski, and Parks 1999). It is expected to result in fewer adverse outcomes, such as using police force or injuries to police officers or citizens resulting from such conflicts, subsequent litigation, and prosecution. A study in Chicago confirmed that police training built on a foundation of procedural justice reduced complaints against police in the district by 10.0% and reduced the use of force against civilians by 6.4% over two years. These findings confirm the reality of changing police leadership and management styles (Wood et al., 2020). Citizens who perceive the police as legitimate might be expected to cooperate more readily with the police and other legal actors, for example, by reporting crimes and possibly providing information to assist their operations (Hart and Rennison, 2003).

Furthermore, citizens who consider the police legitimate are less likely to break the law in general (Paternoster et al. 1997; see also Tyler 1990; Tyler and Huo 2002). Just as significant research has confirmed the hypothesis that even harmful acts are acceptable (arrests, punishments, etc.) as long as they make the decision-making processes leading to the outcome transparent and tangible, it becomes familiar and now understandable to anyone. If the processes are transparent to the community and their fairness, legitimacy, and impartiality, negative results are more likely to be accepted. It can be concluded that police behavior has four features that can be grouped around decision-making and interpersonal treatment and influences the assessment of procedural fairness (Schulhofer et al., 2011; Sunshine & Tyler, 2003; Tyler, 2004, 2009, 2011).

1. The first is participation. Decision-making processes are considered fairer if the citizens concerned can explain their positions and opinions. Their input will be taken into account in making decisions about their case.
2. The second is neutrality. Processes are considered fairer if decisions are made in a neutral, impartial environment. Transparency in decision-making presumably encourages the assessment of neutrality. Individuals trust that the perpetrators and executors of acts are driven by neutral goals (Mazerolle et al., 2013).
3. Third, when citizens trust the motives of the police (they believe that the police are concerned with the well-being and quality of life of the participating citizen or society as a whole), police processes are again seen as fairer. Tankebe (2010) identified three dimensions of trust in the police: (1) reliability, (2) efficiency, (3) procedural fairness. The results show that indirect, non-personal experiences of police corruption and abuse have significantly reduced the positive responses to each of the issues affecting police trust.



4. Finally, human dignity and respect. When police treat citizens politely, and with dignity, their rights are recognized and respected, and the assessment of procedural justice is improved. In the process, they respect their dignity and experience as impartial along with impartial attitude.

Procedural justice is inconceivable without respect for human dignity. Even more often than not, in individual situations, people already experience police action in itself as a violation of this and question its legitimacy. This fact shows why it is necessary to meticulously pay attention to human dignity in police action. Human dignity in itself implies a minimum of recognition in law that ensures individuals' human nature. It cannot be called into question by anyone, requiring anyone to demand respect due to all. This obligation is the basis of social coexistence, which is precisely why it is raised to the level of the Basic Law and is also contained in basic international treaties. *"The right to human dignity means that there is a core of individual autonomy, self-determination, extracted from the provisions of everyone else, as a result of which man remains a subject and does not become an instrument or object."* (Decision 8/1990 (IV. 23.) AB).

As interpreted by the Constitutional Court, human dignity is the "mother right" of the rights of the individual and thus the right to honor and reputation. Reputation, honor, and human dignity are separable rights of the person and are closely linked. Reputation and honor protect the social value judgments about a person. On this basis, defamatory conduct constitutes an attack on human dignity, against which human dignity and honor as legal objects are also protected by the Criminal Code in the area of defamation and libel. Because of the above, any expression which insults human dignity, i.e. which contains a degrading value judgment, is liable to defame. In this respect, the form in which it is used, for example, in a joke, a story, or a question, is irrelevant. Thus, the seriousness or plausibility of the statement is not a function of its factual nature. Typical examples of such conduct include calling the victim stupid, a thief, or even a homosexual, or making offensive or hurtful remarks about someone's origin or ethnicity. Section 216 of the Hungarian Criminal Code punishes hate crimes as "Violence against a member of the community." Since the new Penal Code entry into force, the law no longer only refers to acts of violence motivated by racial, ethnic, or religious hatred but also specifically covers attacks against members of groups based on sexual orientation, gender identity, or disability.

The theory of procedural justice emerges in the work of Tom Tyler (1988, 1990, 2004, 2011; Tyler et al., 2007), who argues that if the police demonstrate 'fair' procedures appropriately, this will have the further consequence of increasing police legitimacy. If police legitimacy is increased, Tyler argues, the police can expect increased cooperation and compliance from the public and thus provide better police service, as the likelihood of acceptance is enhanced. Tyler (2004: 84) offers a 'process-based model' of how police legitimacy can be improved. This situation can be achieved by: '[providing] people with the opportunity to express their views before decisions are made in the policing context; explaining the reasons and the facts behind decisions; and making complaint mechanisms available to people and treating them with courtesy and respect by the police' (Tyler, 2011: 260). Tyler (2011: 257) demonstrates that the most crucial dimension of the encounter between police and citizens is the perceived fairness of the process.

The primary question that shapes people's reactions when they meet the police in person. Citizens who felt that they were treated fairly during face-to-face encounters with the police were more likely to respond in the desired way: cooperating with police and sharing information (Mastrofski, Snipes, and Supina, 1996; Tyler and Huo, 2002). It should be added that Tyler's process-based model was first empirically tested on a sample of 1,000 Chinese, which concluded that procedural justice played a significant role in predicting police legitimacy and cooperation with the police. Still, it showed that police effectiveness was the strongest predictor. Procedural justice seems to be a culture-centric factor, which



is interesting to examine in different relations (Sun et al., 2017). However, in Western democracies, not only successful but also 'fair' policing can have some related outcomes: it can reduce the number of hostile encounters that are detrimental to the overall evaluation of the police (Skogan, 2006); it can enhance the legitimacy of the authority in the eyes of individuals and communities (Sunshine and Tyler, 2003); it can encourage the public to cooperate and comply with crime prevention efforts voluntarily; and finally, it can inspire everyday compliance with the law (Tyler, 2004: 89). As can be seen, procedural justice theory offers some essential insights into police legitimacy; besides being a vital benchmark for democratic societies, police legitimacy plays a role in many desired outcomes. This includes cooperation with the police, information, assistance in solving crimes, acceptance of police authority, and willingness to obey the law more generally (Tyler, 2003; Tyler, 2006; Tyler & Fagan, 2008).

MEASURING AND EXAMINING PROCEDURAL JUSTICE

Just as procedural justice impacts the citizen-police officer relationship, ethical, legitimate policing is closely nexus with the organizational culture of the police and the enforcement of internal procedural justice. These are what we call 'feedback loops,' i.e. the enforcement of procedural justice within the police. The Organization may carry more excellent social support in a leveraged way; conversely, they may also negatively affect organizational performance, with detrimental repercussions. Therefore, how the police define their role in society and the criteria for effective policing is not an irrelevant aspect. Moore and Braga (2004) argue that increasing the number of arrests, detentions, and citations do not reduce crime in the community of interest. According to them, many other things can have a more significant impact on society by having a greater effect on crime reduction. In their study, Charbonneau and Riccucci (2008) outline the importance of social equity factors. In doing so, they propose social equity indicators, including an assessment of fair treatment, similar to what is otherwise defined as 'procedural justice.' They argue that these should be included in police performance and effectiveness measurement, as they are closely linked to community policing. As a proven method, the New York Police Department's Compstat management accountability mechanism has been widely used in several countries. One of the primary virtues of the mechanism is its ability to focus police attention not only on the means - arrests, tickets, etc. - but also on the ends of policing: reducing crime, controlling disorder, improving quality of life, and community satisfaction. But the Compstat system has its drawbacks. Namely, the measurement of outcomes is generally limited to crime and thus misses essential elements that police should also be paying attention to (Worden, 2017). Mark Moore describes a range of outcomes or performance dimensions that reflect the value of policing to a broader extent, including:

- Reducing the number of victims of crime;
- Holding offenders truly accountable;
- Reducing fear and increasing personal safety;
- Ensuring the safety of public spaces;
- Using financial resources reasonably, efficiently, and effectively;
- Using power and authority reasonably, efficiently, and effectively;
- Satisfying the needs of customers and achieving an increase in the legitimacy of police action (Moore 2002, 131-33)



Public perception of police procedures fairness, evaluations of procedural justice, and the relationship between police legitimacy and other outcomes, are issues often examined through community surveys (Hinds & Murphy, 2007; Jonathan-Zamir & Weisburd, 2013; Kochel et al., 2013; Murphy et al., 2008; Reisig et al., 2007; Tyler, 2001, 2004, 2009). In these surveys, procedural justice is typically assessed using guided questions comprising the four mentioned above, often summarized in a single procedural justice function (Tal et al., 2015). Subsequently, the relationships between some of the variables in the processes, such as legitimacy and willingness to comply or cooperate with the police, have been examined (Sunshine and Tyler, 2003). One or more elements of procedural justice and the overarching concept have also been used as a framework for analyzing qualitative data from in-depth interviews with citizens who interact with police (Brunson & Miller, 2006; Elliot, Thomas, & Ogloff, 2013; Gau & Brunson, 2010; Miller & Hefner, 2013). Findings from a study of immigrants in Ghana also suggest that when people perceive procedurally fair behavior by the police, they feel an increased obligation to comply and are willing to cooperate with them (Pryce et al., 2017).

SUMMARY

Based on the above, we need to recognize and shed a whole new light on the quality of police procedures and assess the role of procedural justice as more than a conceptual, theoretical academic element. In addition, the development of a police training system that incorporates aspects of procedural fairness is also a key area, as is the result of an organizational and individual performance evaluation system with this hallmark. The issue of organizational justice is broader than procedural justice because it also includes the fairness of the distribution of material resources, i.e. the sense of how relatively limited/scarce resources, workforce, material, and intellectual endowments are distributed within the organization. Procedural justice, in addition to the aforementioned participation, includes being informed of decisions and fair and humane treatment of subordinates by managers. Police personnel should be involved in decision-making processes in such a way that their concerns are heard. At the same time, the background to management decisions must be justified and transparent (Fair Cop 2, 2015). In England, Oxford research in Durham police has provided a convincing argument that organizational justice, which includes the aforementioned procedural justice of managers and senior managers (decision-making involvement, notification, treatment) and distributive justice, has a positive impact on organizational cohesion and more social, cooperative organizational attitudes and behaviors, as well as having an effect on the work culture of subordinates (Bradford - Quinton, 2014).

REFERENCES

1. Bradford, Ben – Quinton, Paul – Myhill, Andy – Porter, Gillian (2013): Why do People Comply 'the law'? Procedural justice, group identification and officer motivation in police organizations. *European Journal of Criminology*, vol. 11, no. 1. 110–131.
2. Bradford, Ben – Quinton, Paul (2014): Self-legitimacy, police culture and support for democratic policing in an English constabulary. *The British Journal of Criminology*, vol. 54. is. 6: 1,023-1,046.
3. Brunson, R. K., & Miller, J. (2006). Young black men and urban policing in the United States. *The British Journal of Criminology*, 46, 613–640.



4. Charbonneau, Etienne – Riccucci, Norma M. (2008): Beyond the usual suspects: An analysis of the performance measurement literature on social equity indicators in policing. *Public Performance and Management Review*, vol. 31. no. 4. 604–620.
5. College of Policing (2015): Fair cop 2: Organisational justice, behaviour and ethical policing. URL:http://whatworks.college.police.uk/Research/Documents/150317_Fair_cop%202_FINAL_REPORT.pdf (Letöltés ideje: 2016. augusztus 17).
6. Elliott, I., Thomas, S., & Ogloff, J. (2013). Procedural justice in victim-police interactions and victims' recovery from victimization experience. *Policing and Society*. Early publication online: <http://dx.doi.org/10.1080/10439463.2013.784309>
7. Gau, J. M., & Brunson, R. K. (2010). Procedural justice and order maintenance policing: A study of inner-city young men's perceptions of police legitimacy. *Justice*
8. George Wood & Tom R. Tyler & Andrew V. Papachristos (2020): "Procedural justice training reduces police use of force and complaints against officers," *Proceedings of the National Academy of Sciences*, *Proceedings of the National Academy of Sciences*, vol. 117(18), pages 9815-9821, May.
9. Harkin D. Police legitimacy, ideology and qualitative methods: A critique of procedural justice theory. *Criminology & Criminal Justice*. 2015;15(5):594-612. doi:10.1177/1748895815580397
10. Hart, Timothy C., and Callie Rennison. 2003. *Reporting Crime to the Police, 1992–2000*. NCJ Publication No. 195710. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.
11. Hinds, L., & Murphy, K. (2007). Public satisfaction with police: Using procedural justice to improve police legitimacy. *Australian and New Zealand Journal of Criminology*, 40, 27–42.
12. Jonathan-Zamir, T., & Weisburd, D. (2013). The effects of security threats on antecedents of police legitimacy: Findings from a quasi-experiment in Israel. *Journal of Research in Crime and Delinquency*, 50, 3–32.
13. Kochel, T., Parks, R. B., & Mastrofski, S. D. (2013). Examining police effectiveness as precursor to legitimacy and cooperation with police. *Justice Quarterly*, 30, 895–925.
14. Lipsky, Michael (2010): *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*, 30th anniversary expanded edition. Russell Sage Foundation, New York. (Lipsky's book was originally published in 1980.)
15. Mastrofski, S. D., Snipes, J. B., & Supina, A. E. (1996). Compliance on demand: The public's response to specific police requests. *Journal of Research in Crime and Delinquency*, 33, 269–305.
16. Mazerolle, L., Bennett, S., Antrobus, E., & Eggins, E. (2012). Procedural justice, routine encounters and citizen perceptions of police: Main findings from the Queensland community engagement trial (QCET). *Journal of Experiment Criminology*, 8, 343–367.
17. Mazerolle, L., Bennett, S., Davis, J., Sargeant, E., & Manning, M. (2013). Legitimacy in policing: A systematic review. *Campbell Systematic Reviews*. doi:10.4073/csr.2013.1
18. Miller, S. L., & Hefner, K. (2013). Procedural justice for victims and offenders?: Exploring restorative justice processes in Australia and the US. *Justice Quarterly*. Early publication online: <http://dx.doi.org/10.1080/07418825.2012.760643>
19. Moore, Mark H. – Braga, Anthony A. (2004): Police performance measurement: A normative framework. *Criminal Justice Ethics*, vol. 23. iss. 1. 3–19.



20. Moore, Mark H. (2002). *Recognizing Value in Policing: The Challenge of Measuring Police Performance*. Washington, DC: Police Executive Research Forum.
21. Murphy, K., Hinds, L., & Fleming, J. (2008). Encouraging public cooperation and support for police. *Policing and Society*, 18, 136–155.
22. Murphy, Kristina – Hinds, Lyn – Fleming, Jenny (2008): “Encouraging Public Cooperation and Support for Police”. *Policing & Society*, vol. 18, no. 2. 136–155
23. Mustafa Demir, Robert Apel, Anthony A. Braga, Rod K. Brunson & Barak Ariel (2018): *Body Worn Cameras, Procedural Justice, and Police Legitimacy: A Controlled Experimental Evaluation of Traffic Stops*, *Justice Quarterly*, DOI: 10.1080/07418825.2018.1495751
24. Pryce, D. K., Johnson, D., & Maguire, E. R. (2017). Procedural Justice, Obligation to Obey, and Cooperation with Police in a Sample of Ghanaian Immigrants. *Criminal Justice and Behavior*, 44(5), 733–755. <https://doi.org/10.1177/0093854816680225>
25. *Psychology*, 57, 375–400.
26. *Quarterly*, 27, 255–279.
27. Reisig, M. D., Bratton, J., & Gertz, M. J. (2007). The construct validity and refinement of process-based policing measures. *Criminal Justice and Behavior*, 34, 1005–1028.
28. Skogan, W. G. (2006). The promise of community policing. In D. Weisburd & A. A. Braga (Eds.), *Police innovation: Contrasting perspectives* (pp. 27–43). Cambridge: Cambridge University Press.
29. Sun, I. Y., Wu, Y., Hu, R., & Farmer, A. K. (2017). Procedural Justice, Legitimacy, and Public Cooperation with Police: Does Western Wisdom Hold in China? *Journal of Research in Crime and Delinquency*, 54(4), 454–478. <https://doi.org/10.1177/0022427816638705>
30. Sunshine, J., & Tyler, T. R. (2003). The role of procedural justice and legitimacy in shaping public support for policing. *Law and Society Review*, 37, 513–548.
31. Tal Jonathan-Zamir, Stephen D. Mastrofski & Shomron Moyal (2015) *Measuring Procedural Justice in Police-Citizen Encounters*, *Justice Quarterly*, 32:5, 845–871, DOI: 10.1080/07418825.2013.845677
32. Tankebe J (2010) Public confidence in the police: Testing the effects of experience of police corruption in Ghana. *British Journal of Criminology* 50(2): 296–319.
33. Tankebe J (2013) Viewing things differently: The dimensions of public perceptions of police legitimacy. *Criminology* 51(1): 103–135.
34. Tankebe J and Mesko G (2015) Police self-legitimacy, use of force, and pro-organizational behaviour in Slovenia. In: Mesko G and Tankebe J (eds) *Trust and Legitimacy in Criminal Justice*. London: Springer International Publishing.
35. Tyler, T. (1988). What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures. *Law & Society Review*, 22, 103–135.
36. Tyler, T. (2003). Procedural justice, legitimacy, and the effective rule of law. In M. H. Tonry (Ed.), *Crime and justice: A review of research* (pp. 283–357). Chicago: University of Chicago Press.
37. Tyler, T. (2005). Policing in Black and White: Ethnic group differences in trust and confidence in the police. *Police Quarterly*, 8, 322–342.
38. Tyler, T. (2006). Psychological perspectives on legitimacy and legitimation. *Annual Review of*



39. Tyler, T. R., & Huo, Y. J. (2002). *Trust in the law: Encouraging public cooperation with the police and courts*. New York, NY: Russell-Sage Foundation.
40. Tyler, T., & Fagan, J. (2006). *Legitimacy and cooperation: Why do people help the police fight crime in their communities?* Public Law & Legal Theory Working Paper Group (Paper No. 06-99). New York: Columbia Law School.
41. Tyler, T., & Folger, R. (1980). Distributional and procedural aspects of satisfaction with citizen-police encounters. *Basic and Applied Social Psychology*, 1, 281-292.
42. Tyler, T., & Huo, Y. (2002). *Trust in the law: Encouraging public cooperation with the police and courts*. New York: Russell Sage.
43. Tyler, T., & Wakslak, C. (2004). Profiling and police legitimacy: Procedural justice, attributions of motive, and acceptance of police authority. *Criminology*, 42, 253-281.
44. Tyler, T., Rasinski, K., & Spodick, N. (1985). The influence of voice on satisfaction with leaders: Exploring the meaning of process control. *Journal of Personality and Social Psychology*, 48, 72-81.
45. Tyler, Tom R., and Jeffrey Fagan. 2008. "Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?" *Ohio State Journal of Criminal Law* 6: 231-75.
46. Van Craen, M., & Skogan, W. G. (2017). Achieving Fairness in Policing: The Link Between Internal and External Procedural Justice. *Police Quarterly*, 20(1), 3-23. <https://doi.org/10.1177/1098611116657818>
47. Worden, R., & McLean, S. (2017). *Mirage of Police Reform: Procedural Justice and Police Legitimacy*. Oakland, California: University of California Press. Retrieved January 21, 2021, from <http://www.jstor.org/stable/10.1525/j.ctt1w8h1r1>





TOPIC III

CONTEMPORARY SECURITY CHALLENGES





THE END OF THE COLD WAR AS AN INTRODUCTION TO THE CONFLICT OF CIVILIZATIONS

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Abstract: The clash of civilizations is a popular name for the theory that appeared after the end of the Cold War. This theory advocates that main source of conflict in the world will no longer be opposing ideologies, but belonging to different civilizations. The author of the theory is Samuel Huntington who claimed that differences between civilizations will lead to the future wars. According to him, the future wars will be between civilizations.

The aim of this paper is to understand the nature and causes of conflicts in the world after the Cold War, through the prism of the theory of conflicts of civilizations, with a presentation of relevant facts to what extent conflict is possible and real. The paper defines the basic concepts of civilization and social conflicts by pointing to globalization as a possible catalyst for conflict. The authors try to provide answers to the questions such as the following: How important is it to understand the relationship between religion and war? What is the prism of the theory of clash of civilizations? What are the facts that indicate the reality of the clash of civilizations after the Cold War?

Keywords: social conflict, globalization, civilization, Cold War, religion, war

INTRODUCTION

Conflict, in general, is an immanent category of human life and a historical fact. It is present in almost all life issues of people, such as: good and evil, justice and injustice, faith and unbelief, wealth and poverty, knowledge and ignorance, rural and urban, etc. In a word, it is an eternal theme of people, expressed through needs, values and interests. With the formation of society as an organized human

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community, the conflict gained its institutionalized structures, functions and a special social dimension.

Social conflicts are, in their content, changeable, dynamic, multiple-caused and complex phenomena. Their deepest roots lie in the contradictions between the interests, values or significant material and spiritual resources that the parties to the conflict want to have at their disposal. Social conflicts can arise and develop gradually, but also spontaneously, which usually leads to their aggravation and escalation, while in the most extreme form they can result in the complete destruction of the existing social system.

During the Cold War, the world was bipolar, divided into two opposing military blocs: the North Atlantic Alliance and the Warsaw Pact countries. Bipolarity, it will be shown later, meant a balance of power and was the best guarantee of peace. For the first time in history, global politics is multipolar and multicivilizational. After the end of the Cold War, many theorists around the world believe that it now makes much more sense to classify countries not according to the economic level of development and ideology, but rather in terms of their culture and civilization. Therefore, some theorists predict that the conflicts of the future, as the last stage in the evolution of conflict, will be based on civilizational (cultural and religious) differences.

THEORY OF CONFLICT OF CIVILIZATIONS

According to Samuel Huntington's theory of the clash of civilizations, after the end of the Cold War, the main source of conflict in the world will no longer be opposing ideologies, but belonging to different civilizations.

It could already be seen that civilizations are dynamic. In addition to being lasting, civilizations evolve, rise and fall, merge and separate, disappear and are buried. Scientists generally agree in their identification of major civilizations in history and those that exist in the modern world. Yet their views often differ as regards the total number of civilizations that have existed in history. These differences depend in part on whether cultural groups, such as the Chinese or Hindus, have historically had one, two, or more close civilizations, one of which was the result of the other. Despite these differences, the identity of major civilizations is not under dispute.

According to Huntington, the modern world is divided into six civilizations to which Latin American and, possibly, African civilization can be added. The most important civilizations are: Sinic, Japanese, Hindu, Islamic, Western, Latin American, African (possible), but Huntington also shows Orthodox and Buddhist civilization on the map of the world in his book of civilizations after 1990 (Huntington, 2000: 48-51). According to Huntington, the main defining characteristic of civilizations is religion (Huntington, 2000: 48-51).

Huntington's division included the so-called "lonely" countries that stand out among their surroundings with various cultural and other specifics, e.g. Israel in the Middle East, Ethiopia in Africa, as well as the so-called "torn countries" whose parts belong to different civilizations, e.g. Ukraine.

Huntington believed that the most important and dangerous conflicts in this new world would not be conflicts between social classes, rich and poor or other economically determined groups, but between people belonging to different cultural entities: "In this new world, local politics is ethnic politics; global politics is the politics of civilizations." (Huntington, 2000: 48-51).



Although nation-states will remain major players in world affairs, violence between states and groups from different civilizations has the potential to escalate as other states and groups from these civilizations come together to support “related countries.” As one of the examples, he cites the conflicts in Yugoslavia, in which Russia provided support to Serbs, and Saudi Arabia, Turkey, Iran and Libya to Bosniaks, not because of ideological, political or economic reasons, but because of cultural kinship. That is why he claimed that the affiliation to a civilization will be more and more important, and the world will be increasingly shaped by the interaction between civilizations.

Huntington’s arguments as to why civilizations will clash, which he presented in *Foreign Affairs* in an article entitled “The Clash of Civilizations”, could be summarized as follows:

- 1) Due to fundamental differences in history, language, culture, tradition, and (most significantly) religion. People from different civilizations have different views and these differences are much deeper than those based on ideology and political regime.
- 2) Accelerated and increased communication between different cultures has contributed to the intensification of internal civilizational consciousness as well as the awareness of differences in relation to others, which leads to the creation of hostilities.
- 3) Modernization and social change have contributed to the separation of people from old local identities and the nation state. This gap is filled by religious fundamentalist movements.
- 4) Non-Western societies (i.e. their elites) return to the values of their own civilization, rejecting the pro-Westernization that comes from their elites or the Western civilization. Today, more than ever, one can hear references to inward trends (e.g. “Asianization”, “Hinduization”, “Re-Islamization”, etc.).
- 5) The growth of economic regionalism on the one hand strengthens the awareness of civilization; on the other hand, in some parts of the world it presents difficulties for countries like Japan, which is a single society and civilization.

Due to the mentioned differences, Huntington believes that the conflict is inevitable on two levels. At the micro level, neighboring groups living along demarcation lines between civilizations fight, often very brutally, to control a particular territory or each other. At the macro level, states belonging to different civilizations compete for relative military and economic power, fight for control over international institutions and third parties, and promote their personal, political or religious values in a competitive style. Huntington insisted that people of different civilizations have, in addition to different languages, histories, cultures, traditions, and most importantly religions, very conflicting views on the relationship between God and man, that these differences are the product of centuries of tradition and they cannot be overcome quickly and easily.

Wars over inadequate borders are almost always wars between people of different religions. History is full of local conflicts and wars due to the inadequate border, and among the more important conflicts, Huntington cites the conflict between Serbs and Croats in the former Yugoslavia and Buddhists and Hindus in Sri Lanka. According to him, these conflicts are not equally distributed among the world’s civilizations. While at the macro or global level it is the primary conflict between the West and the rest, at the micro or local level it is the conflict between Islam and others. “Everywhere we look along the border of Islam, Muslims have trouble living peacefully with their neighbors.” (Huntington, 2000: 284).

Analyzing several sources of data on involvement in intergroup violence, Huntington concludes that Muslims were engaged in two thirds to three quarters of intercivilizational wars against non-Muslims in the 1990s. That is why he did not hesitate to write the following: “The borders of Islam are bloody,



and the same is the case within its borders.” (Huntington, 2000: 286). This statement provoked several critical comments around the world, and among them was John Esposito, who sharply criticized this Huntington’s thesis in the book *Islamic Threats: Myth or Reality* (Esposito, 1994). Huntington also noted that “Western interference in the affairs of other civilizations is probably the most dangerous source of instability and potential global conflict in a multicivilized world.” (Huntington, 2000: 347). He therefore recommends that the West should refrain from interfering in a possible conflict between China and Japan, and that Islam should not interfere in conflicts in Europe, even in the name of the Muslim minorities living there. Unfortunately, the facts show that the involvement of Islam in the conflicts on the territory of the former Yugoslavia was significant, and this is still the case today, as evidenced by the recent statement of Turkish Prime Minister Erdogan during his visit to Kosovo and Metohija.

Explaining why the conflict between Islam and the West is the most probable, he states that this conflict has been going on for 1300 years. Until the end of the Second World War, the conflicts took place in a wide area with limited intensity. After the period, the growing needs of the West for oil, the emergence of Arab nationalism and Islamic fundamentalism, this decades-long military interaction between the West and Islam will not weaken but may become more deadly. Given the demographic explosion in the Islamic world, the possibility of armed conflicts is becoming more and more probable. The history and depth of the conflict between the West and China is also indisputable, primarily because of China’s economic development, which allows it to expand its military capabilities and increase influence in the region and its ability to join and adapt to that development (Huntington, 2000: 241).

In the end, perhaps the best conclusion about the probability of a clash of civilizations was given by Huntington himself when he said: “Dangerous conflicts in the future will probably arise from the interaction of Western arrogance, Islamic intolerance and cynical confirmation.” (Huntington, 2000: 203).

GLOBALIZATION AS A POSSIBLE CATALYST OF CONFLICT

Globalization is a process of transformation of local or regional phenomena into global ones, and can be described as a process in which the peoples of the world, unified as a single society, function together, so that this process is a combination of economic, technological, sociocultural and political forces.

An increasing number of different actors, in the form of individuals, groups, non-governmental, multinational, transnational, supranational and global actors are appearing on the international scene, playing an increasingly important role in relation to sovereign states and complicating the international scene, sharing and distributing power and influencing its dispersion. “Relative predictability in international relations, which has lasted for over three centuries, conditioned the existence of the system of states as the main, long and only skeleton of world relations, and the process of branching out the global structure began several decades ago,” Dragan Simić points out (Simić, 2002: 15).

CORE AND PERIPHERY COUNTRIES

At the beginning of the 21st century, there are about 200 sovereign states in the world that are legally equal, although there are differences between them. During the Cold War, in a system of international relations based on sovereign states, there was competition between states that were in three different groups: core countries (western countries), communist countries, and third world countries. With the



disappearance of the communist countries after the Cold War, the ideological divisions also disappeared, so the world and the countries of the world were again divided into the countries of the core (center) and the countries of the periphery. Although they are actors in the international relations of the state, their position will determine the place they occupy in the two mentioned categories, the core countries which are smaller in number, yet economically and politically stronger, constitute creators, bearers, financiers and the main support to liberal values, principles and institutions, while peripheral states represent numerically larger portion that consists of weaker states "less committed to democracy, the free market and peace. The core is, therefore, the place from which the process of liberalism spreads to the periphery region," Mandelbaum points out (Mandelbaum, 2004: 68).

With the new process of globalization, the gap between rich and poor countries is deepening, inequalities are increasing and the distance between the West and other civilizations continues to grow. Globalization is thus presented as a form of postcolonial imperialism, which not only deepens the exploitation of the "periphery" by the "center" or the "South" by the "North", but also adds most of the post-communist countries of the Second World to the list of victims of globalization ("semi-periphery"), and in front of all those that remain permanently, "East of Eden" - outside the newly established steel curtain between the European Union and the Eurasian (south) east.

Polarization and differences between the global north and the global south are increasing, giving the problem of economic inequalities a political dimension. "The drastic increase in inequality in the last three decades is primarily due to the neoliberal economic system whose structure and functioning are conducive to high inequality rates," Džuverović said, noting that the rise in inequality may cause the conflict. The dominance of neoliberalism as an economic and political doctrine has led countries to a state in which they free themselves from their traditional role of regulating economic relations and redistributing economic goods, leaving them to market relations. Therefore, it is necessary for states to act preventively on the issue of reducing social inequalities (Džuverović, 2013: 194-195).

The anti-imperialist, anti-colonial and anti-hegemonic mood of the globally awakened mass population of the most underdeveloped part of the world shows its new relative limitations in the emerging global world system. The first constraint is the end of cheap Western military interventions against weak opponents originating from the underdeveloped part of the world. Another limitation is the supremacy of national influence and balanced foreign policy expressed through elements of soft power in relation to the application of elements of hard power in achieving the goals of the subjects of international relations, primarily military forces and military-political alliances. The supremacy of the West on the global level is over, but the "dependence of the West on America, on its internal vitality and on the historical relevance of its foreign policy" is crucial (Bžežinski, 2002: 137).

RELIGION AND SOCIAL CONFLICTS

In the last few decades, and especially in the first two decades of the 21st century, as opposed to the once dominant theory of secularization, approaches and theories that challenge the decline of religiosity and the social importance of religion have become increasingly common. When we talk about absolute and relative numbers, the parallel between the number of religious people in the world since 1970 with the one from 2010 is indicative, which confirms the thesis that the number of religious people is growing. Data on religiosity in absolute terms show that the number of believers in all world religions has increased: Christians from 1.236 to 2.135 billion, Muslims from 554 million to 1.314 billion, Buddhists from 233 to 379 million, Hindus from 463 to 870 million and Judaists from 14 to 15



million. By 2030, the population that practices the principles of the youngest monotheism is expected to grow to 2.2 billion. In terms of relative numbers, in the period from 1970 to 2005, the number of members of these religions grew from 67.8% to 72.4% of the world's population.

It is difficult to answer whether religion, as it has returned to the stage of modern social essences, is the same religion from a few centuries ago. Nevertheless, what can be concluded on the basis of the analysis of the expansion of the new religiosity and its relation to secular authorities is that religion is incorporated into secular life to a significant extent. Whether this happened because religion slowly adapted to secular society, or perhaps secular society proved so incapable of solving the newly accumulated problems of late postmodernism that religion "found itself in trouble" is matter for further discussion. It is obvious that the crisis of modernity has reintroduced religion in society in grand style, although it would not be wrong to conclude that religion itself began to feel stronger, more present and more effective by adapting to secular society and its demands.

RELIGION AS A CATALYST FOR CONFLICT

Religions are essential components of culture and civilization but they are also the causes or at least the factors of numerous conflicts. Religion has changed over time and adapted to new secular circumstances, so today its role in conflicts is focused on supporting ethnic groups, nations and states in their aspirations, mostly ethno-nationalist, but its conflict potential is still not negligible (Subotić, 2017: 233).

Conflicts like the one between Jews and Muslims in the Middle East, clashes between Catholic Christians and Muslims in East Timor, Protestants and Catholics in Northern Ireland, Muslims and Hindus in Kashmir, conflicts between Hindus and Sikhs in India, Taliban tyranny against all others in Afghanistan, the conflict between Christians and Muslims in Nigeria (further complicated in recent years by the presence of the militant Muslim sect Boko Haram) and the like, do have elements of religious conflict. In the public discourse of the post-Yugoslav space, attitudes could be heard that the civil war in the former SFRY, primarily in Bosnia and Herzegovina, was in fact a religious conflict (Subotić, 2018: 79). Of course, religion should by no means be seen as the primary cause of hatred, misunderstanding and various types of conflicts. In these situations, it is seen as an occasion, i.e. as a justification for different preferences of different societies. For example, wars have been fought primarily for economic reasons, i.e. the conquest of natural resources, or even the expansion of territory. In these cases, religion was primarily used as a means of motivating people to participate in the conflict.

THE REALITY OF THE CONFLICT OF CIVILIZATIONS

Huntington's theory of the clash of civilizations has been discussed among sociologists, political scientists, anthropologists, psychologists and other experts. Some justify it, some criticize it. Some people were impressed, some intrigued, some hurt, some terrified, and some confused. Many believe that the terrorist attacks on New York and Washington on September 11, 2001 marked the beginning of the clash of civilizations that Huntington predicted. Many believe that the conflicts occurring at the end of the 20th and the beginning of the 21st century also confirm Huntington's predictions. The "Arab Spring", the conflicts in the Middle East, the events in Ukraine, which Huntington described as a "divided" country, additionally support this theory.



The data show that, since the end of the Cold War, the main global conflicts have not been ideological or economic in nature, but rather conflicts between civilizations. Huntington states that, at the beginning of 1993, slightly less than half of the 48 ethnic conflicts in the world were between groups of different civilizations. So, the notion of the total domination of the West, the “end of history” as some have triumphantly announced, after the end of the Cold War, is completely wrong. The data indicate that Western civilization is in decline, and that economic power is rapidly shifting to East Asia, followed by military power and political influence.

The fact that the world is being modernized does not mean that it is turning to the West. Many examples around the world show that modernization does not necessarily mean Westernization. Modernization does not require any ideology or group of institutions: elections, national borders, civic associations or other signs of Western life. Non-Western societies can achieve modernization without abandoning their own cultures and adopting Western values, institutions, and practices en masse. For example, Japan, Singapore, Taiwan, Saudi Arabia, Iran, India, China and many others have become modern societies, without Westernization. Modernization without Westernization is certainly one of the possible sources of conflict between the West and non-Western civilizations.

The resurrection of Islam and ‘re-Islamization’ are now central themes in Muslim societies (e.g. Turkey, Iran, Indo-Asia). The prevailing tendency in India is the rejection of Western forms and values and the ‘Hinduization’ of politics and society. In East Asia, governments promote Confucianism and political and intellectual leaders talk about the ‘Asianization’ of their countries. In the mid-1980s, Japan became obsessed with the “theory of Japan and the Japanese”. This global process of “returning to one’s own roots” is manifested in the revival of religion in many parts of the world and, most conspicuously, in the cultural resurrection in Asia and Islamic countries achieved by their economic and demographic dynamism. Religious resurrection around the world represents a reaction against secularism, moral relativism and debauchery, and a reaffirmation of the values of order, discipline, labor, mutual aid, and human solidarity. The newly established religious movements are mostly anti-secular, anti-universal and anti-Western, which speaks in favor of the thesis that the conflict of civilizations is a reality, not a myth.

The economic development of East Asia is one of the most significant developments in the world in the second half of the 20th century. The process that began in Japan in the 1950s extended first to Hong Kong (now under Chinese sovereignty), Taiwan (which China considers its own territory), South Korea, Singapore, then China, Malaysia, Thailand, Indonesia, the Philippines, India, and Vietnam. This East Asian economic development significantly changes the balance of power between Asia and the West, especially the United States, which allows them to react less and less to the demands and interests of the United States and to be more and more able to resist pressure from the United States or other Western countries.

While the rise of East Asia has been fueled by spectacular economic growth rates, the rise of Islam has been fueled by the spectacular growth of the population, the so-called ‘demographic explosion’ in Muslim countries. Namely, the expansion of the population in Islamic countries is significantly higher than in neighboring countries and the world in general, with an annual growth rate above 2.0%². This growth rate in the number of Muslims has led to a sharp rise in youth in the more important Muslim countries who are the protagonists of protest, instability, reform and revolution. In addition to the high growth rate and rapid spread of literacy in these countries, it created a gap between the younger generation and the predominantly illiterate older generation, which led to tensions in the political sys-

2 Predictions say that by 2025, the percentage of the Muslim population will reach 30% of the world’s population.



tems of these countries and, ultimately, to the “Arab Spring” in 2011. The complex processes that led to, as Huntington says, the intercivilizational conflict in the former Yugoslavia, had many causes and sources, but one of the most important factors was the demographic change that took place in Bosnia and Herzegovina³ and, especially, in Kosovo and Metohija⁴.

CONCLUSION

With the end of the Cold War, the process of globalization reaches its peak and increases economic and social challenges, risks and threats, especially for underdeveloped countries, and the consequence may be the outbreak of civil wars, ethnic, religious and other conflicts. Inequality and poverty, as a result of the economic imbalance that is clearly visible in the process of globalization, are a powerful factor in generating ethnic conflicts, and poor countries are a rich source of and fertile ground for such conflicts.

Religion has changed over time and adapted to new secular circumstances, so today its role in conflicts is focused on supporting the aspirations of ethnic groups, nations and states in their aspirations, mostly ethno-nationalist, but its conflict potential is still not negligible. Religions are essential components of culture and civilization but also the causes or at least the factors of numerous conflicts.

The clash of civilizations will dominate world politics and will at the same time be the last stage in the evolution of conflict in the modern world. Conflicts will arise along inadequate borders of civilizations because cultural differences are not only real, but also basic.

If we look at what changes after the end of the Cold War and why the clash of civilizations is possible, there are enough arguments. What creates the biggest problem for us now is the pandemic. If we look at it and what it has brought from a civilizational point of view, it may be noted that the relevance of the Western civilization is declining (in this case is a real example of the United States) and that economic power will be transferred to East Asia, that is, to China. This means that the influences on instruments will be able to change very quickly. On the other hand, modernization without Westernization is a source of conflict between the West and non-Western civilizations (every day we witness a more open conflict between the United States and China). Religious resurrection around the world will continue to be a reaction against secularism, moral relativism and debauchery, and a reaffirmation of the values of order, discipline, labor, mutual aid, and human solidarity. The newly established religious movements are mostly anti-secular, anti-universal and anti-Western, an obvious example being the increasingly prevalent theses of sharia, caliphate and religious laws.

Will the structure of the population on the globe change in the foreseeable future? Events and reality warn us that population is aging in countries where the non-Muslim world lives, and there is a demographic explosion in countries where Muslims live. The growth rate of the Muslim population has led to a sharp rise in youth in the more important Muslim countries, with younger generations who are increasingly literate and unemployed and, as such, have become protagonists of protest, instability, reform, and revolution. There are more and more different groups on the scene that want to change civilization, especially the Western one, whether the American withdrawal from Afghanistan

3 In 1961, Serbs made up 43% and Muslims 26% of the population of BiH. By 1991, the relationship was almost exactly reversed: Serbs fell to 31% and Muslims accounted for 44%.

4 The population of Kosovo and Metohija in 1961 consisted of 67% Albanians and 27% Serbs. By 2000, Albanians made up 88% and Serbs only 7% of the population of Kosovo and Metohija.



will mean that everything Western needs to be destroyed, and whether that will be a reason to open new hotspots. It does not matter whether we call them hybrid threats or terrorist attack, it is obvious that the humanity will suffer.

REFERENCES

1. Bžežinski, Z. (2013). *Amerika - Kina i sudbina sveta: Strateška vizija*. Belgrade: Albatros Plus.
2. Esposito, Dž. (1994). *Islamska pretnja: mit ili stvarnost*. Beograd: Prosveta.
3. Mandelbaum, M. (2004). *Ideje koje su osvojile svet*. Beograd: Filip Višnjić.
4. Simić, D. (2016). Neoliberalni globalizam, suverenitet i nacionalna odbrana. *Vojno delo*, 68(6), 20-27.
5. Hantington, S. (2000). *Sukob civilizacija i preoblikovanje svetskog poretka*. Podgorica: CID
6. Džuverović N. (2013). *Ekonomski faktori oružanih sukoba*. Beograd: Službeni glasnik i Jugoistok HHI.



THE ROLE OF WESTERN BALKANS IN NATO STRATEGIC THINKING: REFLECTIONS ON CONTINUITY AND CHANGES IN SEEKING FOR A NEW RELEVANCE

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Abstract: Recently changed global political, security, and strategic context put NATO strategic thinking to new tests. The ability to adapt to unique circumstances and find a suitable position in international society are again on the NATO's agenda. This paper investigates processes on the road ahead of the NATO members to a new NATO strategic concept, emphasizing Western Balkans countries and territories and their efforts to play new roles. Contemporary perception of China threat, Russian aggressive behavior in its neighborhood, pandemics, and climate change seem to put away Western Balkans from the NATO's agenda. The authors claim that NATO must hold back its tier built in previous decades. Some Western Balkans countries became members, but the others remained possible sources of regional instability. Also, this is the region where most great powers clash their interests and fight diplomatically and economically for achieving their particular foreign policy goals. If striving to remain relevant in the area, NATO must (re) discover new roles with appropriate answers.

Keywords: NATO Strategic Concept(s), Western Balkans, Brussels Summit 2021, NATO 2030.

INTRODUCTION

We are witnessing NATO's several temptations to find its own new role since the end of the Cold War. The need to justify the existence of a military-political alliance, which as a legacy of the ideological division of the world after the Second World War was often referred to as the dustbin of history, did

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not abate in the 1990s, and especially not in the first 20 years of the 21st century. Creativity, innovation, and shift in the nature of threats, challenges, and risks for which effective responses needed to be devised, have kept NATO on the world stage of important actors in international relations. It was, by huge part, because of the careful strategic planning and reflection processes conducted inside of the Organization. There were many attempts to find suitable and effective answers to the new strategic and geopolitical contexts: 1951– Committee of Three; 1956 – “Three Wise Men”; 1967 – Harmel Report (Kecskemethy, 2021: 118).

Along with developing new security concepts, innovating strategic thinking, and building on rich institutional experience, NATO learned on the go and turned the strategic compass in the right direction in a timely manner. The alliance was able, by learning, to start a partnership program with countries that are not part of, or do not want membership in the Organization (Partnership for Peace), to improve cooperation through dialogue with, for example, the Russian Federation or Ukraine, but also to recognize the importance of institutionalizing communication with the Mediterranean and Middle East region. Finally, the enrichment of the agenda was accompanied by a successful expansion of membership, especially in the context of the accession of Central and Eastern European countries.

The same can be said for NATO's presence in the Western Balkans. In peacetime, NATO did not miss the opportunity to materialize the position and role built by its field presence during the armed conflict. The original part of monitoring the implementation of international agreements whose adoption established peace in the region (Dayton Agreement 1995, UNSC Resolution 1244 and Kumanovo Military Technical Agreement 1999, Ohrid Agreement 2001) (Đukanović, 2010: 106), was soon upgraded by multilateralism and cooperation embodied in joint and coordinated actions with the European Union, but also the United Nations, i.e., the Organization for Security and Cooperation in Europe. Thus, instead of establishing and preserving peace, NATO's mission in the Western Balkans region has been redefined and focused on the rule of law or the fight against organized crime. Of course, one should not forget that, given that these countries are still going through transition and reform processes, an essential aspect of the NATO presence in the monitoring and advisory assistance to security sector reforms. Thanks to the permanence of its open-door policy, the adjustment of activities has led to the accession of the Western Balkan countries, at least those that pursued the foreign policy goal after the break-up of the former Yugoslavia (Đukanović, 2010: 107).

The authors of this paper seek to prove that there is a need to redefine NATO's role in the Western Balkans region. The broader process of building a new strategic concept of NATO, a condition pointed out for several years, and which was formally started in December 2019, provided us a framework of time and content in which we searched for a potential relationship with the Western Balkans. Of course, a brief analysis of NATO's previous actions towards the Balkan countries, i.e., a review of the current situation, also finds its place in the paper. It was further inevitable to pay attention to the change of the geopolitical context that goes beyond the Western Balkans. It is also important to understand the circumstances in which NATO's regional and global role is being adjusted.

DIPLOMATIC PROCESS OF THE NATO'S NEW ROLE RE-CALIBRATION

At the time of writing, the strategic concept adopted at the Lisbon Summit in 2010 is the basis for identifying and evaluating NATO's strategic direction. Its dilapidation is often the target of criticism, and the need to reach an internal consensus among member states is becoming more pronounced



as time passes. Donald Trump's presidential mandate, which was marked, among other things, by sharp criticism of the allies regarding the lack of funds they allocate for joint defense, is just one of the manifestations. There were also more pessimistic ones, such as the statement of French President Emmanuel Macron, who "declared" the brain death of NATO due to the lack of American leadership. On the margins of these processes, debates are (again) taking place, both constructive and those that cannot boast of that epithet. They have a common purpose. It is increasingly difficult to answer the question: How to modernize NATO's role in the changed global circumstances and preserve its current relevance?

The authors absolutely agree with Kulesa and Wieslander (2019), who show the obsolescence of the current strategic concept prominently and simply. Assessments such as "existing peace in the Euro-Atlantic area" or taking as a given joint contribution of the Russian Federation and NATO "creating a common space of peace, stability, and security" (Kulesa and Wieslander, 2019) were denied shortly after the adoption of the document in 2010. They have not withstood the test of time, rapidly changing circumstances, unpredictability, and uncertainty inherent in international relations. Aware of this, NATO allies gathered in London in December 2019 and made official the beginning of a process, named NATO 2030, that will seek to modernize and strengthen NATO's role in the future (NATO, 2019). From the moment Secretary-General Jens Stoltenberg appointed a team of 10 experts (NATO, 2020a), through his speech in June 2020, which unequivocally pointed out the need for NATO to remain "strong military, be more united politically, and take a broader approach globally" (NATO, 2020b), taking into account the fact that the process is taking place in an "increasingly competitive world" (NATO, 2020b), numerous steps have been taken to improve NATO's strategic thinking.

The one-year discussion, organized in different formats and involving various actors, resulted in a report by a group of experts entrusted by the Secretary-General with a mandate at the very beginning of the process. Guided by the following central principles: "1) reinforcing Allied unity, solidarity, and cohesion (...) 2) increasing political consultation and coordination (...) 3) strengthening NATO's political role and relevant instruments to address current and future threats (...)" (NATO, 2020c: 3) experts provided member countries, as well as the interested public, a vision of the necessary adjustments and ensuring NATO's active position in the future. A rich diplomatic process generated a meaningful document in an endeavor of polyilateralism (Wiesman, 1999), which involved all governmental, non-governmental, and individual actors. Although not large, the document provided over 100 suggestions for strengthening NATO's position on the global stage. The almost entire content was accepted by the Secretary-General, and then by the member states at the pivotal summit in Brussels, on June 14, 2021 (NATO, 2021a).

Despite the abundance of seemingly different ideas, recommendations, and suggestions, they seem to have a common thread. The authors believe that the need for a new strategic concept is a motive that is built into almost every one of the recommendations in the report. Although there were voices against the need to devise a new strategic concept at the beginning of this diplomatic process of NATO's adjustment to the new world, the team of experts, and later representatives of member states, did not give up this, in our opinion, good strategic planning practice. It is also a feature of NATO from the very beginning, considering that the first document of this kind was adopted in January 1950 (NATO, 2021b). Neither the experts nor the representatives of the member states succumbed to the criticism, which can be roughly divided into two columns. The first is made up of those who believed that the process of devising a new strategic concept for one of the undesirable outcomes would only deepen existing differences among members and "expose, or even aggravate, rather than heal, existing rifts within the Alliance" (Kulesa and Wieslander, 2019). The other group of authors is, among others, those who oppose the existence of written strategic documents, argue their views with the need "to



maintain a significant degree of strategic flexibility given it is in the process of adapting to new threats” (Kulesa and Wieslander, 2019).

The overarching goal of NATO is the consolidation of the transatlantic alliance. Given the political change in the United States after the 2020 presidential election, it is clear that this goal will be much easier to achieve than if such a change had not occurred. The “facilitated” realization of this goal is supported by the revival of “systemic rivalry, persistently aggressive Russia, the rise of China, and growing emerging and disruptive technologies” (NATO, 2020c: 12), which was also considered during the preparation of the report. The perception of modern threats adopted in this way, even if one looks at the old strategic concept in which they are entirely absent, would significantly accelerate solidarity and cohesion among members. In order to maintain their identity, to be consistent with the basic ideas, values and interests that member states hold together, the authors of the report saw the new strategic concept as a suitable tool that would “preserve NATO’s three core tasks (...) and update content related to the principles undergirding the NATO Alliance” (NATO, 2020c: 12) in a perfectly balanced way.

How much the circumstances have changed in relation to the context in which the current strategic concept of NATO was created is shown by the fact that the role of the two main systemic competitors, Russia, and China, has completely altered. Russia is no longer invited to, as adopted in point 33 of the “old” Strategic Concept, “a true strategic partnership between NATO and Russia, and we will act accordingly, with the expectation of reciprocity from Russia” (NATO, 2010: 29). Instead of striving to build a strategic partnership, a “dual-track approach of deterrence and dialogue” was recommended (NATO, 2020c: 12). China, which was not being considered at all in 2010, now occupies a prominent place in the list of potential threats to which NATO must have a ready response. However, there is a noticeable lack of precision in terms of recommendations. The reason for this is twofold. First, the Chinese presence in the world is still developing and has not reached its final form. Therefore, member states are recommended to develop mechanisms within NATO that are consultative and coordinating in nature. Obtaining information and actively monitoring the development of the situation was the maximum that a group of experts managed to provide as advice at a given moment. Secondly, it is not clear whether the world in which China plays an increasingly important role will be terrain for conflicts between China and NATO. The recommendations gave some flexibility because they left the possibility to “keep open the prospect of political dialogue with China on shared interests and differences (...)” (NATO, 2020c: 28).

NEW WORLD, NEW CHALLENGES, AND NATO IN BETWEEN

The process of creating and adopting a new strategic concept is not over. Still, a rich discussion has yielded a range of potential tasks that will test NATO’s effectiveness and its ability to adapt to change. Previously briefly presented individual parts of the report prepared by experts in the preparatory phase of the process proved the complexity of the work facing NATO members. It is enough to look at the dominance of political recommendations, in relation to the military, which out of a total of 138, participate with the number of 120, and conclude that this is a document that requires further operationalization to be truly functional. The authors of this paper, therefore, consider the views offered by Tardy (2020) to be fully justified when he says that “many of the recommendations on how to improve political consultations will sound like wishful-thinking to many observes” (p. 4) or that “the Report is not about NATO in a post-COVID world” (p. 4). However, its analytical value would be significantly improved if this was considered.



NATO will challenge internal cohesion during the next decade, according to NATO 2030 Report. That's not a new fact. What should be new are the ways in which it will be arranged. There are three circles or rows of the actors that should be addressed in a way that will change the nature of previously established relations. If we ignore for a moment members, because it is a matter of internal organization and decision-making process; or partner and like-minded organizations, for example EU, because that would require a separate analysis; we are on an uncertain terrain of regulating relations with actors through already established patterns and institutional mechanisms. Some of them proved efficiency, but others are ripe for adjustment and calibration. The potential solution lies in fostering a "global partnership plan, where more effective cooperation with countries of partnership initiatives is needed to advance NATO's strategic interests" (Kecskemethy, 2021: 123).

Although there are some assessments that "NATO is going through one of the greatest crises in history which (...) jeopardize its own survival" (Ferreira da Cruz, 2021: 28), the authors consider it as an unnecessary exaggeration. What needs to be approached is evaluating the current strategic environment and proposals for the new positioning of NATO. The list of possible issues that should be addressed, although not final, implies: burden-sharing, Russia, partnerships, open-door policy (Kulesa and Wieslander, 2019), or, additionally, a new approach to terrorism, climate change, China threat, pandemics, disruptive technology, like it is emphasized in NATO 2030 Report. Member states proclaimed that "NATO is the strongest and most successful Alliance in history" (NATO, 2021c). Still, it is unclear from the 2021 summit communiqué how they can maintain that perception in the eyes of others. In the global arena, there are rivals whose actions undermine the order established, among others, by NATO actions. What is missing is the operationalization of commitments. The list of possible directions of operations, divided into eight parts, seems over-ambitious and unattainable in the context of recent global changes. (NATO, 2021c).

WESTERN BALKANS AND NATO: A STEP FORWARD OR THE STATUS QUO

It was not surprising that the Western Balkans found itself in one out of 79 points at the Brussels Summit Communiqué. NATO's commitment to "the security and stability of the Western Balkans and to supporting the Euro-Atlantic aspirations of the countries in the region" was reiterated (NATO, 2021c). There is a lack of "strong" words that would bring the effect of not only declarative support to the region to the level of a relevant competitor to the interests of other nations that project their power in the region. Especially when it comes to Serbia and Bosnia and Herzegovina. The incentive given by the open-door policy for admission to the membership of Northern Macedonia is not well materialized through public diplomacy. According to relevant public opinion polls, for example in Serbia, support for NATO membership has stagnated at a meager percentage, rarely reaching double digits in the past two decades. There is a noticeable delay in the European integration process, considering that during 2020 and 2021, no cluster was opened in the accession negotiations led by Serbia, despite the acceptance of the new methodology. Keeping in mind the coexistence of the interests and goals of NATO and the EU, their "duplication, overlap, European strategic autonomy and burden-sharing" (Tardy, 2021: 1), the situation becomes even more unclear regarding the future role NATO should play. The independent policy of enlargement, which undoubtedly fell deadlock with the admission of the last member from the region (Larsen, 2020: 2), raises the question of deepening cooperation and qualitative improvement of the existing situation. Along with the inter-organizational processes of a "new bargain that would clarify the division of tasks, set more realistic objectives, and better ensure



the relevance and credibility of the two organizations” (Larsen, 2020: 5), NATO would have to incorporate into its new strategic concept the projection of a new role in the Western Balkans in a quest to refresh significance.

In December 1995, NATO deployed about 60,000 troops to implement military parts of the Dayton Accords. In 2021, this sentence has almost no foundation in the new reality. Peacekeeping missions belong to the past. Although numerous criticisms have been directed at the functionality of the political system of Bosnia and Herzegovina, it is estimated that the IFOR and SFOR missions (since 1996) have achieved their goals in the mandates entrusted to them. The gradual transformation, the transfer of responsibilities to the European Union Mission (EUFOR), and the multiple reductions in the number of troops on the ground have led to a complete shift in NATO’s role in Bosnia and Herzegovina. It is now about advising on security sector reforms and those concerned with Bosnia and Herzegovina’s participation in the Partnership for Peace program. For that purpose, a NATO headquarters was opened in Sarajevo (similar to the one that existed in Albania until 2010), so that their presence would remain visible and institutionalized. There is a similar situation in Northern Macedonia (liaison office, until membership), i.e., Serbia (MLO – military liaison office, since 2006). Thus, there is a visible shift of focus from the exclusive tasks of military oversight of the implementation of peace agreements to strategic and reform orientation, i.e., aiding in improving the entire security sector and harmonizing with NATO standards (Lord, 2016: 42–43).

Frequent voices coming from NATO analytical circles claim that “current trends are far from positive” in the Western Balkans (Larsonneur, 2020: 1). Apart from the criticism directed at the Western Balkan countries for violating the parameters of the value of democracy, sermons on unresolved bilateral issues, ethnic divisions as a legacy of the recent past, and exports of violent extremism are increasingly prominent (Larsonneur, 2020: 3–8). However, the Western Balkans remains a “region of strategic importance for NATO” (NATO, 2021c).

The letter of the final document of the NATO summit in Brussels in 2021 considered the above-mentioned facts. “Long history of cooperation and operations” (NATO, 2021c) is a legacy that NATO does not want to leave to other stakeholders and is making efforts to remain proactive in the region. This is especially true of two phenomena. As is often said in the Euro-Atlantic community, the first is to curb the “malign” influence that external actors project in the Western Balkans. Although the lack of space in this type of document is a justification for the absence of a detailed elaboration of what the malignant influence should mean, i.e., which actors are in question, it is clear from the contextual analysis to be the Russian Federation and increasingly the People’s Republic of China. The second concerns the unresolved status of Kosovo and Metohija. Expressing support for the dialogue between Belgrade and Pristina under the auspices of the EU, NATO members “urge the sides to seize the moment and engage in good faith towards a reaching a lasting political solution” (NATO, 2021c).

Bosnia and Herzegovina received a particular point in the text of the Brussels communiqué. The only country in the region that has adopted a Membership Action Plan and has a confirmed aspirant country status, received a guarantee of commitment to its own territorial integrity and sovereignty and praise for participating in NATO operations. However, the wording that has attracted more public attention concerns “encourage domestic reconciliation and urge political leaders to avoid divisive rhetoric” (NATO, 2021c). This suggests that the concerns of the representatives of the member states regarding the coexistence of the people of Bosnia and Herzegovina are still present. Further reform processes will undoubtedly be under the scrutiny of international actors, and NATO will undeniably have a prominent role thanks to its field presence.



The rigidity of the document left us too much room for anticipation of future NATO's role within the region. Leaning on many research papers about historical and present relations between NATO and Western Balkans countries, we could say that the main reasons for the unclear position of NATO in the near future owes to "external spoilers and lack of unity of command or effort amongst the key Western nations". (Hope, 2017: 13). Of course, there are also political misunderstandings and a lack of internal strategic consensus inside Western Balkan countries on the question of what role NATO should play in the future (Đukanović, 2019: 343–349).

Nevertheless, there is a projected image of role enhancement. The authors of this paper completely agree with the attitude announced by Hope (2017) when he stated that "What is needed from NATO in the Western Balkans is an overarching operational theatre design linking all NATO and partner activity and locations, preventing a 'Balkanization' of our collective efforts." (p. 15). First, there is a strong need for internal cohesion enhancement as a precondition for unique and united performance towards the Western Balkans region. In our opinion, the constructive step should be a non-military, soft power-oriented public diplomacy strategic approach. A lack of two-way communication among all relevant stakeholders, local and international, generates low visibility of current NATO efforts to bring Western Balkans' countries closer to their interests. It can be a tangible way for compelling Western Balkans that NATO is still securing and overseeing its stability.

The second part of the puzzle should be harmonizing and synchronizing endeavors with the EU as a key economic, social, and political regional actor. As mentioned earlier, one can easily identify overlap and unnecessarily time mismatch of activities of NATO and EU policies. An enhanced process of political and security consultation should occur, particularly in terms of the enlargement policy of each organization. Keeping in mind the whole political landscape of the Western Balkans and the conflicting interests of the major great powers, it should be acknowledged that NATO should rely on the already acquired positions in the coming period. Qualitative improvements are only possible in terms of using existing instruments of membership, partnership, and open-door policy, that is, crossbreeding and their complementary use. Viewed from a perspective of the already mentioned new regional (and global) role and projected interests of Russia and, especially China, there is a need within NATO for new policies, based on improved means and tools, to oppose their interests. It is hard to say precisely what the ingredients of those policies are. What can be said with certainty is its urgent formulation and application. This is a crucial aspect of the ongoing and forthcoming process until adopting a new strategic concept.

CONCLUSION

NATO has played multiple roles in recent history (since the early 1990s) towards the region we today call the Western Balkans. In the literature, there are so many passages about NATO enlargement during the 1990s, changing focus on terrorism after the 2001 attacks on the US, or seeking an adequate response to Russian policy towards its neighbors. But, the (Western) Balkans was continuously on NATO agenda, although it wasn't at the forefront.

Seeking a new position in the international arena and a new role and purpose, NATO intervened for the first time out of the area in Bosnia and Herzegovina. The missions of establishing and preserving peace, which extended territorially to the then Macedonia and Kosovo and Metohija, also took place. Using their field presence, they did not hesitate to, in parallel with changing their own role in the world, transform themselves into an organization that contributes to building the capacity of



countries that overcome the severe hardships of the transition process. Although the efforts of NATO missions were focused primarily on the security sector, their activities certainly included the improvement of the building of broader state capacities, i.e., the progress of the rule of law.

Complementary to this, the prospect of participating in the Partnership for Peace Program was offered, especially to those who later proclaimed military neutrality (such as Serbia) or to actors without an internal political consensus on NATO membership aspirations (such as Bosnia and Herzegovina). During the 1990s and the beginning of the 21st century, NATO succeeded in supplementing the deepening of cooperation among its members by opening the door for new members, primarily from the region of Central and Eastern Europe.

For the next ten years, the Western Balkans will be overshadowed by the key challenges facing NATO. Enhancing internal cohesion, redefining relations with actors who see the world order in a complementary way to core interests of NATO, and projecting power in a world that has more than one competitor, we see as crucial for NATO “survival”.

REFERENCES

1. Đukanović, D., (2010). NATO's New Strategic Concept and its Influence on the Stability of Western Balkans. *Croatian International Relations Review*, 16(60-61), 105–110.
2. Đukanović, D., (2019). Bosna i Hercegovina na neizvesnom putu ka članstvu u NATO. [Bosnia and Herzegovina on the uncertain path towards the membership in NATO] *Međunarodni problemi* LXXI(3), 335–360.
3. Ferreira da Cruz, M. A., (2021). NATO 2030: Survival in a New Era. *JANUS e-journal of International Relations* 12(1), 13–30.
4. Hope, I. (2017). The Western Balkans and the Revenge of History. *Research Paper* (142). Rome: NATO Defence College.
5. Kecskemethy, K. S., (2021). The NATO 2030 Report: Strategic priorities of the Alliance, *International Conference Knowledge-Based Organization* 27(1), 118–124.
6. Kulesa, L. and Wieslander, A., (2019). A New Strategic Concept for NATO's 70th Birthday? *European Leadership Network*. Accessed on August 9, 2021. <https://www.europeanleadershipnetwork.org/commentary/a-new-strategic-concept-for-natos-70th-birthday/>
7. Larsen, H., (2020). The Western Balkans between the EU, NATO, Russia and China. *CSS Analyses in Security Policy* (263), ETH Zurich. Accessed on August 10, 2021. <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/CSSAnalyse263-EN.pdf>
8. Larssonneur, J.C., (2020). Key Challenges to Maintaining Peace and Security in the Western Balkans, *Defence and Security Committee – Sub-committee on Transatlantic Defence and Security Cooperation*, Accessed on August 9, 2021. <https://www.nato-pa.int/download-file?filename=/sites/default/files/2020-12/032%20DSCTC%2020%20E%20rev.%202%20fin%20-%20WESTERN%20BALKANS.pdf>
9. Lord, W.T., (2016). NATO in the Western Balkans: time for a new approach?, George S. Marshall European Center for Security Studies. Accessed August 10, 2021. https://www.marshallcenter.org/sites/default/files/files/2020-09/pC_V8N1_en-4_Lord.pdf



10. NATO, (2010). *Active Engagement, Modern Defence – Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organisation adopted by Heads of State and Government in Lisbon*. Accessed on August 10, 2021. https://www.nato.int/cps/en/natohq/official_texts_68580.htm
11. NATO, (2019). *Secretary-General: as the world changes NATO will continue to change*. Accessed on August 9, 2021. https://www.nato.int/cps/en/natohq/news_171581.htm
12. NATO, (2020a). *Secretary-General appoints a group as part of NATO reflection process*. Accessed on August 9, 2021. https://www.nato.int/cps/en/natohq/news_174756.htm
13. NATO, (2020b). *Secretary-General launches NATO 2030 to make our strong Alliance even stronger*. Accessed on August 12, 2021. https://www.nato.int/cps/en/natohq/news_176193.htm
14. NATO, (2020c). *NATO 2030: United for a New Era*. Accessed on August 10, 2021. https://www.nato.int/nato_static_fl2014/assets/pdf/2020/12/pdf/201201-Reflection-Group-Final-Report-Uni.pdf
15. NATO, (2021a). *Leaders agree NATO 2030 agenda to strengthen the Alliance*. Accessed on August 10, 2021. https://www.nato.int/cps/en/natohq/news_184998.htm?selectedLocale=en
16. NATO, (2021b). *Strategic Concepts*. Accessed on August 8, 2021. https://www.nato.int/cps/en/natohq/topics_56626.htm
17. NATO, (2021c). *Brussels Summit Communiqué Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Brussels 14 June 2021*. Accessed on August 07, 2021. https://www.nato.int/cps/en/natohq/news_185000.htm
18. Tardy, T. (2020). NATO 2030. United for a new era: a Digest. *NATO Defence College*, Policy Brief no. 23, Accessed on August 9, 2021. <https://www.ndc.nato.int/news/news.php?icode=1509>
19. Tardy, T., (2021). For a New NATO-EU Bargain. *Security Policy brief* (138), Egmont Royal Institute for International Relations. Accessed on August 9, 2021. <https://www.egmontinstitute.be/content/uploads/2021/02/SPB138.pdf?type=pdf>
20. Wiesman, G., (1999). *Polyilateralism and New Models of Global Dialogue, Discussion Papers* (59). Leicester: Center for the Study of Diplomacy.





ELECTORAL VIOLENCE: A CHALLENGE TO SECURITY

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Abstract: This paper focuses on electoral violence as a subset of political violence, and analyses this concept by examining the complexity of motives, actors, activities it involves, as well as pointing out contextual characteristics that contribute to the occurrence of violent events. Electoral violence can be observed at all stages of the election process - before the election, on election day and after the election. It can involve state, non-state and international groups, as either perpetrators or targets. Its forms range from various pressures, intimidations to physical and deadly violence against voters, candidates, politicians, government officials, police, military, journalists, or international observers. Electoral violence is usually linked to undemocratic regimes, but even well-established democracies are not immune to it. The prevention of electoral violence functions as an extensive network of programs led by international organizations providing assistance in improving conditions for free and fair elections and changing the attitudes around violence. The results of such prevention remain far from ideal, despite decades of efforts and important funding. Nonetheless, prevention and promotion of election integrity remain indispensable methods in combating electoral violence. Increasingly complete databases (CREV, ECAV, NELDA) allow researchers to gain a better insight into what causes electoral violence, allowing for more effective marking of security risks and prevention activities.

Keywords: Electoral violence, elections, prevention of electoral violence, security threat

INTRODUCTION

In terms of political theory, the notions of violence and elections are antithetical: the former is incompatible with politics as an activity aimed at peaceful government of political communities; the latter is a nonviolent and peaceful means of conquest of power. However, real-life politics show ample proof of connection between the two phenomena. History is rife with examples of use of violence as an integral part of the electoral process, and thus an integral part of politics as a whole. The presence of violence

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can at times be so important that it threatens peace, destroys institutions, or leads to civil war (Birch, Daxecker & Höglund, 2020: 3).

The intensity and forms of electoral violence range from subtle pressures on political rival voters or election administration, to open threats, intimidation, attacks, or even brutal confrontations of political opponents that result in numerous casualties. A survey of relevant datasets indicates that a substantial proportion of elections across the globe witnesses at least some violence. The Countries at Risk of Election Violence (CREV) data estimate that over three quarters (78%) of elections in countries deemed to be at risk of violence experience at least ten violent events (Birch & Muchlinski, 2017), while the Electoral Contention and Violence (ECAV) data report more than three violent events in over 50% of elections, and deadly violence in approximately 30% of elections (Daxecker, Amicarelli & Jung, 2019). Various forms of electoral violence have usually been linked to elections in hybrid regimes and unconsolidated democracies, but in recent years, similar phenomena have also been observed in established democratic systems².

The prevalence of electoral violence has been recognized by security researchers and psephologists alike. Security studies have examined the risks of electoral violence in the process of democratization (Snyder, 2000) and extended their interest to elections as cause of civil war or potential risk in ethnically divided societies (Cederman, Gleditsch & Hug, 2013; Cheibub & Hayes 2017; Matanock, 2017), and connections between political violence and election cycles (Harish & Little, 2017). Psephologists, on the other hand, focused on clientelism, electoral corruption, voter pressure (intimidation and vote buying) (Birch, 2011; Norris, 2014; Goldsmith, 2015; Mares & Young, 2016) and they study violence as a campaigning tool used to influence election results (Norris, Frank & Martínez i Coma, 2015; Daxecker, Amicarelli & Jung, 2019; Birch, 2020).

The intention of this paper is to point out the specificity of electoral violence as a type of political violence, define the elements that make up this concept and the security risks it brings to peace and democracy, and to present existing prevention tactics. The subjects that will be discussed include: the definition of electoral violence, institutional circumstances that can act as triggers, the timing of violent electoral strategies and the motives that provoke it, and how electoral violence can affect the functioning of the political system.

ELECTORAL VIOLENCE AS A POLITICAL VIOLENCE SUI GENERIS

Definition and concept of electoral violence

The social context, the competitive character of elections, the incentives of the electoral system make up the factors that determine the positioning of actors, their motives, and the timing of their activities in the election process. These are the coordinates in which electoral violence is conceptualized as a subtype of political violence (Höglund, 2009), with the notions of violence and influence on election

² To name just a few examples, the violent events that followed the elections in the Ivory Coast in 2010 led to the death of 1,000 people, with one million persons internally displaced, and another 100,000 exiled. In Mexico, the period leading up to the elections in June 2021 (from September 2020 to May 2021) saw 782 different cases of electoral violence across all states and 460 municipalities; 234 people involved in the election lost their lives (89 politicians and candidates) (Banwait, 2021). The 2021 attacks on the US Capitol building point to a troubling trend of increasingly violent behavior surrounding elections. Even if the worst case scenarios of widespread violence projected by political and security analysts were avoided, the public confidence in the democratic process was greatly damaged (Westphal, 2021: 16).



results being two key components in this concept and the basis for different definitions³. Political violence can generally be defined as “direct or indirect - latent use of force in the sphere of politics” against “a real or potential, or presumed political opponent” (Simeunović, 1980: 27). Sarah Birch best sublimates different conceptualizations of electoral violence (Bekoe, 2012; Harish & Toha, 2019; Höglund, 2009; Seeberg, Wahman & Skaaning, 2018; Söderberg Kovacs, 2018; Taylor, Pevehouse & Straus, 2017; Staniland, 2014), providing us with the most complete definition, and one that best determines the complexity of electoral violence in the context of this paper: “Electoral violence is levied by political actors to purposefully influence the process and outcome of elections, and it involves coercive acts against humans, property, and infrastructure [...] It can happen in all parts of the electoral cycle, including at the announcement of elections, party primaries, and voter registration [...], and it can be promoted by both state and non-state actors [...] This conceptualization has the strategic use of violence at its core, but alternative and complementary perspectives exist.” (Birch, Daxecker & Höglund, 2020: 4).

Social divisions on the basis of economic, political, ethnic, or religious factors are an inexhaustible reservoir of potential causes for electoral violence. Societies already facing conflicts in this area, be it those with ongoing civil war which seek to reestablish peace through elections, or recent, unconsolidated, democracies, or hybrid regimes with weak institutions and strong authoritarian legacies and tendencies, are the most suitable environments for the escalation of electoral violence. This has been the case in a number of African, Asian, South American and post-socialist countries (Birch & Muchlinski, 2020: 218). As elections are a competitive political process, various actors within fragile societies may resort to violence in order to gain an advantage. Actors in power, members of the opposition, NGOs and international observers can all influence electoral violence. State law enforcement as well as paramilitary forces, terrorist and criminal groups can all be used to intimidate political rivals, obstruct campaigns, pressure voters, or perpetrate physical attacks on leaders and candidates.

The design of electoral institutions themselves can be another potential generator of violence, as they hold “great potential [...] for influencing political behaviour “because “it can reward particular types of behaviour and place constraints on others”. (Reilly, 2002: 127). Research on the potential of electoral design to polarize societies and encourage or prevent electoral violence has focused on the opposition of integrative and consociational models (Lijphart, 1977; Horowitz, 2000; Reilly & Reynolds, 2000). Some researchers report that majoritarian electoral systems hold higher levels of potential for violence as they present elections as a high stakes game (Fjelde & Höglund, 2016). A number of elements of the electoral system can lead to distorted political representation. Rigid conditions for registration of parties, candidates and voters, gerrymandering, unprofessional and biased electoral administration, non-transparent vote counting and publication of results, lack of judicial protection against electoral abuse, clientelism, electoral corruption, fraud and theft, etc. As we can see from this list the failing of electoral institutions can happen at any stage before the election, on election day, and after election (Norris, 2004), and thus potentially lead to violent events.

3 The UNDP Elections and Violence Prevention Guide (authored by Timothy Sisk and Chris Spies) defines electoral violence as “...Acts or threats of coercion, intimidation, or physical harm perpetrated to affect an electoral process or that arise in the context of electoral competition. When perpetrated to affect an electoral process, violence may be employed to influence the process of elections - such as efforts to delay, disrupt, or derail a poll - and to influence the outcomes: the determining of winners in competitive races for political office or to secure approval or disapproval of referendum questions.” (UNDP, 2009: 4). According to researchers who have dealt with aspects of electoral violence from a security perspective, “Electoral conflict and violence can be defined as any random or organized act or threat to intimidate, physically harm, blackmail, or abuse a political stakeholder in seeking to determine, delay, or otherwise influence an electoral process. Election security can be defined as the process of protecting electoral stakeholders, information, facilities, and events” (Fischer, 2002: 3).



TYPOLOGY OF ELECTORAL VIOLENCE: ACTORS, MOTIVES, TIMING AND ACTIVITIES

The electoral system and the election process are the basic components of electoral violence, and the distinguishing elements that differentiate it from other types of political violence: “elections shape the ways in which violence intervenes in the electoral process” (Birch, Daxecker & Höglund, 2020: 5) and crucially they can result in violence that “would not have occurred or would at least have manifested itself differently in the absence of an electoral contest” (Fjelde & Höglund, 2016: 8). Electoral violence as a subtype of political violence was first identified in a series of studies of ethnic conflicts in divided societies, and then in research examining electoral fraud, electoral system manipulation and the electoral process designed to favor certain groups (Höglund, 2009: 415).

The social context in which electoral violence takes place always depends on national specificities. One common type of circumstances is reflected in societies where electoral violence occurs in the midst of wider armed conflicts: civil war, rifts between ethnic and religious groups, armed secessionist rebellions, terrorist actions against the government. In such circumstances, elections can be, and as a rule are, part of peace agreements, the goal being for opposing sides to move from armed conflict to voting stations, if only temporarily (Dunning, 2011). At times, armed violence and elections take place simultaneously - military wings of rebel groups conduct military actions, and political battles are fought in the electoral arena (Heger, 2015; Matanock & Staniland, 2018). Electoral violence in such environments is directed towards all election actors (parties, candidates, voters and political institutions) and can encourage authorities to defend their positions by means other than political; in turn, the opposition can come to consider elections as a whole as a form of violence (Birnie & Gohdes, 2018; Condra, Long, Shaver & Wright, 2018). Such environments can turn violence into a permanent pattern of behavior in subsequent election cycles (Harish & Toha, 2019). Another kind of context that can escalate in violence occurs in societies in which political elites use divisions to manipulate the distribution of resources and win over voters. Electoral violence often correlates with crime, whether because state actors collaborate with crime organizations to persecute and intimidate political rivals and their voters, or because non-state actors embrace crime groups and protect them from government persecution (Harish & Little, 2017; Trejo & Ley, 2018).

The general goal of electoral violence is influencing the outcome of the electoral process; more specific motives, however, can be multi-layered. Certain actors may have a negative attitude towards elections and reject them as a method of constituting government. In other cases, violent opposition against elections comes from actors opposing the legitimacy of the government and distrusting that the existing institutional environment allows for acceptable conditions for elections. In such situations, even if elections are not outright rejected by the groups resorting to violence, they are clouded by serious doubts about the government's intentions and ability to conduct free and fair elections. The most common motive for electoral violence lies in the effort to gain an advantage in electoral competition and obstruct the work of other participants in the electoral process. All these motives exist concurrently in divided societies. The latter two are more common in unconsolidated democracies, electoral democracies, and hybrid systems. It is clear that these motives can manifest in all phases of the electoral process, mobilize different actors, manifest in different activities and produce different effects (Höglund, 2009: 415–6).

Electoral violence occurs in the pre-election phase, on election day and in the post-election period, that is to say, in virtually all phases of the election process. In the pre-election period, competitors and voters who support them can be disfavored by various forms of organized violence. This is usually a lead-up to further violent actions once voting day is officially announced, and during the election campaign phase. As a rule, violent events then continue on the day of voting and extend in the



post-election period. The timing of these events is chosen by the actors so as to produce the greatest desired effect. Some studies show that governments most often resort to violence against the opposition before and after elections. Authoritarian governments unsure of electoral victory and unbound by serious institutional constraints use violence as part of an electoral strategy, and in return such situations increase the likelihood of post-election violence due to anti-regime protests (Hafner-Burton, Hyde, & Jablonski, 2014: 158). The chronology of the election process indicates five possible moments of violence initiation. The first is the pre-election period when actors are fighting for recognition in the political system and entering the electoral arena. Party registration, political activity and candidacy opportunities are the most common domains where violence is used to either prevent or force actors to participate in elections. The second step when actors practice election violence is during the campaign: every effort is made to disrupt rival campaigns, through intimidation, threats, and attacks on candidates to reduce visibility and to discourage and prevent voters from going to the polls. Election Day is the third step in the chronology of electoral violence: at this stage it is pointed at voters and the election administration. Violence among actors can also occur during the determination and announcement of results due to election fraud and the inability and the unwillingness of institutions to resolve election disputes. Finally, the fifth step occurs after the election, if the losing side lashes out for being left out of government, or the election winners decide to defend their position in power by using force (Fischer, 2002: 3).

The main actors in electoral violence are the political parties of the government and the opposition. Of course, political parties never admit to resorting to violence, but as they can be galvanizers, perpetrators and targets at the same time, their role cannot be hidden. It is understood that the actors in power use state resources, the army and the police against opposition actors who rely on insurgent armed formations, terrorist groups for violence against the government (Burchard, 2015: 12–13). Both sides often have overt or covert organized groups within party structures in charge of carrying out attacks. These most often include party branches that bring together youth and/or some types of party militias. Both state and non-state actors do not hesitate to use the “services” of organized crime organizations to commit violent acts during elections. This list of actors is not exhaustive. It also includes international organizations involved in election observation, either by providing support to election administration or assessing compliance with standards of free and fair elections. The actions of these organizations can, for example, encourage state violence if irregularities pointed out by the opposition are minimized and ignored. Their actions to detect and prove electoral irregularities committed by government actors can also incite opposition actors and citizens to rise up against government officials, especially if electoral fraud is perceived as key to the election result (Daxecker, 2012: 504; Birch & Muchlinski, 2020: 220). The perpetrators and victims of violence are individuals even if they work for collective actors: party activists, members of the police, soldiers, and individuals from the criminal milieu are often known to the public. Victims are party leaders, activists, candidates and voters who are also individually known even when it comes to mass actions.

Electoral violence involves a wide range of activities: harassment, intimidation and attacks, rioting, destruction of property and election material, political assassinations. “The fear created by such tactics can substantially influence not only if people vote, but also who they will vote for.” (Höglund, 2009: 417). That is why election actors use violence as part of a strategy to win votes. The choice of activities to use from this arsenal and the timing of their implementation depends on what will ensure the desired result - a greater number of votes and seats in the representative bodies - with as little drawbacks as possible - avoiding condemnation for electoral violence, the possibility of masking it, relativizing it, etc.

Different typologies have been elaborated by focusing on motives, actors, timing or activities. Distinguishing between state and non-state actors and monitoring their activities through the pre-election



phase, voting and the post-election period is a good methodological tool for researchers in systematizing electoral violence (Höglund, 2009: 418 and 423). Newer typologies are based on collecting data around the world follow and classify occurrences of threats and attacks committed during the election process. These databases do not insist on acts of property destruction, but rather focus on the position of international organizations, intergovernmental and transnational elections observers. Government actors, politicians and institutions such as the police and the army are marked as state actors, while opposition parties, ethnic and religious groups, non-governmental organizations, and ordinary citizens are considered as non-state actors. This typology differentiates between perpetrators and victims of violence: government against non-governmental actors, non-governmental actors against government, non-governmental actors against each other, and international actors against any actor and vice versa (Birch & Muchlinski, 2020: 221).

ELECTORAL VIOLENCE - SECURITY CHALLENGES AND PREVENTION

The government resorts to abuse of political power more often than the opposition. Since it is a matter of politically motivated actions, such acts of political violence “represent politically positioned crimes and ideologically motivated crimes” and “can also be considered political crime in the broad sense of the word” (Mijalković, 2018: 271). Electoral violence presents a threat to security, as does any other type of violence. Even if, as previously mentioned, the security apparatus and its individual parts can at times be a part of violent events in the election arena, it is tasked with the challenge of preventing electoral violence, detecting its actors, and mitigating the consequences. Different contexts require different security approaches: societies facing electoral violence as part of a wider conflict, those where elections are a way to build peace, or those that control other forms of organized violence still use violence as an electoral strategy- all these cases need separate approaches. The work of security institutions in delicate and incendiary conditions is always related to the issues of respect of human rights and freedoms, functioning of democracy, respect for procedures. In the abuse of political power, the government “usually relies on the police and secret services that massively exceed and unjustifiably exercise their official powers”; they do not hesitate to “assign military powers to police units” and abuse private investigative agencies, former members of the security sector, etc. (Mijalković, 2018: 274). Involvement in electoral violence, exceeding authority, inadequate treatment of situations can make the security sector part of the problem, not a mechanism for preventing electoral violence.

Prevention of electoral violence is “[...] defined as any type of electoral assistance activity that aims to prevent or mitigate some form of electoral violence” (Birch & Muchlinski, 2018: 387), that is, a special type of international electoral assistance to countries that are estimated to have a high level of risk of electoral violence. A number of projects and programs initially treated the prevention of electoral violence as a police issue (Birch & Muchlinski, 2018: 386). This approach was replaced by electoral integrity programs, such as UNDP, the International Institute for Democracy and Electoral Assistance (IDEA), the United States Agency for International Development (USAID), the International Foundation for Electoral Systems (IFES) and the United States Institute for Peace (USIP), based on assessments and experiences gathered in sub-Saharan and North Africa, Asia, the Middle East and the liberalization of post-socialist countries where electoral violence was particularly intense. The fear of certain actors that they will remain excluded from politics and decision-making due to ethnic discrimination, electoral fraud, manipulation of the electoral system and the absence of conditions for free and fair elections increases the importance of elections. In these cases, actors are more likely to



resort to electoral violence. Therefore, prevention organizations believe that equal involvement of all actors in decision-making processes should be ensured, and trust in the elections and non-violent conquest of power should be strengthened. The two primary aims are to improve the work of electoral institutions, and to change the attitudes of election actors so as to promote a rejection of electoral violence. The first goal is relatively simple to implement, while the change of opinions and attitudes remains much more challenging and uncertain (Birch & Muchlinski, 2018: 387).

The guides created to implement such programs advise a combination of technical assistance in strengthening electoral institutions and political engagement with electoral actors so as to promote non-violent approaches to elections. The experiences of these organizations show that the *hardware* (the technical, financial and logistics support), must go hand in hand with appropriate the *software* (political action and conflict resolution policies) (UNDP, 2009: 30). Unregulated electoral procedures, insufficient organizing, lack of planning and education of election actors - these are the most common shortcomings of elections; problems arise when they are perceived as being politically motivated. Operational assistance in raising the capacity of electoral actors and bodies conducting elections should eliminate these weaknesses and increase the credibility of elections as a mechanism for gaining power and establishing government, and thus reduce tensions that risk escalating in electoral violence. The second approach considers that prevention should change the contextual and structural elements that are the drivers of electoral violence. Approaches based on mediation through round tables, debates, development of codes of conduct, fostering peace through the media, cultural institutions, dialogue, and understanding of the positions and interests of opposing electoral actors are encouraged. Proponents of this approach believe that it has long-term effects and discourages actors from using violence as part of electoral action (Kehailia, 2014).

Analyses that have measured the impact of these two approaches to the prevention of electoral violence draw contradictory conclusions. Some studies that have analyzed the prevention effects of UN missions in Africa and Latin America in the period 1990-2008 show that technical assistance reduces electoral violence, especially when state bodies participate in such activities, sending a signal to the opposition that they want free and fair elections, which encourages electoral actors to give up violence as a strategy (von Borzyskowski, 2015). Some analyses particularly emphasize the success of technical assistance aimed at optimizing the work of state actors, primarily security structures and election administration bodies, and the benefits of long-term voter education backed by state actors (Claes & Macdonald, 2016). In contrast, the effect of attitude-transformation prevention through civil society actions, various forms of dialogue, messages of peace, voter counseling, youth programs, etc. "remains small or unclear" (Claes & Macdonald, 2016: 192). Studies that have explored similar approaches in individual African countries, however, claim that they have had more success in motivating voters to resist pressure and violence (Collier & Vicente, 2014).

The most recent research on the impact of prevention strategies in diminishing electoral violence shows that both approaches, the first aimed at raising the capacity of actors and institutions and the second aimed at changing the attitudes of actors, show positive results and even greater control of various factors related to electoral violence. The empirical findings show that "attitude-transforming interventions are associated with a reduction in violence by state actors, whereas capacity building appears to reduce violence by non-state actors." (Birch & Muchlinski, 2020: 397). This confirms the importance of electoral violence prevention in reducing security risks and paving the way for permanent improvement. The research indicates funding, technical support, logistics, international, regional and national organizations implementing prevention programs are in no way a wasted effort, even though they have not yet achieved the desired effects on all levels.



CONCLUSION

As a subtype of political violence, electoral violence has long remained out of the focus of research despite being widespread. Elections are a competitive political process in which a large number of opposing political groups and candidates fight for power. In such an environment, electoral violence easily becomes an acceptable element of the electoral strategy of political leaders, parties, state and non-state actors, as well as for non-democratic societies, hybrid regimes, unconsolidated democracies, which is an unfortunate reality. But democratic societies are not exempt either. The consequences of electoral violence can have a devastating effect on maintaining security, peace and consolidating democracy.

The striking absence of a systematic theoretical and methodological framework for researching this phenomenon is largely disproportionate to the number of case studies that have analyzed certain aspects of violence in the electoral process. In the last two decades, researchers have made significant progress in conceptualizing and studying the phenomenon of electoral violence and the wide range of actors, motives and forms of violence encountered in elections. They of course have national peculiarities. But researchers, based on case studies and series of data on violence in a large number of election cycles, try to conceptualize theoretical paradigms (where, when and what kind of violence is present) and develop prevention mechanisms. Increasingly precise and complete databases on electoral violence - CREV, ECAV, NELDA - enable researchers to analyze in more depth and systematize the motives, actors and forms of violence.

The goal, to predict situations that have a high potential for escalation of electoral violence, is still far. But there are more and more known elements in the mosaic that enable election violence to be prevented. Although decades-long programs based on improving technical capacities for free and fair elections and reframing attitudes around the use of violence in election strategies have not yet met all projected expectations, prevention strategies remain an indispensable mechanism in reducing electoral violence.

REFERENCES

1. Banwait, H. (2021). *Electoral Violence in Mexico*, The Organization for World Peace, <https://theowp.org/reports/electoral-violence-in-mexico/>. (accessed 10.07.2021.)
2. Bekoe, D. A. & Burchard, S. (2017). The contradictions of pre-election violence: The effects of violence on voter turnout in sub-Saharan Africa. *African Studies Review*, 60(2): 73–92. <https://doi.org/10.1017/asr.2017.50>
3. Birch, S. (2011). *Electoral Malpractice*. Oxford: Oxford University Press.
4. Birch, S. (2020). *Electoral Violence, Corruption and Political Order*. Princeton, NJ: Princeton University Press.
5. Birch, S., Daxecker, U., & Höglund, K. (2020). Electoral violence: An introduction. *Journal of Peace Research*, 57(1), 3–14. <https://doi.org/10.1177/0022343319889657>
6. Birch, S. & Muchlinski, D. (2017). Electoral violence: Patterns and trends. In: H. Garnett & M. Zavadskaya (eds.). *Electoral Integrity and Political Regimes: Actors, Strategies and Consequences*, (pp.100–112), New York & London: Routledge.



7. Birch, S. & Muchlinski, D. (2018). Electoral violence prevention: What works? *Democratization*, 25(3), 385–403. <https://doi.org/10.1080/13510347.2017.1365841>
8. Birch, S. & Muchlinski, D. (2020). The Dataset of Countries at Risk of Electoral Violence, *Terrorism and political violence*, 32(2), 217–236. <https://doi.org/10.1080/09546553.2017.1364636>
9. Birnir, J.K. & Gohdes, A. (2018). Voting in the shadow of violence: Electoral politics and conflict. *Journal of Global Security Studies*, 3(2), 181–197. <https://doi.org/10.1093/jogss/ogy001>
10. Von Borzyskowski, I. (2015). *Peacebuilding beyond Civil Wars: UN Election Assistance and Election Violence: Working paper*. [https://www.peio.me/wp-content/uploads/PEIO8/ Borzyskowski %2021.1.2015.pdf](https://www.peio.me/wp-content/uploads/PEIO8/Borzyskowski_2021.1.2015.pdf) (Accessed 11.08.2021.)
11. Burchard, S.M. (2015). *Electoral Violence in Sub-Saharan Africa: Causes and Consequences*. Boulder, CO: Lynne Rienner.
12. Cederman, L.-E., Gleditsch, K. S., & Hug, S. (2013). Elections and Ethnic Civil War. *Comparative Political Studies*, 46(3), 387–417. <https://doi.org/10.1177/0010414012453697>
13. Cheibub, J. A., & Hays, J. C. (2017). Elections and Civil War in Africa. *Political Science Research and Methods*, 5(1), 81–102. <http://doi.org/10.1017/psrm.2015.33>
14. Claes, J. & Macdonald, G. (2016). Findings and Conclusion. In: J. Claes (ed.), *Electing Peace: Violence Prevention and Impact at the Polls* (pp. 195–220), Washington: United States Institute for Peace.
15. Collier, P. & Vicente, P.C. (2014). Votes and Violence: Evidence From a Field Experiment in Nigeria. *Economic Journal* 124(574), F327–F355. <https://doi.org/10.1111/eoj.12109>
16. Condra, L.N., Long, J.D., Shaver, A.C. & Wright, A.L. (2018). The logic of insurgent electoral violence. *American Economic Review* 108(11), 3199–3231. doi.org/10.1257/aer.20170416
17. Daxecker, U. E. (2012). The cost of exposing cheating: International election monitoring, fraud, and post-election violence in Africa. *Journal of Peace Research*, 49(4), 503–516. <https://doi.org/10.1177/0022343312445649>
18. Daxecker, U., Amicarelli, E., & Jung, A. (2019). Electoral contention and violence (ECAV): A new dataset. *Journal of Peace Research*, 56(5), 714–723. <https://doi.org/10.1177/0022343318823870>
19. Dunning, T. (2011). Fighting and Voting: Violent Conflict and Electoral Politics. *Journal of Conflict Resolution*, 55(3), 327–339. <https://doi.org/10.1177/0022002711400861>
20. Fischer, J. (2002). *Electoral Conflict and Violence: A Strategy for Study and Prevention*, IFES White Paper 2002-01. <https://www.ifes.org/sites/default/files/econflictpaper.pdf> (Accessed 11.8.2021).
21. Fjelde, H., & Höglund, K. (2016). Electoral Institutions and Electoral Violence in Sub-Saharan Africa. *British Journal of Political Science*, 46(2), 297–320. <http://doi.org/10.1017/S0007123414000179>
22. Goldsmith, A. A. (2015). Elections and civil violence in new multiparty regimes: Evidence from Africa. *Journal of Peace Research*, 52(5), 607–621. <https://doi.org/10.1177/0022343315576014>
23. Hafner-Burton, E. M., Hyde, S. D., & Jablonski, R. S. (2014). When Do Governments Resort to Election Violence? *British Journal of Political Science*, 44(1), 149–179. <http://doi.org/10.1017/S0007123412000671>
24. Harish, S., & Little, A. (2017). The Political Violence Cycle. *American Political Science Review*, 111(2), 237–255. <https://doi.org/10.1017/S00030554160007330>



25. Harish, S.P. & Toha, T. (2019). A New Typology of Electoral Violence: Insights from Indonesia, *Terrorism and Political Violence*, 31(4), 687–711, DOI: 10.1080/09546553.2016.1277208
26. Heger, L. L. (2015). Votes and violence: Pursuing terrorism while navigating politics. *Journal of Peace Research*, 52(1), 32–45. <https://doi.org/10.1177/0022343314552984>
27. Höglund, K. (2009). Electoral Violence in Conflict-Ridden Societies: Concepts, Causes, and Consequences, *Terrorism and Political Violence*, 21(3), 412–427.
28. <https://doi.org/10.1080/09546550902950290>
29. Horowitz, L.D. (2000). *Ethnic Groups in Conflict*. (2nd edition). Berkeley: University of California Press
30. Kehailia, G. (2014). Countering Electoral Violence with Electoral Education. In: A. Cyllah (ed.) *Elections Worth Dying for? A Selection of Case Studies from Africa*, (pp. 29–45). Washington: International Foundation for Electoral Systems, https://www.ifes.org/sites/default/files/elections_worth_dying_for_-_a_selection_of_case_studies_from_africa_final2.pdf (accessed 10.06.2021.)
31. Lijphart, A. (1977). *Democracy in plural societies: a comparative exploration*. New Haven: Yale University Press.
32. Mares, I. & Young, L. (2016). Buying, expropriating, and stealing votes. *Annual Review of Political Science*, 19, 267–288. <https://doi.org/10.1146/annurev-polisci-060514-120923>
33. Matanock, A.A. (2017). *Electing Peace: From Civil Conflict to Political Participation*. Cambridge: Cambridge University Press
34. Matanock, A. M., & Staniland, P. (2018). How and Why Armed Groups Participate in Elections. *Perspectives on Politics*, 16(3), 710–727. <http://doi.org/10.1017/S1537592718001019>
35. Mijalković, V. S., (2018). *Nacionalna bezbednost*. Beograd: Kriminalističko-policijska akademija.
36. Norris, P. (2004). *Electoral Engineering: Voting Rules and Political Behavior*. Cambridge: Cambridge University Press.
37. Norris, P. (2014). *Why Elections Fail*. Cambridge: Cambridge University Press.
38. Norris, P., Frank, R. & Martinez i Coma, F. (2015). The risks of contentious elections. In: P. Norris, R. Frank & F. Martinez i Coma (eds.), *Contentious Elections: From Ballots to Barricades* (pp.133–150). New York & London: Routledge.
39. Reilly, B. (2002). Elections in Post-Conflict Scenarios: Constraints and Dangers. *International Peacekeeping*, 9(2), 118–139. <https://doi.org/10.1080/714002729>
40. Reilly, B. & Reynolds, A. (2000). Electoral Systems and Conflict in Divided Societies. In: P. C. Stern & D. Druckman (eds.), *International conflict resolution after the Cold War* (pp. 420–483). Washington: National Academy Press.
41. Seeberg, M. B. , Wahman, M. & Skaaning, S-E. (2018). Candidate nomination, intra-party democracy, and election violence in Africa. *Democratization*, 25(6), 959–977, DOI: 10.1080/13510347.2017.1420057
42. Simeunović, D., (1980). *Političko nasilje*. Beograd: Radnička štampa.
43. Snyder, J. (2000). *From Voting to Violence: Democratization and Nationalist Conflict*. New York: WW Norton.

44. Söderberg Kovacs, M. (2018). Introduction: The everyday politics of electoral violence in Africa. In: M. Söderberg Kovacs, J. Bjarnesen (eds.), *Violence in African Elections: Between Democracy and Big Man Politics* (pp. 1–25.), London: Zed.
45. Staniland, P. (2014). Violence and democracy. *Comparative Politics* 47(1), 99–118. DOI: 10.5129/001041514813623128
46. Taylor, C. F., Pevehouse, J. C., & Straus, S. (2017). Perils of pluralism: Electoral violence and incumbency in sub-Saharan Africa. *Journal of Peace Research*, 54(3), 397–411. <https://doi.org/10.1177/0022343316687801>
47. Trejo, G. & Ley, S. (2018). Why did drug cartels go to war in Mexico? Subnational party alternation, the breakdown of criminal protection, and the onset of large-scale violence. *Comparative Political Studies*, 51(7), 900–937.
48. United Nations Development Programme - UNDP (2009). *Elections and conflict prevention - A Guide to Analysis, Planning and Programming*. http://contenttext.undp.org/aplaws_publications/2431678/Elections-Conflict-Prevention.pdf. (Accessed on 10. 6.2021.)
49. Westphal, T. (2021). *Violence and the 2020 General Election*. Stanford-MIT Healthy Elections Project https://healthyelections.org/sites/default/files/2021-06/Violence_2020_Election.pdf.
50. (Accessed on 11.08.2021)





MISUSE OF PERSONAL DATA IN PUBLIC OPINION POLLS – NEW EXAMPLES IN THE FORM OF INTERNET OF THINGS DEVICES AND APPLICATIONS

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Abstract: This paper will analyze the importance of quantitative and qualitative research, but also their impact on the security of citizens who participate in them. Although they are of great importance both for science and for commercial purposes, personal data collected through research can be misused. During the pandemic caused by the COVID-19 virus, there was a rapid growth of online research, due to restrictions on movement and gatherings. This method of data collection is an example of how additional interests can motivate researchers to misuse personal data of respondents in different ways.

Besides, much bigger problem can be created by Internet of Things applications and devices that collect and analyze data using their software. Therefore, this paper will also offer solutions to limit and prevent potential misuse of personal data of users of these applications and devices.

Keywords: *analyze data, public opinion polls, data misuse, internet security, Internet of Things devices and applications.*

IMPORTANCE OF QUANTITATIVE AND QUALITATIVE METHODS FOR SCIENTIFIC AND PRIVATE SECTOR RESEARCH

In the social sciences, it is of great importance to apply various research methods in order to substantiate and expand existing theories or refute them with new knowledge. The application of qualitative, quantitative, and in recent decades mixed methods has enabled scientists and researchers to make an additional contribution to scientific reflections and answers to numerous questions. If we want to see



their importance for the study of socio-political changes, we can take the example of the elections in Great Britain at the end of the last century. The British Election Surveys (BES) made extensive use of quantitative methods, which was not enough to show the deeper causes of Labor's growth and their victory in the 1997 elections. By applying qualitative methods, some researchers have been able to show the deeper effects of this change, which only shows the importance of research methods (Devine, 2005).

Regarding the use of methods, there were great differences in the views of many authors and researchers. While some applied mostly qualitative methods, others firmly adhered to quantitative methods. The main reasons are their ontological and epistemological determinations. For more than a decade, mixed methods have been used to overcome this division between qualitative and quantitative methods. Mixed methods are the best for achieving new knowledge in order to complement the shortcomings that exist between them. In this regard, very famous methodologist Professor John W. Creswell explains the importance of the application of mixed methods, as well as the models for the application (Creswell 2014).

Mix methods also have great importance for any research within the private sector. Namely, it has always been of great importance to get information about what consumers of products and services think about them, as well as what drives them and influences their decisions when choosing. For these reasons, surveys of consumer attitudes and preferences became more common during the second half of the twentieth century. It is also a period of extremely great rise in the development of the economy of many countries, as well as their mutual trade.

All large companies have people in their teams who deal with marketing and market analysis, in order to gain customers. According to Kotler and Keller's analysis, the process of making decisions about buying a product consists of five phases, which are: understanding the problem, seeking information, evaluating alternatives, buying decisions, and post-purchase behavior (Kotler & Keller, 2006). Marketing teams are obliged to follow these phases, the changes of which can lead to a sudden withdrawal of customers from the products or services of a certain company. For such reasons, public opinion polls with citizens are important in order to examine their preferences and the reasons that influence to their choices for certain products and services. It is very interesting that with the development of Internet programs and applications, there has been an increase in sales over the Internet. Although many criticize this type of trade because it goes beyond the framework of legal regulations or is a matter of tax evasion, it is an increasingly common form of purchase, especially among the younger population. This certainly represents an additional challenge for companies, and forces them to start thinking about additional offers and checks whether such types of sales would suit the buyers of their products (Škare, 2006).

PROBLEMS IN CONDUCTING PUBLIC OPINION POLLS AND WAYS OF MISUSING PERSONAL DATA OF RESPONDENTS

As we have previously stated, there are quantitative, qualitative and mixed methods for conducting public opinion research. A large number of researches are conducted daily for the needs of science, politics or commercial purposes and many other reasons that strive to find out the attitudes of citizens on numerous issues. However, in order for a research to be conducted and its results presented to the public, it is necessary to prepare a lot of things, i.e. to start the analysis and creation of the planned research project before starting the data collection. When noticing a certain problem, it is necessary to first analyze what the current scientific and social fund says as well as previous research on that topic,



if any. When choosing a research topic, it is necessary to have a research project. It includes a draft of a scientific idea, various plans, as well as instruments for conducting research. Certainly, the draft of a scientific idea is the most complex, and at the same time among the most important elements, because it formulates the problem to be researched, determines hypotheses, indicators and the subject of research, analyzes previous research. In addition, it presents the scientific and social justification, as well as the goals that this research seeks to achieve (Marczyk, DeMatteo, and Festinger 2005, 16; Milosavljevic & Radosavljevic, 2003).

When it comes to a concrete example of the application of research methodology in scientific papers, it has become more present. For example, master's theses more often, in addition to description, explanation and classification as the most common scientific goals, also contain research. Empirical research that students in Serbia apply in their master's theses is useful because they give additional importance to science, and the topics they cover do not only have a descriptive element, which is usually the most present when we talk about these works (Arezina, 2021). An example of this is the master's thesis "Air pollution in the Republic of Serbia as a consequence of energy efficiency", in which the author Nenad Spasojevic applied the results from his quantitative public opinion survey, gathering the data using the mixing technique of online and telephone research. In that way, in difficult conditions caused by the COVID-19 virus, because of which the realization of the research was specific, as the author states, the chosen techniques were used to obtain data from respondents of different groups and territorial distribution, which were defined before the research (Spasojevic, 2020).

Besides, doctoral dissertation represents the original and independent scientific research and therefore the highest level of final works, with achieving knowledge in specific scientific field. Consequently, many faculties and universities have a number of regulations and guidelines that guide researchers and students to make the greatest possible contribution to their doctorates (Arezina, 2021).

While in research for the needs of science, researchers are expected to come up with new knowledge that will encourage further development of science, in practice there is also research that someone orders. These surveys must also follow the above steps in order for the data to be obtained to be adequate. Unlike scientific research, examples with commissioned research are different because we have the wishes of a particular client, and it often happens that they are more complex to implement. This refers to situations with the necessity of contract existence, frequent ignorance about the subject of research by the client, and possible disagreements and misunderstandings. The latter are a consequence of the fact that the client expects to receive practical proposals for solving his problem, while the researcher on the other hand comes to the origin of the problem and how to establish the basis for solving the problem, but also strives for opportunities to provide practical and concrete solutions (Gacinovic, 2017).

Researches are facing with several problems in the realization of public opinion polls. For the purposes of conducting public opinion research, it is necessary to have several important things. First, the professional knowledge and skills of the researcher are needed, then to have the experience gained through practice in conducting research. In addition to this, it is necessary to have human resources, because on the example of field research, it is impossible for the entire research process to be conducted by one person. Important element are the financial and other resources and capacities that would be desirable for the researcher or an agency to have. However, it often happens that the researchers themselves, disregarding the previous examples of the constituent elements of the research vocation, find themselves in a situation where they cannot realize the research as originally planned, or rather what it should actually look like in a professional framework. Consequently, there are situations where researchers without experience, originality, competence (certified knowledge), methodological cul-



ture, but also other shortcomings, bring the realization of research into question. This actually means that the data obtained by researchers are of questionable relevance, especially when it comes to the way they were obtained and who the respondents were according to the sample of researchers (Adamovic, Ivic & Vukovic, 2017).

Determining the sample is one of the most common problems in public opinion research. When starting the research, it is necessary to single out a certain unit from the entire observed mass, which would be studied, i.e. which would be a research sample. In his book "Statistical Techniques and Procedures in Political Science Research", Dževad Termiz, in the section on statistical mass and sample in political science research, defines these terms both in theoretical and practical terms, applying natural sciences as well. In this way, he also gives formulas on how to determine the size and validity of the sample itself (Termiz, 2006). Many researchers have difficulty to determine the pattern in their research, which is a consequence of either neglecting this element as an essential or more often non-existent knowledge of how it is determined.

The mentioned sampling is an increasingly common problem in Serbia. Numerous researches appear in the media that do not have a good methodological basis to be valid. In addition, research that has been unsigned, without data who conducted it, when and where, based on which sample, has been a huge problem in Serbia for years. Thus, we come to the conclusion that in Serbia, first of all, the most frequent, quantitative public opinion polls are largely inadequate, i.e. that they give a distorted picture of reality in terms of citizens' attitudes (Pavlovic, 2021).

Although mix methods have been applied more than decade, it is necessary to point out some of the qualitative and quantitative methods. Qualitative methods include observation, case studies, interviews and focus groups (Arežina, 2021). When it comes to quantitative research, in addition to scales and experiments, the survey is the most common (Creswell, 2014; Arežina, 2018). In the field of surveys, telephone (CATI), field (CAWI) and in recent months increasingly frequent online surveys stand out. For the purposes of this paper, examples will be presented with the problems of abuse and omissions during the conduct of research, and above all with surveys, given that unacceptable actions occur much more often.

According to Moser, "a survey is a technical procedure for collecting facts of material by combining a statistical method of sampling by interview or questionnaire" (Moser, 1962). According to this definition, we are actually talking about a data collection technique better known as testing. When it comes to the quantitative method, it has evolved over time, and so through the field and telephone, the survey became possible through mail survey options by sending e-mails, but also through other modern ways (Djordjevic, 2012). Today, online surveys are also widely used, which are the simplest and most cost-effective way for many researchers to collect data from respondents.

When collecting data for research purposes, data misuse is also common, which can best be seen in the example of online surveys. Thus, when filling out an online questionnaire (take the most common Google drive questionnaires as an example), researchers finally give respondents the opportunity to leave their e-mail address to inform them most often about the results of that research, and often about future research. However, as it is difficult for some researchers to reach respondents, they use this option to create their own database of respondents, by collecting email addresses. With each subsequent survey, they reach out to send emails to previous participants. In this way, the average user of Internet services is exposed to spam, by using his e-mail address for other purposes. As the COVID-19 pandemic spread, it also led to a huge prevalence of online surveys, and this led to further development of this problem (Google surveys, 2021). In this case, the e-mail addresses of the respondents are misused for other purposes that were not originally planned and presented to the respondents.



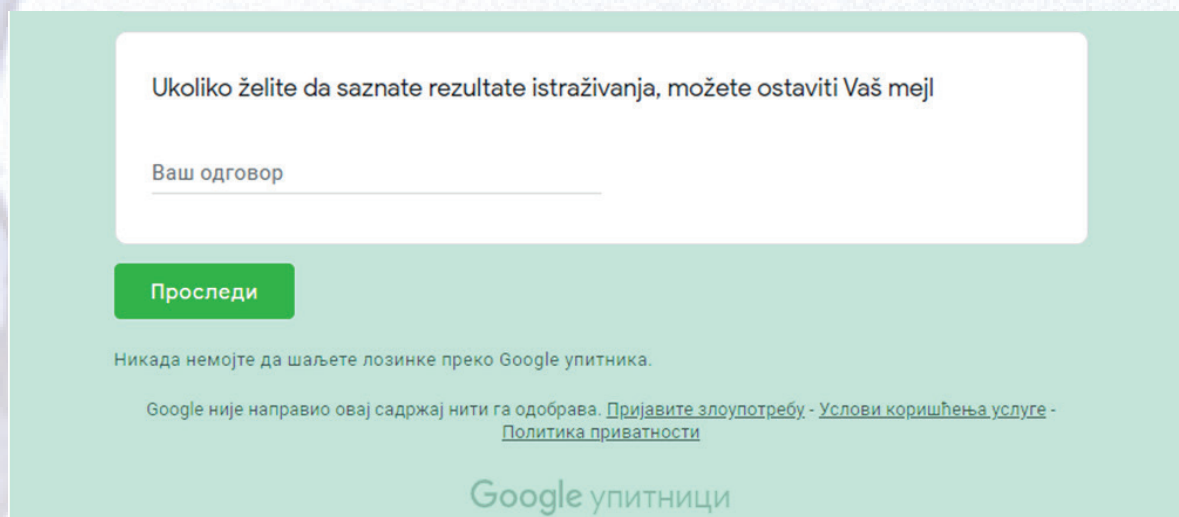


Figure 1 Example of an online questionnaire and questions at the very end, where the respondent is given the opportunity to leave his / her e-mail address in order to get the results of the research

In some field research in our country, there are two problems that threaten the privacy of respondents' data, and which can be used by researchers as in the case of online surveys to create a database. However, specific problem here is the part of the questionnaire called the header, in which data are entered only by the respondent (street and building number, floor, apartment number, and if possible name and surname). In addition to these data, the respondent is required to leave contact telephone number, in order to be contacted by the researcher to check whether the questionnaire was conducted. In addition to this, another problem is the use of GPRS navigation, which monitors the movement of interviewers. It is used to prevent interviewers from completing surveys outside the defined area of research. By using these applications, the privacy of the respondents can be endangered, because the place of residence of the respondents is found out, which can be interesting for researchers during the next research. In this way, there is a completely questionable anonymity of the research, which is guaranteed to the respondents before the very beginning of the research.

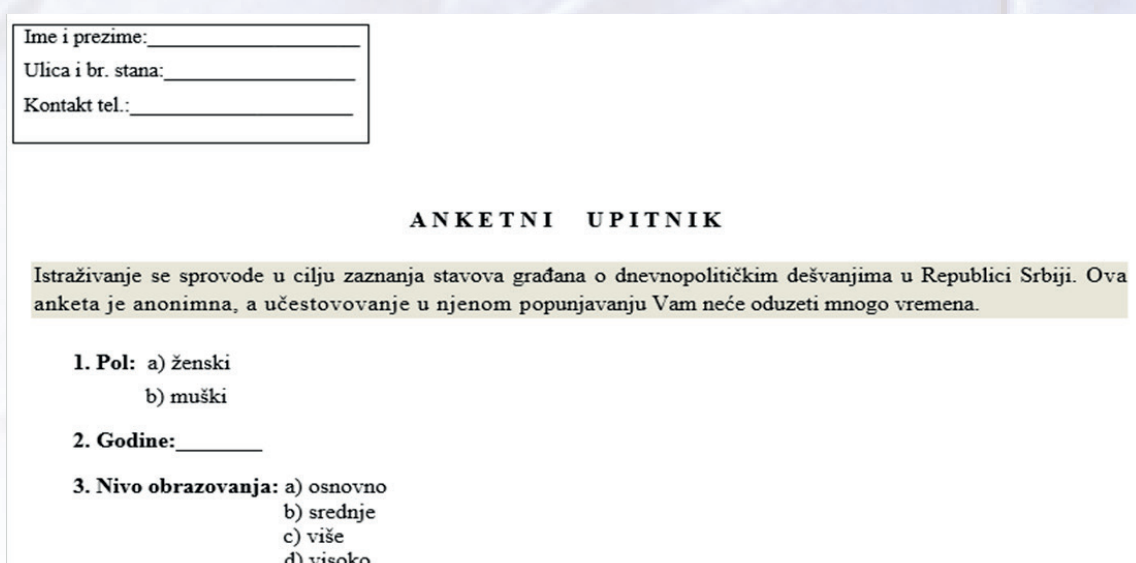


Figure 2 Example of a field research questionnaire, with a header, a couple of initial questions about the respondent and a brief description of the research

In the case of telephone research, we have situations that are similar to the problems from the previous two cases. The problem in telephone research is the way in which the researcher comes to the telephone numbers of the persons he would like to interview. In Serbia, for years, numerous agencies and companies have large databases of mobile and landline numbers of Serbian citizens, which leads to the conclusion that some mobile operators do not respect the privacy rights of their users and the data becomes publicly available to anyone.

These examples represent situations in which it is possible for the personal data of the respondents to be misused by the researcher during the research. It is important to note that these examples are not a constant occurrence and that not all researchers make these illegal ways to obtain certain data through the misuse of personal data of citizens. However, the actions of the citizens themselves are also a big problem. Namely, by using internet content and various applications, citizens often unknowingly provide their personal data without caring about their security. Besides, these data are important to large companies (Suceska & Hanic, 2014). It often happens that companies or smaller companies use the data collected from their former customers or service users in order examining their attitudes. This is a trend of checking consumer habits, but the problem is how data can also be used by the private sector.

On account of the mentioned unsafe access by citizens to the use of Internet content, it is necessary to point out that there are several omissions in the use of Internet services and applications. Thus, citizens are insufficiently aware of the potential dangers, even when they know about the risk, they are not too interested in preventing it. Also, they do not read too extensive terms of use and accept them lightly, but they also agree to share their personal data opposite to what they get for use. The results of numerous researches on the use of social networks and internet content show very interesting data. The reason for that is that they show that e.g. in the USA, despite the large number of cases of personal data breaches, citizens still do not pay enough attention to the protection of their data on the Internet (Mitrović, 2020).

DATA COLLECTION VIA INTERNET OF THINGS DEVICES AND APPLICATIONS AND WAYS OF THEIR MISUSE

Almost all companies engaged in the production of modern technologies in their business use comprehensively collected data in order to tailor their product to the needs of their customers. As manufacturers strive to make the use of a new product intuitive, the necessity of using the results of different types of research becomes inevitable. By using this data in different stages of product development, starting from the appearance of the product, through its functions and capabilities, to the marketing strategy itself, companies believe that using these data will better position themselves on the market. However, after collecting them, as we will see, almost nothing stops these companies from selling the collected data to third parties. Doing so directly violates the privacy of users, as well as ethical principles. The question is: who is the owner of the data we leave behind when using information and communication technologies?

To begin with, we will briefly look at how companies collect user data. First of all, we should start from what data are important for the further development of products and services, i.e. what are the data collected (Freedman, 2020):

- Personal data - which includes data such as ID number, browser cookies, device ID number and others;



- Usage data - talk about how users use the website, applications, social networking sites, paid advertisements and other content;
- Behavioral data - this group includes data on how the user uses the device, its purchase history and other quantitative data;
- Attitudinal data - they consist of measurable indicators of customer satisfaction, product demand, etc.

The methods by which companies obtain these data are: by direct inquiry of users, indirect monitoring of users or obtaining information from other legal entities (Freedman, 2020). Consequently, the question arises why do companies act like this? The answer is simple - the goal is to increase profits. Companies achieve this in two ways: by using the collected data to continue to develop their products and services and by selling the collected data to third parties. It is this sale that has led to the creation of new business models, where companies are established whose business concept is precisely the trade in this data - data brokers. They collect the data, sort it and process it, after which their results are ready for sale, and their clients are companies that have opted for the method of so-called personalized marketing. All this happens without the knowledge of the device users. Interesting data from the user privacy survey, conducted by Cisco Systems, states that only 32% of citizens are active in protecting their data, and 57% of respondents believe that they cannot adequately protect their data (Cisco Systems, 2019).

It can be seen from the above that this whole area of collecting, processing and selling personal data of users is a social problem, and looking at it, adequate legal regulations must be established for it. For now, legislation in this area around the world is rather scarce. Conditionally, the strictest law that directly concerns the protection of users' personal data is the California Consumer Privacy Act.⁴ In short, this law regulates the right of users to know what data is collected about it, how they are shared and used, then the right to delete collected data as well as the possibility of refusing to sell their data (California Consumer Privacy Act, 2018).

Although the previous part of the paper refers to the general principles of collecting personal data through smart devices and services (whether they are smartphones, personal computers, browsers, etc.), we should not forget that modern technologies such as the Internet of Things belong to this group, and that it is thus part of a spectrum of devices that collect the personal data of their users. For this reason, this general methodology for collecting personal data on smart devices also applies to the Internet of Things. As for protection against this type of information outflow, the principles are also similar, but the Internet of Things has the added problem that these devices usually do not have enough processing power, and if the manufacturer did not take security into account when designing the device, there is little possibility of installing any subsequent security programs (Jing, Vasilakos, Wan, Lu, & Qui, 2014). Other limiting factors of production do not support this, such as energy consumption, memory size, necessary time for production (Jing, Vasilakos, Wan, Lu, & Qui, 2014).

A good example of understanding how the Internet of Things collects personal data is the fact that these smart devices often collect location data and query data (Jing, Vasilakos, Wan, Lu, & Qui, 2014). Although this problem occurs at the application level of the Internet of Things, they certainly form a unique system, and for that reason this problem cannot be related to the device on which the application itself is located (example: application on a smartphone). The analysis of these data can lead to the residence of the user, their financial situation, behavior, health condition, etc. which the user unknowingly left behind during the search, e.g. for the nearest restaurant (Jing, Vasilakos, Wan, Lu, & Qui, 2014). It is a frightening fact that, in addition to the small number of users who even know that

4 California Consumer Privacy Act of 2018 [1798.100 - 1798.199.100] available at: https://leginfo.ca.gov/faces/codes_displayText.xhtml?division=3.&part=4.&lawCode=CIV&title=1.81.5



such data are collected, there is little they can do to protect their personal data. They are faced with the choice between using the device and providing their personal data, and where without the consent of the company to dispose of the user's data - the user is prevented from using the device which he owns.

Although all this may seem as if it did not happen so often and the consequences are felt only by individuals paranoid about their privacy, in reality the opposite is true, as evidenced by scandals where Internet of Things collected users' personal data. Thus, the smartwatch called TicTocTrack, intended for child safety in its design, had security flaws that allowed others to easily access the GPS data of the watch, as well as for the attacker to present himself as a "parent" and thus collect personal data of the child (Kirk, 2019). An additional problem is the fact that due to a software error, by accessing one account, it was possible to access all other accounts registered in the territory of Australia (Kirk, 2019).

These devices do not have to directly possess data of importance, but they can be an entrance to the network itself, which is a kind of problem not only for the individual, but also for companies. Although this type of data does not belong to personal data and thus is not the topic of this paper, it is important to be mentioned, given that they can have significant material consequences for the work of the legal entity, and thus indirectly on the micro and macro economy in which that company is located (primarily depending on the size and contribution of the legal entity). An example of a device that is found in the homes of users, but also in offices, are smart printers, which make up 18% of the Internet of Things, and as much as 24% of total security vulnerabilities (Unit 42, 2020).

CONCLUSION

In the modern world, collecting data on users is a very important element of the business of many actors. In this regard, these data are of increasing importance for both the private sector and science, all with the aim of easier access to the views and opinions of citizens and respondents. For this reason, the question of the moral and security conduct of researchers, agencies and companies in the implementation of these public opinion polls is increasingly being raised.

Taking all the above into account, the question arises: how to stop and dispute this problem of collecting and using personal data by third parties (often without the knowledge and consent of the device user)? Also, the next question that arises is: who should stop it? If the responsibility is on the individual, the sad fact is that they can do little. It has already been stated that an individual is faced with the decision to either not use the device and thus protect their privacy, or to use the device but thereby "disclose" their personal data. For this reason, we believe that at the level above the individual, primarily at the state level and by law, the user of the device must be protected and the area of data collection by the manufacturer must be regulated. The first step in this solution is for the state, or an international body, to recognize the collection of personal data as a social problem. Only after that can we start finding the best way for producers to obtain objectively necessary data for their work, while keeping individuals safe.

Another element for solving this problem should be the education and information of users. Just as the state should recognize as a social problem the misuse of collected personal data, so the individual should understand that each of their interactions with the Internet of Things leaves behind a trace that someone can use. Security culture is a key. Also, when citizens are informed about this problem, using democratic mechanisms they can influence decision makers and insist that this area be regulated. By establishing such a system, society can prepare for this type of new technology, the number of which will certainly not decrease in the future.



REFERENCES

1. Adamović, Ž, Ivić, M, & Vukvović, V. (2017). *Metodologija i tehnologija izrade naučnih radova*. Banja Luka: Univerzitet za poslovni inženjering i menadžment Banja Luka.
2. Arežina, V. (2021). Metodologija istraživanja u političkim naukama. *Srpska politička misao*. XXVIII, vol. 71, 273-292.
3. Arežina, V. (2018). Research Design in Methodology of Political Science. *Proceedings of ADVED 2018 – 4th International Conference on Advances in Education and Social Sciences*. Istanbul: ADVED.
4. California Consumer Privacy Act , 1798.100 - 1798.199.100 (State of California 2018).
5. Cisco Systems. (2019). *Consumer Privacy Survey*. San Jose: Cisco Systems.
6. Creswell, John W. (2014). *Research design: qualitative, quantitative, and mixed methods approaches*. Los Angeles: SAGE. Fourth edition.
7. Freedman, M. (2020, Jun 17). *How Businesses Are Collecting Data (And What They're Doing With It)*. Retrieved from Business News Daily: <https://www.businessnewsdaily.com/10625-businesses-collecting-data.html>.
8. Gaćinović, R. (2017). Prikupljanje podataka u procesu naučnog istraživanja. *Politička revija*. XVI, vol. 52, 137-156.
9. Devine, F. (2005). Kvalitativne metode. In: D. Marsh & G. Stoker (Ed.), *Teorije i metode političke znanosti*, Zagreb, Hrvatska: Fakultet političkih znanosti.
10. Đorđević, M. (2012). *Istraživanje politike: Bihevioralni pristup*. Belgrade: Službeni glasnik.
11. Jing, Q., Vasilakos, A. V., Wan, J., Lu, J., & Qui, D. (2014). *Security of the Internet of Things: perspectives and challenges*. New York: Springer Science+Business Media.
12. Kirk, J. (2019, April 15). *Australian Child-Tracking Smartwatch Vulnerable to Hackers*. Retrieved from Bank Info Security: <https://www.bankinfosecurity.com/australian-child-tracking-smartwatch-vulnerable-to-hackers-a-12376>.
13. Kotler, P. & Keller, K. J. (2006). *Marketing menadžment*, Belgrade: Data status.
14. Marczyk Geogrey, DeMatteo David, and David Festinger. (2005). *Essentials of Research Design and Methodology*. New Jersey: John Wiley & Sons, Inc. p. 29.
15. Mitrović, M. (2020). Sloboda izražavanja i zaštita podataka o ličnosti na internetu: Perspektiva internet korisnika u Srbiji. *CM : Communication and Media*, XV(47) 5–34.
16. Milosavljević, S, & Radosavljević I. (2003). *Osnovi metodologije političkih nauka*. Belgrade: Službeni glasnik.
17. Mozer, C. A. (1962). *Metodi anketiranja u istraživanju društvenih pojava*. Belgrade: Kultura.
18. Pavlovic, N. (2021). *Metodološki problemi u sprovođenju kvantitativnih istraživanja posredstvom interneta u sociologiji*. Niš: Univerzitet u Nišu – Filozofski fakultet.
19. Spasojevic, N. (2020). *Aerozagadenje u Republici Srbiji kao posledica energetske efikasnosti*. Belgrade: Fakultet političkih nauka, Univerziteta u Beogradu.
20. Starr, D. (2020, Avgust 10). *Here's Why You Should Be Concerned About Cameras in Robot Vacuums*. Retrieved from Safety: <https://www.safety.com/heres-why-you-should-be-concerned-about-cameras-in-robot-vacuums>.



21. Sućeska, M, & Hanić A. (2014). *Zaštita ličnih podataka u BiH i Srbiji. Sinteza - Međunarodna naučna konferencija Univerziteta Singidunim*. Belgrade: Univerzitet Singidunum.
22. Škare, V. (2006). Internet kao novi kanal komunikacije, prodaje i distribucije za segment mladih potrošača. *CROMAR (Hrvatska zajednica udruga za marketing) i Ekonomski fakultet Zagreb*, 18 (1–2) 29–40.
23. Termiz, Dž. (2006). *Statističke tehnike i postupci u politikološkim istraživanjima*. Lukavac: NIK Grafit.
24. Unit 42. (2020). *2020 Unit 42 IoT Threat Report*. Santa Clara: Palo Alto Networks.
25. Wiens, K., & Chamberlain, E. (2018,, septembar 19). *John Deere Just Swindled Farmers out of Their Right to Repair*. Retrieved from Wired: <https://www.wired.com/story/john-deere-farmers-right-to-repair/>

IMPORTANCE OF COUNTER TERRORISM SCREENING FOR PASSENGER SAFETY IN AIR TRAFFIC

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Abstract: Prevention is very important for countering all forms and sources of threats. Safety of civil aviation, and counter terrorism screening for prevention of threats to safety of civil aviation, are topics covered by many university syllabi and multiple authors. Nevertheless, we may say that safety of civil aviation has not still been studied enough scientifically and theoretically, and that there are very few papers on this topic. Taking this into consideration, there is still a need for research and expanding of knowledge in this area. This paper is based on practical findings and experience, and attempts to present the importance of counter terrorism screening of aircrafts and passengers in civil aviation.

Keywords: threats, civil aviation, counter terrorism screening, terrorism

INTRODUCTION

In many countries of the world security threats have become one of the principal social problems. The end of the 20th and beginning of the 21st century was marked by many new non-military challenges, risks and threats. Terrorism is currently the biggest threat to global security (Mijalković, 2018: 235) and thus also to security of civil aviation.

Each threat, activity and illegal action which can threaten an airplane, passengers, and human and material resources of the Republic of Serbia is considered a terrorist threat from air space of the Republic of Serbia. Procedures for actions of competent bodies in case of terrorist threats from the air space are established by the Government's acts, upon proposals of the minister in charge of defense.³

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3 The Law on Air Traffic, Official Gazette of RS, no. 73/2010, 57/2011, 93/2012 and 45/2015, paragraph 26.



As terrorism is a complex phenomenon, there are many classifications, and one of them includes international terrorism, which implies acts which threaten international resources, such as international traffic (Stajić, 2015: 287).

This paper focuses on implementation of counter terrorism screening, whose purpose is prevention of terrorism in air traffic.

As for terrorism in air traffic, the first thing that comes to our minds is the attack on the the Twin Towers in United States of America, which happened on September 11 2001, when centers of economic, political and financial powers of America were attacked, and when many people were killed.

Scientific and professional circles wonder why air traffic is the target of terrorists. Air traffic, because of exceptional transportation possibilities it offers, and sensational effects achieved by threats to security of airplanes and passengers, is more and more a target of terrorists. Among possible forms of attacks on civil aviation (placing of explosive devices, missile shooting of civil airplanes, producing aircrafts clashes), kidnapping of airplanes is at the top (Glišović, 2016: 198). It is defined as taking over control of an airplane in the air through use of force, or through threatening to use physical force (Pejanović, Bejatović, 2009: 44). It attracts large media attention, it is easy to prepare and execute, it is useful as the means for revenge (Harrison, 2009: 54).

Inspite security threats, air traffic still presents the safest form of traffic. In order to maintain and increase the existing security level, cooperation and commitment of all actors is necessary, as well as investments in equipment and training of employees, but primarily it is important to understand the significance of implementation of counter terrorism screening as a prevention measure, and to pay even more attention to it.

THE PHENOMENON AND ACTORS OF CIVIL AVIATION

Aviation is an activity linked with flying in air space, and includes civil and military aviation. Civil aviation includes commercial flights and general aviation. Commercial air transportation includes all flights whose purpose is transportation of passengers and goods for financial compensation. General aviation implies transportation for own needs, sport flying, performing of special tasks from the air, such as photography, search and rescue operations, medical transport, etc.

Security is dominant in all aviation activities and organizations, and is the priority in performance of air traffic (Čokorilo, 2017: 29). It includes a state in which risk from threats to life and health of people and inflicting damage to property are reduced and maintained at an acceptable level, through constant detection of danger and control of risk from detected threats.⁴ Security of civil aviation can be disturbed by various forms of threats, so it is necessary during security screenings to use methods, means and human resources which shall ensure safe flight to passengers and prevent unforeseeable undesirable events, such as terrorist attacks.

Actors in charge of security of civil aviation are actors at international and national levels.

CIVIL AVIATION ACTORS AT THE INTERNATIONAL LEVEL

International Civil Aviation Organization-ICAO. The key task of this organization is improving of global aviation security. The Chicago Convention from 1944 did not predict the possibility of air-planes kidnapping-hijacking and similar actions of illegal disruption, therefore the event happened in the USA on September 11 2001. This event is the turning point of the whole area of civil aviation security. After this event the existing legal regulations were altered. The International Civil Aviation Organization defines annual global security plans-Global Aviation Security Plan (GASP).⁵

International Air Transport Association-IATA. It protects interests of air companies around the world, and simplifies numerous procedures and defines rules which members are obliged to follow. The rules IATA defines concern security and safety, efficiency and cost-effectiveness of flying.⁶ This association has defined a security strategy which is available through the Global Aviation Data Management Project. The Project offers useful information concerning safety in aviation.⁷

European Civil Aviation Commission-ECAC. This organization, with its head office in Paris, plays a key role in solving issues concerning security, the environment, and civil aviation. Privileges of members, 44 of them, is that they can exchange knowledge, compare techniques, information and methodology.

Eurocontrol-The European Organization for the Safety of Air Navigation. This is an organization which provides support to civil aviation and through its work promotes the significance of security culture and preventive actions for the purpose of prevention of actions of illegal disruption.⁸ Director of the Civil Aviation Directorate of the Republic of Serbia is a member of Eurocontrol.⁹

CIVIL AVIATION ACTORS AT THE NATIONAL LEVEL

Civil Aviation Directorate of the Republic of Serbia. It was founded by the Law on Air Traffic. The Directorate has the capacity of a legal entity, and its head office is in Belgrade. The competence of its director in the field of security is to issue certifications to personnel for performing security jobs. He is also authorized to perform occasional checkups of employees and ensure implementation of security standards. All activities of the Directorate are designed to develop a more efficient aviation security. They are supported by cooperation with the International Civil Aviation Organization and the European Agency for Security of Air Navigation. The Directorate establishes the Safety Review Board – SRB, and the Safety Review Group - SRG.¹⁰

National Aviation Security Committee. For the purpose of harmonization of activities of actors and organizations which implement security measures in aviation, and making recommendations for their improvement, the Government forms the National Aviation Security Committee as an occasional working body of the Government. The Government defines the members and methods of work of the National Aviation Security Committee upon proposal of the minister competent for traffic.¹¹

Airport Security Committee. Airport operator for public air transport and the general airport operator are obliged to form an airport aviation security committee at the airport in order to implement and coordinate security measures it is authorized for by the National Aviation Security Program and the Aviation Security Program made by the airport operator.



Representatives of all actors involved in implementation of airport security measures¹² are appointed for members of the Airport Aviation Security Committee.

Other actors at the national level who influence security of civil aviation are as follows: Ministry in charge of transport, Ministry of Defense (in case of emergencies); Ministry of Internal Affairs (border police station); Security-Information Agency; Board for Security and Internal Affairs, Group for Assessment of Security Risks.

NORMATIVE REGULATIONS IN CIVIL AVIATION

Civil aviation, and generally the field of security, without whose existence air traffic could not be performed, is regulated by a series of international and national regulations. What is specific for our country is that it adopts international documents, and harmonizes its national regulations with international regulations. Although the Republic of Serbia is not a member of the European Union, it adjusts and harmonizes its regulations with the European Union's regulations. Procedures which regulate the method of operation at the airport are stipulated in accordance with domestic and international regulations.

Chicago Convention on International Civil Aviation and its Annex 17. Chicago Convention was adopted in 1944. This convention is also known as the convention of the International Civil Aviation Organization¹³. It regulates the most important issues in the field of security and international civil aviation. It has 96 articles which define the principles. Of special significance is Annex 17 of the Chicago Convention which contains Standards and Recommended Practices-SARP. Security issues are regulated through several annexes, and the one which especially regulates the field this paper deals with is Annex 19 (Čokorilo, 2017:15).

Document 8973 enables countries to implement Annex 17, offering them instructions for the way of using of recon how to implement standards and practices. It is adopted by the International Civil Aviation Organization. Annex 17 and Document 8973 are constantly being altered and amended in accordance with new threats and tendencies. In recent alterations attention was paid to equipment for detection of behavior, face screening of persons who are not passengers, security on land, unpredictability of terrorist organizations activities, and the necessity to prevent them.

The Law on Air Traffic of the Republic of Serbia regulates terms for safe performance of air traffic in the Republic of Serbia. The law applies to airplanes while they are in the territory of the Republic of Serbia, while other situations are regulated by international agreements.

National Security Program of the Republic of Serbia is a national document which regulates rules, principles and activities for achieving and improving the acceptable level of security in accordance with the recommended practice and standards of the International Civil Aviation Organization.¹⁴

National Security Program is implemented by the Civil Aviation Directorate, and adopted by the Government of the Republic of Serbia upon proposal of the minister competent for transport.

12 *Ibid*, paragraph 223.

13 <https://www.icao.int/Security/SFP/Pages/Annex17.aspx>, accessed 11.06.2021.

14 The Law on Air Traffic, paragraph 10.



Rule Book for security management in civil aviation¹⁵ regulates terms for implementation and establishment of the security management system, which aviation actors must satisfy (Čokorilo, 2017: 19).

Agreement on establishing of the European Common Aviation Area is a multilateral agreement among countries of the European Community and other countries among with Serbia, The Republic of Bulgaria, the Republic of Croatia, Bosnia and Herzegovina, and others. The goal of the agreement is to regulate certain issues among countries, including common rules in the field of security and safety (Čokorilo, 2017: 19).

COUNTER TERRORISM SCREENING IN CIVIL AVIATION

In previous years security of passengers and airplanes was disrupted mostly because of technical reasons. Numerous examples of airplane crashes show us that deficiency was in airplanes properties, and that accidents happened because of motor breaks and breaks of control devices of airplanes, insufficiently fixed cargo, and flammable matters (Marković, 201: 14).

During the two world wars, airplanes were used for combat purposes. After the World War Two, the Cold War deterioration of relationships among countries produced the phenomena of individuals, terrorists, who from the 60s of the 20th century have become the biggest security problem for civil aviation. That is why the accent during implementation of security measures in aviation is in fact on prevention of realization of terrorists' goals.¹⁶

SECURITY IN CIVIL AVIATION

Security in aviation is a collection of measures, human and material resources, whose purpose is to make aviation safe, i.e. to protect it from actions of illegal disruption.¹⁷

Security measures are implemented for prevention of bringing forbidden objects into airplanes and the security-restrictive zone of the airport, and prevention of performing actions of illegal disruption.

Counter terrorism screening of luggage is performed by experienced operators in cooperation with customs officers. Screened luggage is stored in containers which later go to a special airplane luggage compartment, which is separated from passengers.

Material and technical expenses of screening and security measures expenses are provided from the sum departing air passengers pay to airport operators. This sum is determined by airport operators upon approval of the ministry in charge of transport.¹⁸

Rule Book on training certificates of personnel performing security screening and air personnel training centers for aviation security¹⁹ implies the following as personnel performing security screening:

15 Rule Book for security management in civil aviation, Official Gazette of RS, no. 24/2013.

16 *Ibid*, p. 16

17 The Law on Air Traffic, paragraph 220.

18 *Ibid*, paragraph 229.

19 Rule Book for training certification, and certification of personnel performing security screening, and aviation security training centers for aviation personnel, Official Gazette of RS, no. 4/2016, 49/2018-second rule book and 1/2020, paragraph 4.



1) persons who perform security screening of people; 2) persons who perform security screening of hand luggage; 3) persons who perform security screening of luggage going to airplane storage space; 4) persons performing security screening of goods and postal deliveries; 5) persons performing security screening of postal deliveries and material of air transporters, stocks intended for consummation during flight, and stocks intended for consummation at airports; 6) persons performing vehicles screening; 7) persons performing screening of access, supervision and checkup rounds.

Security screening is performed by the airport operator, or a legal entity which has a contract with the airport operator on performing security screening, with supervision of the Ministry of Internal Affairs. Airport operator is obliged to provide the space for performance of security screening, and the necessary technical equipment (Marković, 2011: 124).

COUNTER TERRORISM SCREENING

Security measures in aviation are implemented in accordance with domestic laws, by-laws and adopted programs, based on international standards stimulated by the International Civil Aviation Organization (ICAO), European Conference of Civil Aviation (ECAC), and the European Union.

Counter terrorism screening at airports is performed in airport facilities, at platforms, and at taking-off/landing runways.

In airport facilities, i.e. passenger waiting rooms - gates, counter terrorism screening is performed by trained persons - operators who screen passengers and luggage with the equipment that will be discussed later.

Operators who screen/control passengers, following the procedure and using the equipment as regulated, make decisions on whether it is safe for a person to enter an airplane. As needed, apart from the accompanying equipment, operators who screen passengers can perform manual search of persons.

It is necessary for all persons, their clothes, as well as pets, to be screened, but respecting privacy, cultural and religious orientation in that.

Operators of X-ray devices watch luggage images, and if they find something suspicious, they open hand baggage and search it. Hand baggage is opened in the presence of their owners. If the operator cannot determine that hand baggage contains a forbidden object, the baggage will not be allowed to enter the airplane. Most world airports, just like the Belgrade Nikola Tesla airport, have many signs placed informing of forbidden objects in civil aviation. The list of forbidden objects in the Republic of Serbia is defined by the Civil Aviation Directorate. Forbidden objects include: guns, firearms, and other devices that fire projectiles; explosive and flammable matters and devices; stun devices; sharp-edged and sharp-tip objects; tools; blunt objects.²⁰

As for forbidden objects, we should remember that special attention should be paid to those which at first sight look harmless – credit card knife, belt knife, pencil gun, and the smallest gun - mini gun.

Special attention should also be paid to imagination and innovation of those who want to make an attack, and to the possibility for an improvised electronic device to be totally different from all previous ones, as well as to the manner of its transportation, for each single part could be separate to be

20 <http://cad.gov.rs/upload/security/Listazabranjenih%20predmeta.pdf>, accessed 12.06.2021.



assembled later on.²¹ That is why all actors participating in aviation security must be concentrated, well trained and cautious, because just one mistake can make an enormous damage.

In case an airport ceases to fulfill a term necessary for safe performance of air traffic, airport operator²² is obliged to limit, or to permanently or temporarily stop operation of the airport.²³

Apart from counter terrorism screening in Serbia for the purpose of preventing of terrorist attacks, but also for the purpose of prevention of customs offences, luggage screening is performed when it arrives (also hand baggage) by customs officials.²⁴ Besides, cargo is also checked, cargo transported in special purpose airplanes with special openings. This field is regulated in detail by the Law on Transportation of Hazardous Cargo.²⁵

The competent body can define categories of hand baggage which, from objective reasons, is submitted to special security screenings, or is exempted from that. Exemption is specifically regulated by procedures and documents with classification degrees. One of the examples of exemption from security screening, according to the Vienna Convention on diplomatic relations, is diplomatic personnel.²⁶ They must be announced in advance, and they are accompanied by security officials.

SCREENING EQUIPMENT

Walk-through metal detector. These detectors are used for security screening of people. They produce sound and light signalization if they detect metals. They detect metals individually or in a combination, by summing metal quantities.

Passengers who belong to the sensitive category of people (people with a pacemaker, prosthetic aid, or another kind of aid, pregnant women and people in wheelchairs), are treated in a special way defined by the procedure.

Walk-through metal detectors must: produce sounds and/or visual signals when a certain percentage of people pass through them without triggering alarm; have the option to set this percentage; count persons who were security screened, not counting persons passing in opposite direction; register the number of alarms; calculate the number of alarms into a number of people who were security screened.²⁷

Scanner for security screening with no ionizing radiation. Efficiency of the scanner for security screening is reflected in its strong capacity to detect metal and non-metal objects held on the body, not disturbing peoples' privacy, and with a small number of false alarms.²⁸

21 <https://www.un.org/disarmament/convarms/ieds-a-growing-threat/>, accessed 12.06.2021.

22 Airport operator is a company, other legal entity, or an entrepreneur who uses the airport, is licensed to provide airport services, and has the license to use the airport, entered into the airport register.

23 The Law on Air Traffic, Official Gazette of RS, no. 73/2010, 57/2011, 93/2012 and 45/2015, paragraph 103

24 *Ibid*, p. 131.

25 The Law on Transportation of Hazardous Cargo, Official Gazette of RS, no. 88/2010 and 104/2016 - second law.

26 Rule Book on detailed measures for implementation of joint principal standards of aviation security, Official Gazette of RS, no. 5/2018, paragraph 4.1.2.11.

27 Rule Book on detailed measures for implementation of joint principal standards of aviation security, Official Gazette of RS, no. 5/2018, paragraph 12.1.2.3.

28 <https://www.smithsdetection.com/insight/aviation/insider-threat-part-2-technology-brings-visibility>, accessed on



Scanner for security screening can detect metal, ceramic, plastic and liquid objects, which means it has a larger capacity for detection than walk-through metal detectors. One of its advantages is also that it does not require enormous financial means for training of operators.

System for detection of traces of explosives. System for detection of traces of explosives has the capacity to detect presence of traces of explosives in less than eight seconds. Explosives can be made of various mixtures, so this system is set to detect many kinds of substances.

Hand-held metal detector. It detects metal and iron objects. Its operation is not affected by sources of disruption.²⁹

Liquid explosives detection system-LEDS. It belongs to the type of equipment which enables detecting of materials (liquids, gels, aerosols) which are threats. Liquids, aerosols and gels include pastas, lotions, mixtures of liquid/solid substances and contents of pressured packages. LEDS alarm sounds in the following cases: if it detects a hazardous material; if it detects presence of an object which prevents detection of a hazardous material; if it cannot determine if liquids, aerosols and gels are harmless or not.³⁰

Explosive detection system. Explosive detection system is set so to sound alarm in the following cases: if it detects an explosive material; if it detects presence of objects which protect explosive materials from detection, and if the content of luggage or packages cannot be analyzed because of its high density.³¹ The device is set so to show images of forbidden objects on its monitor during operation. The images must not disturb normal operation of the device.

Dogs trained for detection of traces of explosives. These dogs are used as additional means for security screening of people.³² They must be able to detect and react to explosive materials. In order for a dog and its guide to be approved as a team, they must pass through basic and periodical trainings.

CONCLUSION

Terrorism is the biggest threat to global security, and also to civil aviation security. With advancement of technology, attack methods of terrorists have also advanced.

Aviation is a target of attacks because terrorists' goal is to produce fear and panic of a large number of people, and airplane flying is the very thing for that. Media coverage, and extortion of demands and suicide attacks are some of the reasons why terrorists choose airplanes for their targets.

Large financial power and availability of ingredients necessary for making of hand made improvised electronic devices provide terrorist organizations with the capacity to get explosives which are difficult to detect. Taking into consideration previous events and sophistication of terrorist groups, i.e. organizations attacks, we can conclude that equipment, expertise, well handling of equipment, training, and following of procedures by operators of counter terrorism screening and other actors in charge

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29 Rule Book on detailed measures for implementation of joint principal standards of aviation security, Official Gazette of RS, no. 5/2018, paragraph 12.

30 *Ibid*, paragraph 12.7.1.3.

31 *Ibid*.

32 *Ibid*, paragraph 12.



of security in civil aviation are of crucial importance in order to prevent persons intending to bring forbidden objects into airplanes and begin actions of illegal disruption to do so.

Counter terrorism screenings as preventive forms of protection are constantly being improved. Each terrorist act was the basis for introduction and implementation of new security measures.

In Serbia, as well as in other countries of the world, counter terrorism screening is implemented in accordance with standards and recommended practice of the International Civil Aviation Organization. There are many organizations which, at international and national levels, control implementation of counter terrorism screenings in civil aviation. Equipment used must satisfy the appropriate standards and its functioning must be constantly checked.

The September 11 2001 events are a good example of how, in spite of large financial power the USA has, it was possible for terrorists to find soft spots and design new methods for attacks. Kidnapping of airplanes and demolition of buildings which were centers of political, economic and trade power are indicators for what kind of threats we are facing today, and how necessary it is that there is a developed security culture in place, and cooperation among all security actors for prevention and stopping of potential threats.

Oppression as a preventive measure always produces less results than preventive and proactive actions, that is why faults must be removed, for the purpose of a better and more efficient protection of air traffic.

REFERENCES

1. Gudelj, N., Krstić, J. (2016). Deset osnovnih problema u borbi protiv terorizma i finansiranja terorizma. *Vojno delo*, 68 (2), 263–276.
2. Glišović, M. (2016). Otmica vazduhoplova kao bezbednosna pretnja civilnom vazduhoplovstvu. *Nauka, bezbednost, policija*, 21 (2), 197–213.
3. Glišović, M. (2016). Politički aspekti otmice vazduhoplova u periodu od početka Drugog svetskog rata do početka 21. veka – doktorska disertacija. Beograd: Fakultet političkih nauka.
4. Dimitrijević, V., Stojanović, R. (1996). *Međunarodni odnosi*. Beograd: Službeni list SRJ.
5. Lečić B. (2017). Islamska država – od utopije do krvave distopije. *Kultura polisa*, 33, 9–24.
6. Marković, S. (2011). Preventivni i protivdiverzion pregledi u vazдушnom saobraćaju, Beograd.
7. Mijalković, S (2018). *Nacionalna bezbednost*. Beograd: Kriminalističko-policijski univerzitet.
8. Pejanović, Lj., Bejatović, M. (2009). *Avioterorizam*. Novi Sad: ABM Ekonomik.
9. Savić, A. (1998). *Osnovni državne bezbednosti*. Beograd: VŠUP.
10. Stajić, Lj. (2015). *Osnovi sistema bezbednosti – sa osnovama istraživanja bezbednosnih pojava*. Novi Sad: Pravni fakultet u Novom Sadu.
11. Stojanović, Z., Perić, O. (2006). *Krivično pravo-posebni deo*. Beograd: Pravna knjiga.
12. Harrison, J.: (2009). *International Aviation and Terrorism: Evolving threats, evolving security*. New York.
13. Čokorilo, O. (2016). *Bezbednost vazduhoplova*. Beograd: Saobraćajni fakultet.



14. The Law on Air Traffic, Official Gazette of RS, no. 73/2010, 57/2011, 93/2012, 45/2015, 66/2015, 83/2018 and 9/2020.
15. Law on Transportation of Hazardous Cargo, Official Gazette of RS, no. 88/2010 and 104/2016 -second law.
16. Law on Transportation of Hazardous Materials, Official Gazette of RS, no. 15/2016.
17. Criminal Law of the Republic of Serbia, Official Gazette of RS, no. 85/2005, 88/2005, 107/2005, isp., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019.
18. National Civil Aviation Security Programme, Official Gazette of RS, no. 38/2015.
19. Rule Book on reporting of events in civil aviation, Official Gazette of RS, no. 52/12.
20. Rule Book on security management in civil aviation, Official Gazette of RS, no. 24/2013.
21. Rule Book on detailed measures for implementation of joint principal security standards for implementation in aviation, based on Article 265 and Article 237, item 3 of the Law on Aviation, Official Gazette of RS, no. 73/2010 and 57/2011
22. Rule Book on certification of trainings and certification of personnel performing security screenings and training centers for aviation personnel in the field of aviation security, Official Gazette of RS, no. 4/2016, 49/2018 -second Rule Book and 1/2020.
23. Agreement on establishing of a joint European air space. Official Gazette of RS, no. 38/2009.
24. (Countering Air Terrorism (2009), Partnership for Peace Consortium of Defense Academies and Security Studies Institutes, 1/10, Downloaded July 11, 2021 <https://www.jstor.org/stable/pdf/26326183.pdf>).
25. (Lista zabranjenih predmeta (2013), Downloaded July 12, 2021, <http://cad.gov.rs/upload/security/Listazabranjenihpredmeta.pdf>).
26. Graham T. Allison (2001, Novembar 20), Preventing terrorism in the air: A how to guide for nervous airline passengers, *Belfer center for Science and International Affairs*, Cambridge, accessed on June 9, 2021. <https://www.belfercenter.org/publication/preventing-terrorism-air-how-guide-nervous-airline-passengers/>.
27. Nordeen S., Insider Threat – Part 2: Technology brings visibility, <https://www.smithsdetection.com/insight/aviation/insider-threat-part-2-technology-brings-visibility/>, accessed on 12.06.2021.
28. IEDS-a growing threat, United Nations, Office for Disarmament Affairs, <https://www.un.org/disarmament/convarms/ieds-a-growing-threat/>, accessed on 12.06.2021.
29. <https://www.aviokarta.net/iata/>, accessed on 09.06.2021.
30. <https://www.iata.org/services/safety-flight-operations/pages/i-asc.aspx/>, accessed on 09.06.2021.
31. <https://www.icao.int/Security/Pages/.aspx/>, accessed on 09.06.2021.
32. <http://mgsl.gov.rs/cir/aktuelnosti/mirjana-chizmarov-izabrana-za-potpredsednicu-eurokontrola>, accessed on 10.06.2021.
33. <https://eurocontrol.int/safet>, accessed 10.06.2021.

INNOVATIVE SOLUTIONS FOR DISASTER EARLY WARNING AND ALERT SYSTEMS: A LITERARY REVIEW

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Abstract: In different parts of the world, decision-makers and risk managers use specific and particularly complex disaster early warning and alert systems to protect people and their material goods from the harmful effects of various disasters in a timely, efficient and appropriate manner. However, concerning the level of scientific-technological and economic development of certain countries, such systems can differ in the many characteristics that make them more efficient in specific situations. Guided by this, the subject of the paper is reflected in the systematic identification, analysis, and classification of the best innovative solutions of early warning systems regarding their usability and efficiency. To find appropriate innovative solutions, a search of different electronic databases was carried out. The findings of this review showed that there is a huge potential for innovative solutions in the field of disaster early warning and alert systems.

Keywords: disasters, early warning, alert system, innovative solutions, DAREnet, literary review.

INTRODUCTION

Around the world, national and regional organizations are developing technical systems to detect potential natural hazards (Fujita & Shaw, 2019; Guo & Kapucu, 2019; Ocal, 2019) as timely and easily as possible, then pass on such information to citizens and enable them to protect themselves on time. Many communication tools, such as short message service (SMS), email, radio, TV, and online service, are now accessible for warning distribution (Alias et al., 2020; Aloudat & Michael, 2011; Chen, Zhu, Ni, & Su, 2020; Grasso & Singh, 2011; Mills, Chen, Lee, & Raghav Rao, 2009; Sharma et al., 2015). In literature, there is a great deal of empirical evidence that the systems mentioned are successful in terms of decreasing human fatalities and saving property (Kull, Mechler, & Hochrainer-Stigler, 2013; Mechler, 2016; Rai, van den Homberg, Ghimire, & McQuistan, 2020) and essential features of civil protections (Alfieri, Salamon, Pappenberger, Wetterhall, & Thielen, 2012).



Certainly, the most frequently used technologies for warning the public are sirens (Bubar et al., 2020; Kuligowski, Kuligowski, & Doermann, 2018; Perera et al., 2020; Piciullo, Calvello, & Cepeda, 2018) that are publicly announced, electronic media and the staff of competent institutions that go on the streets and inform the citizens by using appropriate speakers or megaphones (Sorensen, 2000). All the mentioned ways of informing the citizens have their advantages and disadvantages, as well as innovative improvements or alternative replacements. Early warning systems had their origins in the 1980s when famines in Sudan and Ethiopia prompted the need to predict and prevent future food insecurity (Alcántara-Ayala & Oliver-Smith, 2019; Kim & Guha-Sapir, 2012). Early warning systems designed for volcano, earthquake, tsunami, and flood risks may appear inadequate when dealing with illnesses like COVID-19 (Cvetković et al., 2020; Fearnley & Dixon, 2020; Öcal, Cvetković, Baytiyeh, Tedim, & Zečević, 2020). For these reasons, continuous improvement of early warning systems (LaBrecque, Rundle, & Bawden, 2019; Perera et al., 2020; Yang, Zhang, Wang, & Tang, 2018) is needed to respond to all the natural and anthropogenic risks faced by the community. In the future, cell phones might be used to communicate outlooks and warnings to rural locations that lack communications infrastructure, as could satellite-based broadcasts of danger warnings to remote areas (Glantz, 2003; Indrasari, Iswanto, & Andayani, 2018; Toya & Skidmore, 2018).

In practice, alert, detection, prevention, monitoring, and warning systems, have unambiguously been referred to as early warning systems (Sättele, Bründl, & Straub, 2016). Excellent and highly reliable early warning systems can detect various types of natural hazards and never produce a false alarm (Intrieri, Gigli, Mugnai, Fanti, & Casagli, 2012). The United Nations Office for Disaster Risk Reduction (UNISDR, 2012) defines a warning system as a set of capabilities needed for the timely and meaningful generation and dissemination of alert information to individuals, communities, and organizations at risk for optimal preparedness and response and at the appropriate time to reduce the likelihood of injury and death (International Strategy for Disaster Reduction, 2004). Basher (2006, p. 2171) defined early warning systems as a linear set of connections from observations through warning generation and transmittal to the user. The Hyogo Action Framework has also focused on identifying, evaluating, monitoring, and increasing early warnings in disaster risks (UNISDR, 2005). High false alarm rates are a major issue in the operation of these systems, as they can weaken public trust, promote distrust, dilute the impact of alerts, and diminish the credibility of future warnings. Early warning system failures frequently arise in the communication and preparation aspects (Basher, 2006; Sorensen, 2000). Krzhizhanovskaya et al. (2011, p. 107) highlight that the introduction of an early warning system requires the development of a range of innovations and disciplines of expertise, including the construction, implementation, and technical maintenance of flood protection system sensor equipment; sensor data transport, filtering, and analytics software; dike stability analysis, dike collapse prediction, prospective dynamic flood models and evacuation technique optimizations are all conceivable with computer models and simulation elements; technological advancements for interactive visualization; develop a decision-making support system to assist public authorities and people in selecting and reacting to optimum flood control methods; remote connection over Internet or customized remote access to early warning and decisions support systems, etc.

Taking into account the above, the aim of this paper is a scientific description and systematic identification, analysis, and classification of the best innovative solutions of early warning systems. Also, the best world solutions in that regard are analyzed to see the best systems.



METHODS

Aim and search strategy

The purpose of this review was systematic identification, analysis, and classification of the best innovative solutions regarding early warning and alert systems. To find appropriate research, a search of an electronic database was performed. Web of Science, Scopus, Google scholar, DAREnet Knowledge Base, was the main source used for literature searches (Cvetkovic & Martinović, 2020). The studies were incorporated into the EndNote program after searching all databases.

Inclusion and exclusion criteria

Articles were considered for review if the objective of the research was some kind of innovative solutions for early warning and alert systems. Furthermore, articles were included for review if they met the following criteria: (1) peer-reviewed, (2) useful and used by practitioners, and (3) related to these early warning systems, alert system, warnings, monitoring and observation, disaster (flood, earthquake, tsunami, landslides, drought, etc.), forecasting, (4) related to subtopics as models, framework, technical equipment, standardization, evacuation. Articles that included some unusable solution, insufficiently tested, scientifically unproven were excluded from the review.

Search outcomes

The initial search resulted in 250 papers and this number diminished to 70 after a review of titles and abstracts found that 180 articles had no relevance to the objectives of the review. A full-text reading of the remaining articles resulted in 50 studies that were considered appropriate for review.

TYPES OF EARLY WARNING SYSTEMS FOR NATURAL HAZARDS

There are traditional and advanced systems of early warning and alert systems in the world. Traditional ones usually consist of three phases: a) monitoring of precursors; b) forecasting of a probable event; c) the notification of a warning or an alert should an event of disasters take place (de León, Bogardi, Dannenmann, & Basher, 2006). Early warning systems differ strongly in their monitoring strategies and two main monitoring strategies can be distinguished (Sättele, 2015). The data contents of the monitored data are high, but the related lead times are low if the early warning systems monitor existing continuous risk event characteristics. If the early warning systems tracks precursors before the commencement of a hazardous event the data contents are decreased, but, the lead time is increased. Because of that, they vary in their spatial dimensions, lead time, design, and associated degree of automation. Fakhruddin and Chivakidakarn (2014) identify four elements for early warning systems to be effective that research has consistently found: (1) active input from vulnerable groups; (2) continuing public education and awareness initiatives; (3) multi-faceted delivery of the messages and the alerts.

The literature also promotes the fourth phase, which refers to indicating the beginning of disaster response activities after a warning has been issued. The four elements of people-centered early warning systems: risk knowledge; dissemination; warning service; response capability (de León et al., 2006).



Sophisticated classification for early warning systems could not be found in the literature and several institutions developed definitions for the terms alarm (Villagrán de León, Pruessner, & Breedlove, 2013). Sättele's (2015) novel approach classifies early warning systems into alarm systems, warning systems, and forecasting systems. Also, in literature, there is a dichotomy between current early warning systems, which either mainly focus on the hazard component of disaster risk (Rogers & Tsirkunov, 2011), or follow a people-centered approach (Thomalla & Larsen, 2010), including the dissemination of information for the people to react to a given hazard. Concerning the occurrence type of a natural hazard process, three monitoring strategies can be distinguished (Sättele, 2015): precursors of processes that evolve slowly are monitored; precursors of processes that are triggered spontaneously are monitored; process parameters of processes that are triggered spontaneously are monitored.

It should be noted that the designs of early warning systems differ depending on the disaster for which they are designed. For example, the early warning system for nuclear preparation is based on the Arduino software, a GPRS shield, and radiofrequency technology to send ambient radiation measuring results and meteorological data (Farid, Prawito, Susila, & Yuniarto, 2017). The aforementioned early warning system comprises continuous monitoring of ambient radiation and an alarm mechanism. In addition, the system was intended to continually monitor the gamma air dosage rate in the facility's environment. The dependability of sensors, data transmission equipment, and data processing mechanisms at the Server all indicate environmental radiation online monitoring (Farid et al. 2017). Khankeh, Hosseini, Farrokhi, Hosseini, and Amanat (2019) found that there has been no systematic evaluation of early warning system models, structures, and components, and there have been some attempts to fully analyze early warning system models and components. One of the recognized innovations is stochastic early warning system design, which uses a risk measure as a reference variable to allow integration of the many impacts collected by monitoring devices (Medina-Cetina & Nadim, 2008). As mentioned, the risk measure not only acts as a logical index for determining warning levels but also integrates EWS into a decision-making framework.

PRACTICE AND SOLUTIONS IN WARNING SYSTEMS

In different countries, certain systems are applied that specialize in certain types of hazards, but on the other hand, have their advantages and disadvantages. In Italy, there is an operational warning system for shallow landslides that monitors the whole region and displays real-time results on a graphical interface via a dedicated software module called SMART – shallow landslides movements announced by rainfall thresholds (calibrated through a database of 160 landslides with hourly information of gauged precipitation and time of triggering) (Alfieri et al., 2012; Tiranti & Rabuffetti, 2010).

Multi-hazard Early Warnings, applied in China, includes multi-agency coordination, cooperation, and participation in disaster prevention mechanisms (Rogers & Tsirkunov, 2011). Also, the China Meteorological Administration (CMA), for example, issues fourteen categories of warning signals: tropical cyclones, heavy rain, heavy snow, cold surges, strong wind, dust, heatwaves, droughts, thunder and lightning, hail, frost, heavy fog, haze, icy roads (Tang & Zou, 2009). Worldwide, national Meteorological and Hydrological Services in charge of hydrometeorological-related early warning systems continuously conduct systematic monitoring and observation of hydrometeorological indicators, provide various data in real-time, analyze hazards and perform mapping as well as hazard forecasting (Rogers & Tsirkunov, 2011).



A group of German scientists developed a concept for a tsunami early warning system for the region (German-Indonesian Tsunami Early Warning System) which presents complete new technologies and scientific concepts to reduce early-warning times down to 5–10 min with the integration of near real-time GPS deformation monitoring as well as new modeling techniques and decision supporting procedures (Rudloff, Lauterjung, Münch, & Tinti, 2009). In Finland, the monitoring unit of the national forecasting system includes measuring stations and manual measurements for precipitation, water level, discharge, run and snow water equivalent, ice thickness, water temperature (SKYE, 2013). In England, more than 200 stations measure meteorological parameters, including air temperature, atmospheric pressure, precipitation, wind speed and direction, humidity, cloud height, and visibility. In addition, technologies such as weather satellites, balloons, and aircraft measurements are applied (Legg & Mylne, 2004). In Switzerland, alarms (acoustic or optical signals) are directly issued to endangered persons or the public, in contrast to warnings that are issued to inform responsible authorities about potential risks (Martina Sättele, 2015).

In Serbia, according to the current Law on Disaster Risk Reduction and Emergency Management (Official Gazette of RS, No. 87/2018), the public alarm system consists of appropriate acoustic sources (sirens), devices for transmitting and receiving signals for remote control of sirens, portable roads and other equipment and specialized civil protection units for alerting. It is also prescribed that local governments perform procurement, installation, and maintenance following their risk assessments, acoustic studies, technical standards, etc. It is important to mention that local governments have a legal obligation to complete acoustic studies within 3 years, and if they do not have a remote activation system, they must have specialized civil protection units for alerting. The mentioned system is managed by the Ministry of Internal Affairs. It is important to mention that sirens were installed in Serbia almost 50 years ago, and it can be said that their functionality is largely questionable. Also, even after 11 years of the stated intention to introduce the universality of the system “number 112 for emergency calls” which was supposed to provide coordinated, rapid, and efficient intervention and assistance in disasters, in full compliance with standards and practices present in European Union countries is not yet functional (Cvetković, 2020).

In the late 1940s, the United States began to build its federal early warning system as part of a post-war drive to invest in decreasing the effect of tropical cyclones, floods, storms, drought, tsunamis, and other dangers that endangered its population (Buan & Diamond, 2012). All of this contributed to the development of the National Response Framework, the Incident Command System, the multi-channel Emergency Alert System, and federal, state, and local policies that encouraged increased hazard awareness, risk mitigation, and disaster preparation (Buan & Diamond, 2012). Integration of MultiChannel Disaster Alert Systems include three main elements (Klaft & Ziegler, 2014, p. 2): a) one or more instances of alert message producers, i.e. distinct front-ends used by various authorities for creating and defining alert messages; an alert message repository as a central storage location for alerts from multiple, dispersed warning systems; c) dissemination channels - the messages repository's specified interface allows for the inclusion of new alert message distribution systems as they become available.

The Russian early-warning system, which was developed to provide Soviet strategic forces with information in the event of a nuclear disaster, has two main components: a network of early-warning radars and a space-based early-warning system with satellites in highly elliptical and geosynchronous orbits (Podvig, 2002). Russia has over 90 satellites that were initiated between 1972 and 2003 to form the early warning system's satellite constellation (Paleologue, 2005). It is significant to mention that there are different platforms, and one of them is the first operational runoff forecasting system in Russia which is open forecast based only on open-source software and data—GR4J hydrological model,



ERA-Interim meteorological reanalysis, and ICON deterministic short-range meteorological forecasts (Ayzel et al., 2019).

The Japanese government launched a new countrywide early-warning system for landslide disasters in 2005 and the system's core technique is to establish criteria for debris flow and slope collapse events based on multiple rainfall indicators in each 5-km grid mesh encompassing all of Japan (Osanaï, Shimizu, Kuramoto, Kojima, & Noro, 2010). Earthquake early-warning systems, first introduced in Japan, have facilitated the communication of very short-term warnings that earthquake movements from earthquakes will arrive in seconds to tens of seconds. Currently, the national system exists only in Japan, but regional systems are becoming available in many earthquake-prone countries, including the United States. Another means of earthquake prediction is the operational prediction of earthquakes based on the occurrence of seismic activity of various types, which increases the short-term probability that additional earthquakes, including harmful earthquakes, could occur in a few hours to a few days (Goltz & Roeloffs, 2020).

As part of the UrbanFlood FP7 project, Krzhizhanovskaya et al. (2011) created a prototype of an early flood warning system. Sensor networks are deployed in flood barriers (dikes, embankments, etc.). The system analyzes sensor signal anomalies, estimates dike failure probabilities, and simulates probable cases of dike breaking and flood propagation, among other things. An interactive decision support system uses all the essential information and simulation results to enable dike managers and city officials to make educated decisions in disaster situations and normal dike inspections. A considerable number of initiatives aiming at developing better and "smarter" flood protection systems have been completed in recent years (Akhtar, Corzo, van Andel, & Jonoski; Artan, Restrepo, Asante, & Verdin; Gouldby, Krzhizhanovskaya, & Simm, 2010; Pengel et al., 2013; Thennavan et al., 2020; Chakma et al., 2021): DAREnet project (Cvetkovic & Martinović, 2020); the FLOODsite project – a set of efficient models essential for flood risk analysis as well as the management methodologies (Morris, Kortenhuis, & Visser, 2009); Delft-FEWS – a hydrological forecast and warning system (Gijssbers); Flood-Control 2015 – an advanced forecasting and decision support system (Pengel et al., 2013).

It is currently impossible to provide an accurate earthquake forecast (Kanamori, Hauksson, & Heaton, 1997). However, also a few seconds of early warning time for different vital facilities will be beneficial for pre-programmed disaster actions. For earthquakes that occur spontaneously without precursors and are the most challenging process for prediction. Because of that, designed systems produce so-called shake maps, which graphically illustrate measured ground vibrations immediately after an event to establish and organize emergency measures in areas in need of help (Gasparini & Manfredi, 2014). In Taiwan, an earthquake early warning system has been created thanks to the Central Weather Bureau's installation of a real-time strong-motion network (Hsiao, Wu, Shin, Zhao, & Teng, 2009).

Effective Early Warning Systems require improvements in weather warnings (Gunasekera, Plummer, Bannister, & Anderson-Berry, 2005): Extended warning lead time; enhanced alert quality; the increased need for probabilistic predictions; better communication and distribution; the use of new alerting mechanisms; Aiming for suitable and particular customers of warning services (proper, right-of-the-matter information) and notifications and necessary action is understood. There are two concepts, central systems in which the national organization performs these functions and decentralized systems where these tasks are carried out more locally by other agencies, cities, counties, volunteer organizations, and employees in assessing who performs the first two phases of the Early Warning Systems, i.e. monitoring and provision (De León et al., 2006)

There are lot of challenges facing early warning systems: warning communication and community response capabilities; a lack of clear, unambiguous, and precise messages; the use of various channels of



communication; the regional understanding of early warning “bottom-up” provides multidimensional sensitivity to issues and requirements through the active participation of surrounding people; and different groups have different priorities; dissemination structures need to be handy to all (old, young, deaf and dumb); schooling of the general public and their recognition need to be improved; understanding of risks and threats; appreciate and synchronization with the extent of preparedness and reaction capacity; unique dangers require unique early caution structures (distinction among drought and tsunami; problems in predicting volcanic eruptions because of insufficiently advanced technical measuring devices; Many structures which are capable of trouble warnings for some of natural hazards are in place; suitable warnings and the capability of the general public to receive, recognize and reply to the issued caution in a well-timed and powerful manner, atmospheric failures are commonly nicely included in international via the countrywide meteorological and hydrological offerings of the World Meteorological Organizations; , whether or not maps and statistics are available, inadequate improvement of countrywide incorporated chance discount and chance control capabilities; the detection of nearby flash foods, prompted through nearby heavy rainfall and the response of small catchments stays a prime challenge.

More systemic, cross-cutting, and applied research is required, including on the following issues (Basher, 2006): improvement and use of geospatial facts models, risk maps and scenarios, cost-powerful observations systems, development of center prediction machine models and prediction equipment, caution choice machine equipment for disaster managers, control under caution uncertainty, assessment and assessment of caution communicate methods, fashions of human reaction conduct such as evacuations, visualization of influences and reaction alternatives for network preparedness, etc.

To improve the functioning of early warning systems, it is necessary to meet certain prerequisites regarding the various stages of functioning (Rogers & Tsirkunov, 2011): 1. monitoring and warning service: institutional mechanisms established; monitoring systems developed; forecasting and warning systems established; 2. dissemination and communication: organizational and decision-making processes institutionalized; effective communication systems and equipment installed; warning messages recognized and understood; 3. response capacity: warnings respected; disaster preparedness and response plans established; community response capacity assessed and strengthened; public awareness and education enhanced.

CONCLUSION

By identifying different models for early warning systems, the preconditions are created for the development of a comprehensive model that will enhance all the advantages and minimize all the observed disadvantages. Early warning systems and the technology and instruments which enable them to operate best if they are incorporated into the society in which they live, comprehensible, and relevant. To improve these systems, serious political commitment and institutional support are needed for the implementation of innovative solutions and the implementation of further scientific research with the aim of their comprehensive development. In many countries, different systems are used to warn the public of natural hazards and they differ significantly in the degree of their scientific and technological basis and functionality. It is necessary to improve the infrastructure of such systems, raise the level of awareness of the population about the ways of reacting and encourage the implementation of scientific research to develop innovative solutions.



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REFERENCES

1. Akhtar, M. K., Corzo, G., van Andel, S., & Jonoski, A. Rainfall from Satellite Data and Artificial Neural Networks. WaterMill Working Paper Series, 2008, no. 3
2. Alcántara-Ayala, I., & Oliver-Smith, A. (2019). Early warning systems: lost in translation or late by definition? A FORIN approach. *International Journal of Disaster Risk Science*, 10(3), 317-331.
3. Alfieri, L., Salamon, P., Pappenberger, F., Wetterhall, F., & Thielen, J. (2012). Operational early warning systems for water-related hazards in Europe. *Environmental Science & Policy*, 21, 35-49.
4. Alias, N. E., Salim, N. A., Taib, S. M., Mohd Yusof, M. B., Saari, R., Adli Ramli, M. W., Ismail, N. (2020). Community responses on effective flood dissemination warnings—A case study of the December 2014 Kelantan Flood, Malaysia. *Journal of flood risk management*, 13, e12552.
5. Aloudat, A., & Michael, K. (2011). Toward the regulation of ubiquitous mobile government: a case study on location-based emergency services in Australia. *Electronic Commerce Research*, 11(1), 31-74.
6. Artan, G. A., Restrepo, M., Asante, K., & Verdin, J. (2002). A flood early warning system for Southern Africa. In *Proc., Pecora 15 and Land Satellite Information 4th Conf.*
7. Ayzel, G., Varentsova, N., Erina, O., Sokolov, D., Kurochkina, L., & Moreydo, V. (2019). OpenForecast: The First Open-Source Operational Runoff Forecasting System in Russia. *Water*, 11(8), 1546.
8. Basher, R. (2006). Global early warning systems for natural hazards: systematic and people-centred. *Philosophical transactions of the royal society a: mathematical, physical and engineering sciences*, 364(1845), 2167-2182.
9. Buan, S., & Diamond, L. (2012). Multi-hazard early warning system of the United States National Weather Service. In *Institutional Partnerships in Multi-Hazard Early Warning Systems* (pp. 115-157): Springer.
10. Bubar, A., Eckstein, B., Ell, A., Hilts, E., Martin, S., Powell, T., Rios Rincon, A. (2020). Emergency siren detection technology and hearing impairment: a systematized literature review. *Disability and Rehabilitation: Assistive Technology*, 1-9.
11. Chakma, U., Hossain, A., Islam, K., Hasnat, G. T., & Kabir, M. H. (2021). Water crisis and adaptation strategies by tribal community: A case study in Baghaichari Upazila of Rangamati District in Bangladesh. *International Journal of Disaster Risk Management*, 2(2), 37-46. <https://doi.org/10.18485/ijdrm.2020.2.2.3>
12. Chen, A., Zhu, H., Ni, X., & Su, G. (2020). Pre-warning information dissemination models of different media under emergencies. *Chinese Physics B*, 29(9), 094302.
13. Cvetković, V. (2020). Disaster risk management (Upravljanje rizicima u vanrednim situacijama). Beograd: Naučno-stručno društvo za upravljanje rizicima u vanrednim situacijama.



14. Cvetkovic, V. M., & Martinović, J. (2020). Innovative solutions for flood risk management. *International Journal of Disaster Risk Management*, 2(2), 71-100.
15. Cvetković, V. M., Nikolić, N., Radovanović Nenadić, U., Öcal, A., K Noji, E., & Zečević, M. (2020). Preparedness and preventive behaviors for a pandemic disaster caused by COVID-19 in Serbia. *International journal of environmental research and public health*, 17(11), 4124.
16. De León, J. C. V., Bogardi, J., Dannenmann, S., & Basher, R. (2006). Early warning systems in the context of disaster risk management. *Entwicklung und Ländlicher Raum*, 2, 23-25.
17. Fakhruddin, S. H. M., & Chivakidakarn, Y. (2014). A case study for early warning and disaster management in Thailand. *International journal of disaster risk reduction*, 9, 159-180.
18. Farid, M. M., Prawito, Susila, I. P., & Yuniarto, A. (2017). *Design of early warning system for nuclear preparedness case study at Serpong*.
19. Fearnley, C. J., & Dixon, D. (2020). Early warning systems for pandemics: Lessons learned from natural hazards. *International journal of disaster risk reduction*, 49, 101674.
20. Fujita, K., & Shaw, R. (2019). Preparing International Joint Project: use of Japanese flood hazard map in Bangladesh. *International Journal of Disaster Risk Management*, 1(1), 62-80.
21. Gasparini, P., & Manfredi, G. (2014). Development of earthquake early warning systems in the European Union. In *Early warning for geological disasters* (pp. 89-101): Springer.
22. Gijsbers, P. (2010). *Opportunities and limitations of DelftFEWS as a scientific workflow tool for environmental modelling*. *International Environmental Modelling and Software Society (iEMSs)*.
23. Glantz, M. H. (2003, October). Usable science 8: early warning systems: do's and don'ts. In *Report of workshop* (pp. 20-23).
24. Goltz, J. D., & Roeloffs, E. (2020). Imminent Warning Communication: Earthquake Early Warning and Short-Term Forecasting in Japan and the US. In *Disaster Risk Communication* (pp. 121-153): Springer.
25. Gouldby, B., Krzhizhanovskaya, V., & Simm, J. (2010). Multiscale modelling in real-time flood forecasting systems: From sand grain to dike failure and inundation. *Procedia Computer Science*, 1(1), 809.
26. Grasso, V. F., & Singh, A. (2011). Early warning systems: State-of-art analysis and future directions. *Draft report, UNEP*, 1.
27. Gunasekera, D., Plummer, N., Bannister, T., & Anderson-Berry, L. (2005). Natural disaster mitigation: role and value of warnings. *Economic value of fire weather services*, 3.
28. Guo, X., & Kapucu, N. (2019). Examining stakeholder participation in social stability risk assessment for mega projects using network analysis. *International Journal of Disaster Risk Management*, 1(1), 1-31.
29. Hsiao, N. C., Wu, Y. M., Shin, T. C., Zhao, L., & Teng, T. L. (2009). Development of earthquake early warning system in Taiwan. *Geophysical research letters*, 36(5).
30. Indrasari, W., Iswanto, B. H., & Andayani, M. (2018 2018). *Early Warning System of Flood Disaster Based on Ultrasonic Sensors and Wireless Technology*.
31. Intrieri, E., Gigli, G., Mugnai, F., Fanti, R., & Casagli, N. (2012). Design and implementation of a landslide early warning system. *Engineering Geology*, 147, 124-136.



32. Kanamori, H., Hauksson, E., & Heaton, T. (1997). Real-time seismology and earthquake hazard mitigation. *Nature*, 390(6659), 461-464.
33. Khankeh, H. R., Hosseini, S. H., Farrokhi, M., Hosseini, M. A., & Amanat, N. (2019). Early warning system models and components in emergency and disaster: a systematic literature review protocol. *Systematic reviews*, 8(1), 1-4.
34. Kim, J. J., & Guha-Sapir, D. (2012). Famines in Africa: is early warning early enough? *Global health action*, 5(1), 18481.
35. Klafft, M., & Ziegler, H. G. (2014, April). A concept and prototype for the integration of multi-channel disaster alert systems. In *Proceedings of the 7th Euro American Conference on Telematics and Information Systems* (pp. 1-4).
36. Krzhizhanovskaya, V. V., Shirshov, G. S., Melnikova, N. B., Belleman, R. G., Rusadi, F. I., Broekhuijsen, B. J., Bubak, M. (2011). Flood early warning system: design, implementation and computational modules. *Procedia Computer Science*, 4, 106-115.
37. Kuligowski, E. D., Kuligowski, E. D., & Doermann, J. (2018). *A review of public response to short message alerts under imminent threat*: US Department of Commerce, National Institute of Standards and Technology.
38. Kull, D., Mechler, R., & Hochrainer-Stigler, S. (2013). Probabilistic cost-benefit analysis of disaster risk management in a development context. *Disasters*, 37(3), 374-400.
39. LaBrecque, J., Rundle, J. B., & Bawden, G. W. (2019). Global navigation satellite system enhancement for tsunami early warning systems. *Global Assessment Report on Disaster Risk Reduction*.
40. Legg, T. P., & Mylne, K. R. (2004). Early warnings of severe weather from ensemble forecast information. *Weather and Forecasting*, 19(5), 891-906.
41. Mechler, R. (2016). Reviewing estimates of the economic efficiency of disaster risk management: opportunities and limitations of using risk-based cost-benefit analysis. *Natural Hazards*, 81(3), 2121-2147.
42. Medina-Cetina, Z., & Nadim, F. (2008). Stochastic design of an early warning system. *Georisk*, 2(4), 223-236.
43. Mills, A., Chen, R., Lee, J., & Raghav Rao, H. (2009). Web 2.0 emergency applications: How useful can Twitter be for emergency response? *Journal of Information Privacy and Security*, 5(3), 3-26.
44. Morris, A., Kortenhaus, A., & Visser, P. J. (2009). Modelling breach initiation and growth. Executive summary.
45. Ocal, A. (2019). Natural disasters in Turkey: Social and economic perspective. *International Journal of Disaster Risk Management*, 1(1), 51-61.
46. Öcal, A., Cvetković, V. M., Baytiyeh, H., Tedim, F. M. S., & Zečević, M. (2020). Public reactions to the disaster COVID-19: a comparative study in Italy, Lebanon, Portugal, and Serbia. *Geomatics, Natural Hazards and Risk*, 11(1), 1864-1885.
47. Osanai, N., Shimizu, T., Kuramoto, K., Kojima, S., & Noro, T. (2010). Japanese early-warning for debris flows and slope failures using rainfall indices with Radial Basis Function Network. *Landslides*, 7(3), 325-338.

48. Paleologue, A. (2005, May). Early warning satellites in Russia: What past, what state today, what future?. In *Modeling, Simulation, and Verification of Space-based Systems II* (Vol. 5799, pp. 146-157). International Society for Optics and Photonics.
49. Pengel, B. E., Krzhizhanovskaya, V. V., Melnikova, N. B., Shirshov, G. S., Koelewijn, A. R., Pyayt, A. L., & Mokhov, II. (2013). Flood early warning system: sensors and internet. *IAHS Red Book*, 357, 445-453.
50. Perera, C., Jayasooriya, D., Jayasiri, G., Randil, C., Bandara, C., Siriwardana, C., Kamalrathne, T. (2020). Evaluation of gaps in early warning mechanisms and evacuation procedures for coastal communities in Sri Lanka. *International journal of disaster resilience in the built environment*.
51. Piciullo, L., Calvello, M., & Cepeda, J. M. (2018). Territorial early warning systems for rainfall-induced landslides. *Earth-Science Reviews*, 179, 228-247.
52. Podvig, P. (2002). History and the current status of the Russian early-warning system. *Science and global security*, 10(1), 21-60.
53. Rai, R. K., van den Homberg, M. J. C., Ghimire, G. P., & McQuistan, C. (2020). Cost-benefit analysis of flood early warning system in the Karnali River Basin of Nepal. *International journal of disaster risk reduction*, 47, 101534.
54. Rogers, D., & Tsirkunov, V. (2011). Implementing hazard early warning systems. *Global Facility for Disaster Reduction and Recovery*, 11, 1-47.
55. Rudloff, A., Lauterjung, J., Münch, U., & Tinti, S. (2009). Preface” The GITEWS Project (German-Indonesian Tsunami Early Warning System)”. *Natural Hazards and Earth System Sciences*, 9(4), 1381-1382.
56. Sättele, M. (2015). *Quantifying the reliability and effectiveness of early warning systems for natural hazards* (Doctoral dissertation, Technische Universität München).
57. Sättele, M., Bründl, M., & Straub, D. (2016). Quantifying the effectiveness of early warning systems for natural hazards. *Natural Hazards and Earth System Sciences*, 16(1), 149-166.
58. Sharma, B. N., Jokhan, A. D., Kumar, R., Finiasi, R. W., Chand, S., & Rao, V. (2015). Use of short message service for learning and student support in the Pacific region. In: Springer.
59. SKYE (2013). Hydrological observations, Finnish Environment Institute, URL http://www.environment.fi/en-US/Maps_and_statistics/Hydrological_observations, last accessed: 2013
60. Sorensen, J. H. (2000). Hazard warning systems: Review of 20 years of progress. *Natural Hazards Review*, 1(2), 119-125.
61. Tang, X. and Y, Zou, 2009: Overview of Shanghai MHEWS and the Role of NMHS. Second Experts’ Symposium on MHEWSs with focus on the Role of NMHSs, 5-7 May 2009, Toulouse, France. <http://www.wmo.int/pages/prog/drr/events/MHEWS-I/Presentations/Session%201/Shanghai/ShanghaiMHEWS.pdf>
62. Thennavan, E., Ganapathy, G., Chandrasekaran, S., & Rajawat, A. (2020). Probabilistic rainfall thresholds for shallow landslides initiation – A case study from The Nilgiris district, Western Ghats, India. *International Journal of Disaster Risk Management*, 2(1), 1-14.
63. Thomalla, F., & Larsen, R. K. (2010). Resilience in the context of tsunami early warning systems and community disaster preparedness in the Indian Ocean region. *Environmental Hazards*, 9(3), 249-265.



64. Tiranti, D., & Rabuffetti, D. (2010). Estimation of rainfall thresholds triggering shallow landslides for an operational warning system implementation. *Landslides*, 7(4), 471-481.
65. Toya, H., & Skidmore, M. (2018). Cellular telephones and natural disaster vulnerability. *Sustainability*, 10(9), 2970.
66. UNISDR (2012). Terminology. UNISDR (United Nations International Strategy for Disaster Risk Reduction, 2004), Geneva. Available from: <http://www.unisdr.org/we/inform/terminology>. Accessed 23 July 2021.
67. UNISDR (United Nations International Strategy for Disaster Reduction) (2005). Hyogo framework for action 2005–2015: Building the resilience of nations and communities to disasters. Available from: https://www.unisdr.org/files/1037_hyogoframeworkforactionenglish.pdf Accessed 23 July 2021.
68. Villagrán de León, J. C., Pruessner, I., & Breedlove, H. (2013). Alert and warning frameworks in the context of early warning systems.
69. Yang, J., Zhang, H., Wang, C., & Tang, D. (2018). Research on disaster early warning and disaster relief integrated service system based on block data theory. *International Archives of the Photogrammetry, Remote Sensing and Spatial Information Sciences*, 42, 3.



THE ROLE OF CBRN LIVE AGENT TRAINING IN EDUCATION OF FIRST RESPONDERS

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Abstract: In the modern security architecture, CBRN threats represent one of the most dangerous and devastating threats with immediate and prolonged effects both on people and the environment with additional security and economic consequences. The prompt and professional response has a key role in the management of the crisis caused by CBRN agents. That is why the first responders need to be trained and qualified individuals with special equipment and working methods. The aim of this paper is to present the importance of a holistic approach in training, through the integral CBRN activities that include chemical, biological, and radiological field detection and decontamination procedures, medical response and personal protection, sampling, and laboratory analytical methods as well as adequate security procedures and protocols. Having in mind that time of reaction and adequacy of responses are the key factors for crisis management, as the main conclusion of this paper a necessity to improve the skill of the first responders through comprehensive training during which trainees must be familiarized with different types of threats, respond protocols, techniques, and equipment is recognized. Due to the complexity of the research subject, which requires knowledge from different scientific fields, qualitative research design has been applied which includes a literature review, qualitative content analysis, and scenario methods.

Key words: CBRN threats, CBRN agent training, security, the first responders

INTRODUCTION

In contemporary security studies, the use of CBRN agents is perceived in several ways: as an asymmetric threat (Lambakis, 2015), as a weapon that defines a type of war (Lele, 2014), as well as an emergency situation caused by accidental release or exposure to toxic industrial material (also known



as Hazmat) and deliberate release of hazardous material (Calder and Bland, 2015). The institutional efforts are directed in two ways: focusing on the prevention of the hostile misuse of CBRN agents, materials and knowledge, and building proactive and reactive capacities in case of an accident.

The origin of these threats can be different, starting with accidents during the transport of dangerous goods, then accidents that occur during the work processes in industry, nuclear plants, or laboratories, as well as accidents that happen as a result of weather disasters such as earthquakes and typhoons. However, the origin of CBRN threats can also be found in the activities of terrorists and organized criminal groups, whether they pretend to use or resell these agents. The effects of CBRN agents are varied and dependent on the agent involved, impingement area, incident conditions (weather, terrain, time), and exposures to life, systems, and environment (Bhardwaj, 2010:157). Common for all CBRN accidents is that they leave serious health, environmental, economic, and security consequences, have large psychological impact on the population and require an integral response from different institutions.

Individuals and teams who are the first sent to the site of CBRN accidents to gather information, isolate the scene and mitigate consequences are the first responders. Their primary task is to apply the basic identification methods to adequately recognize and classify the type of threat and organize activities to prevent the spread of agents and to protect people and the environment. This complex task does not require expertise, but an approach based on multidisciplinary knowledge from different fields of science with the aim of shortening the response time. For this reason, the first responders must know methods such as sampling, analytical methods, in order to define zones of action (hot, warm, and cold) in the shortest possible time, and take over all necessary activities in the chain of custody. The more professionally they undertake these activities, the faster and more efficient the work in the laboratory will be, and the response to the CBRN threat will be faster and more comprehensive.

The aim of this paper is to present, analyze and explain the importance of a holistic approach in CBRN live agent training of the first responders. This education includes an integral approach in CBRN activities that should harmonize treatment in chemical, biological, and radiological field detection and decontamination procedures, medical response and personal protection, sampling and laboratory analytical methods as well as adequate security procedures and protocols. CBRN live agent training requires participants to gain specific skills and knowledge through participation in lectures, demonstration exercises, and scenario-based simulations.

CHARACTERISTICS OF CBRN AGENTS

The risk of CBRN incidents has increased in recent years, due to advances in technology, wider use of these materials in industry, and medicine and increased willingness of terrorists to use unconventional weapons. CBRN threats fall into the category of 'dread' risks because they are often invisible, the consequences of contamination unknown, and they may have catastrophic potential (Carter, Drury & Amlôt, 2020). In security science, CBRN threats are perceived as complex, highly unpredictable events that are of low probability but of potentially very high impact. The main properties of CBRN agents – toxicity, latency, persistency and transmissibility (ICRC, 2020:6-7) - make the CBRN threats complex and with a multiple adverse effects. These threats can also have various manifestations, can be combined with other threats, and be carried out by different perpetrators. Therefore, an effective response to these threats require special readiness, knowledge, organization and interoperability between relevant institution and a cross-sectoral approach.



THE ORIGIN OF CBRN THREATS

A CBRN incident is defined as “any occurrence, resulting from the use of CBRN weapons and devices; the emergence of secondary hazards arising from counterforce targeting; or the release of toxic industrial materials (TIMs) into the environment, involving the emergence of CBRN hazards” (Joint Publication 3-41, 2016:I-1). Therefore, the origin of the CBRN usage differs and includes situations where it may be released during work processes unintentionally, as well as situation in which intentional releases and deliberate use of CBRN agents occur. ICRC recognizes many situations that can result in unintentional releases of CBRN agents:

- industrial accidents involving fire or explosion at a chemical plant or storage facility, an accident at a nuclear power plant, or a leak from a biological containment facility;
- accidents at military research, production, and storage facilities for chemical, biological or nuclear weapons;
- conflict situations in which a CBRN agent is released because of collateral damage to an industrial plant or a research, manufacturing or military facility;
- accidents during transport of CBRN agents for industrial or military purposes;
- natural outbreaks of a human, animal or plant disease, e.g. pandemic influenza in humans, foot and mouth disease in cattle and fungal blight in plants;
- natural disasters, such as an earthquake or tsunami, leading to damage of an industrial plant or a military or storage facility;
- contamination from previous incidents, e.g. sites of industrial accidents, or from locations formerly used for the production, storage or testing of CBRN weapons;
- remnants of war, such as lost, abandoned or unexploded CBRN weapons, or residual contamination from their use (ICRC, 2020:10).

Those situations of sudden and uncontrolled release of CBRN contaminants are mostly the result of non-compliance with working procedures or violations of security procedures by employees, inadvertency, technical-technological flaws, and obsolescence of infrastructure, natural factors or causality. The fact that in those cases the release of the CBRN agent is not deliberate does not have impact on the extent of the consequences, or lethality of accident, and requires the same activity in response and recovery as in any other CBRN event.

The second event that can occur is the situation in which CBRN agents have been intentionally released with the intention to cause injury and death and/or to generate fear and panic in population. Some of those situations are:

- the dispersal of CBRN agents as gases, liquids, aerosols, or solids in the air, or on the ground using munitions, explosives or other means of dispersal (e.g. spray devices), leading to contamination of widespread areas or within confined spaces or buildings;
- the use of CBRN agents in armed conflict or other situations of violence through purpose-built military weapons or improvised devices, with or without explosives;
- the use of CBRN agents for small or large-scale contamination of food or water supplies



- the targeted delivery of CBRN agents to individuals or groups, e.g. by post, leading to contamination of individuals and buildings (e.g. anthrax spores), or the use of CBRN agents to poison individuals (ICRC, 2020:10-11).

The perpetrators of such attacks can be both state, and non-state actors, including terrorists and organize criminal groups. The motivation for using this type of threat is different, but it is based on the fact that the use of this weapon has destructive power, destabilizes entire states, and leaves great political consequences. Unlike most other security threats where the consequence is in direct correlation with the number and organization of perpetrators, financial resources, availability of weapons, proximity to the target, etc., in the case of CBRN attacks even relatively small attacks with a limited number of direct casualties could have a significant impact on society. It could induce fear and panic, major socio-economic disruptions, and paralyze certain areas over a long time. So, one of the security imperative of any state is to prevent CBRN agents from getting into terrorists' hands. Because of the nature of CBRN threats, great attention is paid not only to the activity of terrorist organizations but also to lone wolves.

Concern about dual-use of goods and technologies is also present in security discussion on CBRN. This refers to those products that were designed to be used for peaceful and legitimate civilian or commercial purposes, but also have potential applicability in the development or enhancement of weapons' programs, including CBRN (Galatas, 2020:561). Many technical solutions improve different aspect of human life, but at same time increase CBRN insecurity as drone technology that improved delivery of CBRN agents, cyber-attacks targeting critical infrastructure and facilities.

As security paradigm evaluates, societies confront with new, transformed and combined threats. One of the newest kind of threats is hybrid threat defined as "any adversary that simultaneously and adaptively employs a fused mix of conventional weapons, irregular tactics, terrorism, and criminal behaviour in the battle space to obtain their political objectives" (Hoffman, 2010:443). In the constellation of hybrid threats, special attention should be merited on hybrid threats that involve the use of unconventional means and CBRN agents such as the use of toxic chemical agents (the assassination of Kim Jong Nam with VX in 2017, as well as the poisoning with Novichok of Sergei and Yulia Skripal in 2018 and Alexei Navalny in 2020) (Novossioloova and Martellini, 2021:8).

CLASSIFICATION AND EFFECTS OF CBRN AGENTS

CBRN is the acronym for nuclear, radiological, biological and chemical agents. These agents include a wide spectrum of materials and substances that have the potential to affect human health. Important characteristics of the agents include agent class, physical properties and onset of effects (latency) (Bland, 2014). The most usual classification of CBRN agents is listed below:

- Chemical agents: The main classes of chemical agents are:
- Nerve agents (organophosphorus compounds);
- Blistering agents (vesicants);
- Cyanides (also known as blood agents);
- Pulmonary agents (choking or lung damaging agents);
- Incapacitants (mental and physical);



- Toxic industrial chemicals (TICs). While this class of agent is used, there is significant overlap with other classes of chemical agents especially cyanides and pulmonary agents;
- Riot-controlled agents (RCAs). These agents used by law enforcement agencies are not prohibited by international conventions but may still have harmful effects;
- Pharmaceuticals. This class includes illicit and commercial drugs usually at supra-therapeutic or toxic doses.
- Biological agents: The two classes of biological agent are:
 - Live agents such as bacteria including rickettsia and chlamydia, viruses and fungi;
 - Toxins – chemical agents that are of biological origin and include those derived from bacteria, fungi, plants and animals (venom).
- Radiological material: This hazard can be classed by the type of ionising radiation present:
 - Alpha – a relatively large subatomic particle (similar to a helium nucleus) with limited range in air (millimetres) but significant damaging effects;
 - Beta – a small subatomic particle similar to an electron with a range in air of centimetres;
 - Gamma/X-ray – high-energy photons with no mass but highly penetrating;
 - Neutrons – normally associated with nuclear material and the fission (nuclear) process which are highly penetrating and with variable damaging effects.
- Nuclear material: The term nuclear material is generally used to describe material involved in the nuclear power or weapon industry, or as having fissile properties, i.e. the potential for the nucleus to be split and therefore generate energy, fission products and further neutron emissions.

Delivery methods strongly depend on physical properties and stability of agents as well as on vulnerable routes of absorption. The two types of delivery are overt or covert. Overt releases are likely to follow a conventional major incident response, while a covert release may go unrecognized for a period of time.

There are four major types of effects of CBRN agents on human health. Those are intoxication (due to an exposure to TIC, CWA or toxins), irradiation (due to exposure to ionizing radiation), infection (due to exposure to biological agents) and different types of injuries caused by subsequent trauma. Depending on the type of agent and the route of exposure, they can cause severe effects ranging from incapacity, through different types of damage, to lethal outcome. The time period between exposure and occurrence of the first medical symptoms is called latency period for chemical and radiological agents, or incubation period for biological agents. Proper recognition of symptoms and knowledge on latency and incubation periods is of profound importance in protective and medical response to a crisis. Figure 1 shows an onset of effects of some common CBRN agents.



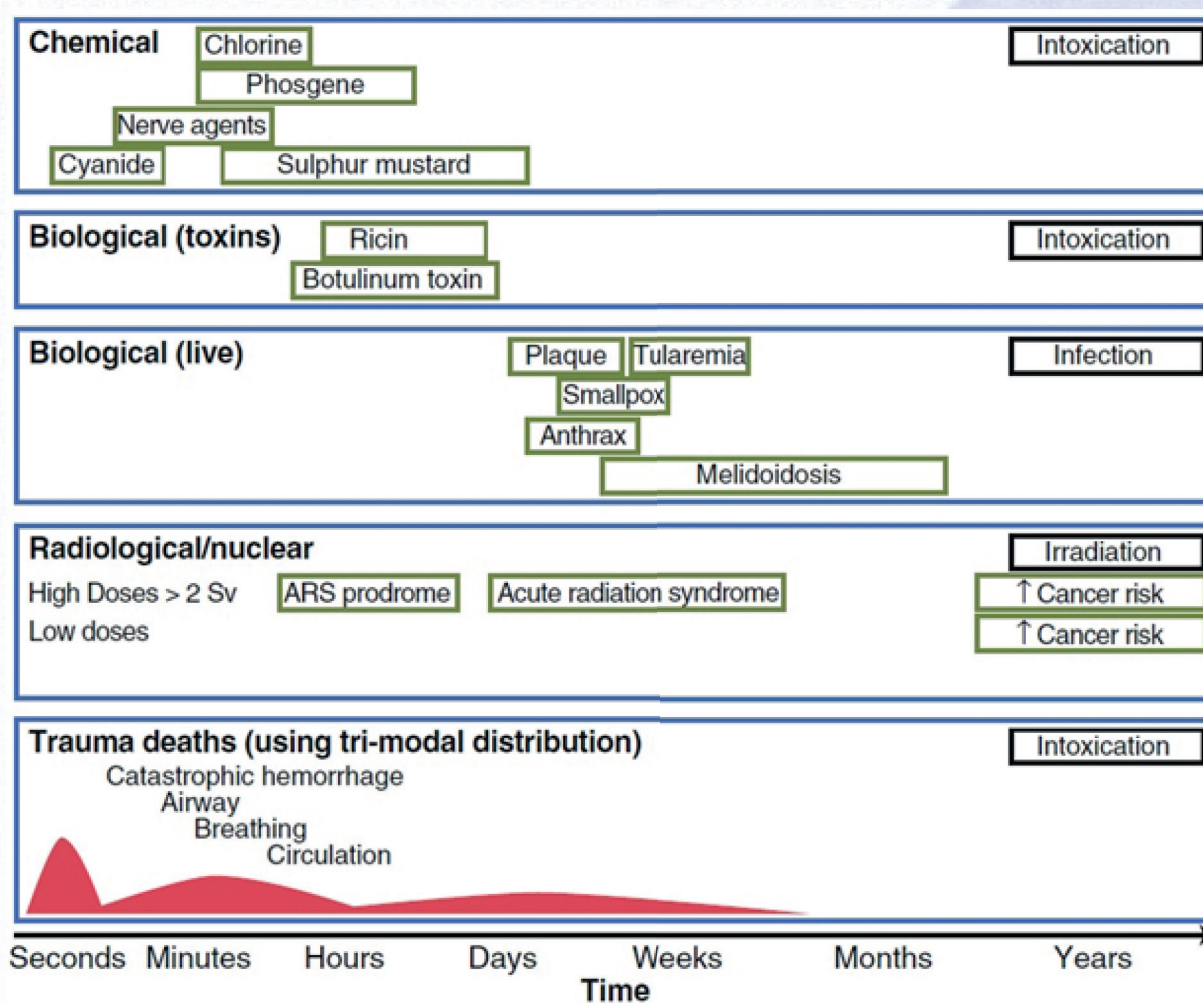


Figure 1: Onset of effects of some common CBRN agents (Bland, 2014:752)

INTEGRAL RESPONSE TO THE CBRN CRISIS

The first two decades of the 21st century are characterized by growing economic globalization, new technological advances, and emergence of the non-state actor with great influence on international politics. The new technological discoveries are advancing human society, but at the same time, they can be abused and become a security threat. In order to provide adequate countermeasures to those threats, it is necessary to establish the best response strategy on a national and international level. In the security strategies of most modern countries, the proliferation and misuse of CBRN agents is identified as a special risk. By reconsidering the risk management principles in the context of CBRN agents, it is possible to establish an integral response to the CBRN crisis.

Risk management is defined as “a process of identifying opportunities and avoiding or mitigating losses. To achieve these ambitious stipulations, it must be a structured and systematic process. In this process it is necessary to establish an understanding of the risks associated in a way that enables an organization to minimize losses and maximize opportunities” (Blum, et al. 2013:434). The main purpose of risk management is to prepare stakeholders for potential problems that can occur unexpectedly and

to facilitate anticipating problems in advance. Phases of risk management arise from two basic activities – risk assessment and risk evaluation (Figure 2).

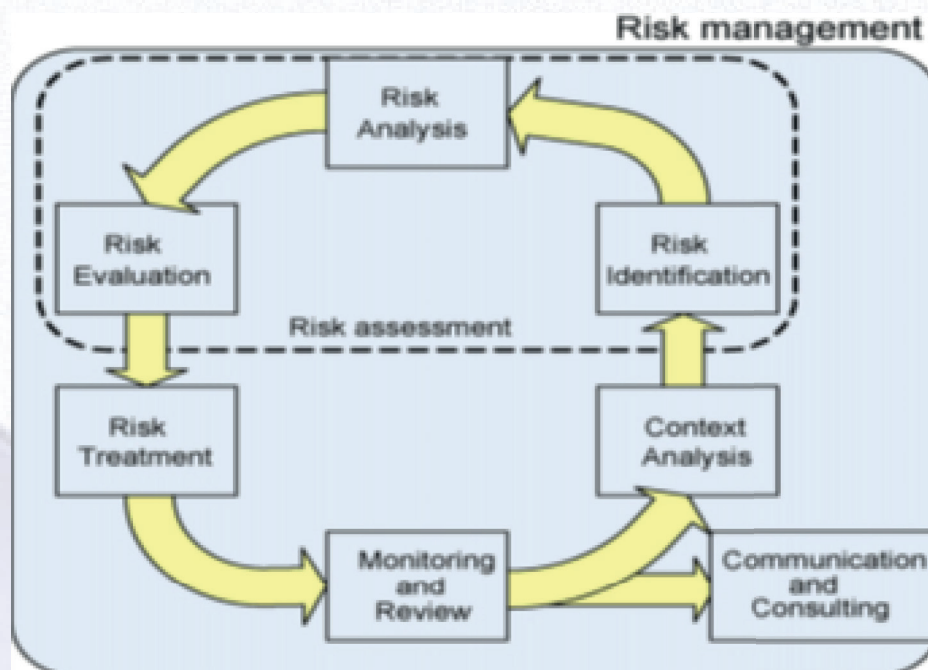


Figure 2: Risk management phases (Aloini et al., 2007:548)

Risk assessment is the function of identifying the threats and vulnerabilities for a given resource, articulating the risk, and rating that risk on a given scale. Risk evaluation is the function of determining the proper steps to manage the risk, whether they be to accept, mitigate, transfer or avoid the risk exposure (Wheeler, 2011:47). The presented matrix is generic and applicable to different types of risk areas – production, marketing, financial, legal, and human, etc. The complexity of security risks, their interdependence, and the context in which they occur require a comprehensive risk management approach that includes various specific elements. Lemyre et al. have identified four interrelated elements of risk management that should provide scientifically sound, cost-effective, integrated actions that reduce or prevent risks:

- 1) issue identification, including understanding the social, cultural, ethical, political, and legal context of the problem;
- 2) risk assessment - that is, hazards identified, likelihood of adverse outcomes estimated, risks and benefits characterized;
- 3) the identification, selection, and implementation of risk management options; and
- 4) the on-going monitoring of risk management interventions (Lemyre et al., 2005:318).

Security risk management requires a comprehensive approach that includes the establishment of adequate context, understanding the nature of security threats, identifying relevant stakeholders, analysing the characteristics of potential perpetrators, the causes, contributing factors and actual or potential consequences, and many other factors. Due to these specific elements, certain activities of crisis management are modified, while the basic phases remain unchanged.

CBRN RISK MANAGEMENT

In order to prevent and reduce the risk of CBRN incidents modern states establish integrated CBRN risk management which includes preventing, detecting, preparing for, and responding to the deliberate misuse of CBRN. Numerous actors with clearly defined roles participate in mitigating and providing a response to this kind of incident. NATO has developed the Guidelines for First Responders to a CBRN Incident (2014) that provide guidance in procedures, capabilities, and equipment required to implement an effective response incorporated in a matrix with four sections. Each section gives detailed advice, but for the purpose of this research, we summarize that matrix in one process shown in Figure 3.

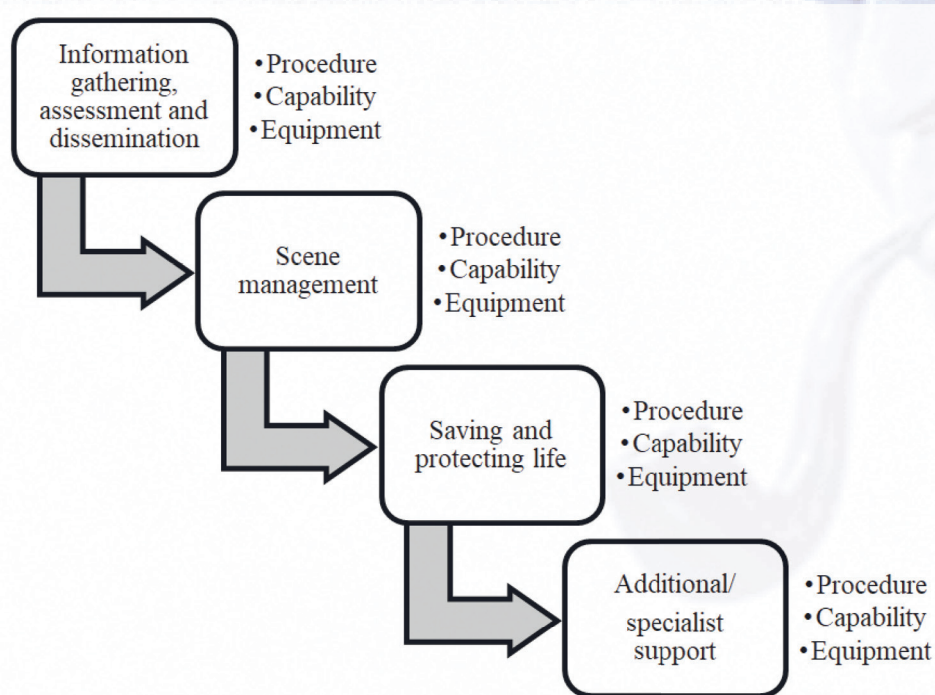


Figure 3: *Alternative representation of steps in response to a CBRN Incident*

In each of the identified phases, a large number of different actors are involved, applying special procedures in order to ensure effective and coordinated response to CBRN crisis. All actors involved need to have a common understanding of actions required during the initial response phase. It is crucial that activity of stakeholders be fully integrated with high level of cooperation and coordination. The precondition for that is CBRN live agent training, especially of first responders.

The term “first responders” refers to individuals and teams that are involved in activities which address the immediate and short-term effects of a CBRN incident (Guidelines for first responders to a CBRN incident, 2014). This includes personnel from police, fire brigades, health services, security services and private security providers, environmental specialists, soldiers, and scientists and laboratory specialists (Kaszeta, 2013:5) acting to minimize the consequences of a CBRN incident. First responders have different basic skills, education and experience that need to be unified during CBRN live agent training.

THE EDUCATION OF FIRST RESPONDERS

In order to secure a proper respond to different CBRN threats, the first responders should go through large-scale trainings which cover a wide variety of lectures, practical demonstrations and complex exercise scenarios. The personnel involved in all stages of an incident response and post incidental recovery should be familiar with the whole process, protocols and rolls of other involved teams. They should gain both theoretical and practical knowledge in possible CBRN threats and agents, the use of PPE (personal protective equipment), the application of safe work practices, the chain of custody protocols, the proper identification and decontamination methods, medical emergency, as well as applicable legislation.

The stated especially concerns all emergency and security personnel that will directly respond to possible CBRN incidents. For these teams, the CBRN live-agent training courses should be designed in order to provide them with knowledge, skills and abilities to work confidently in protective clothing in a toxic environment containing chemical agents, toxic industrial chemicals, biological agents and radiological or nuclear materials (Stolar, 2012).

Every kind of training has its advantage. It can be cost-efficient, fast or practical, but only genuine theoretical education, paired with usual training tasks and live agent training can bring responders as close as possible to the problems they will have in reality. It is possible to use simulations or films and past experiences in the training, or to use materials which can simulate an agent in practical exercises. Unfortunately, these types of training carry one evident problem: there is no real CBRN danger and, therefore, they create less stress. When it is time for the real incident, everything looks a lot different. That is why the live agent trainings have paramount importance in preparation of the first responders for real life situations. These trainings can be tailored to meet specific customer needs and can be conducted with the use of chemical or biological agents, radiological materials and explosive devices.

For instance, Coughlin states the main advantages of live agent training (Coughlin, 1992, Appendix I p.4):

- a. Toxic/live agent training is more stressful and builds confidence more effectively than training with stimulants.*
- b. A soldier who has trained with toxic agents is a more credible expert/trainer than a soldier who has trained with stimulants alone.*
- c. No existing stimulant adequately replicates a chemical agent physically, physiologically or psychologically for training purposes.*
- d. Live/toxic agent training, by increasing the confidence and credibility of Chemical Corps soldiers, increases the readiness of those soldiers and of their units. Our current level of NBC readiness cannot be sustained without live agent training.*

The course program should be designed to ensure that participant develop high level of proficiency in application of operational equipment – the detectors and their operational modes, sampling packs, auto injectors, decontamination equipment, etc. Furthermore, they need to understand and experience all the factors that influence the effectiveness of CBRN equipment, e.g. they should be capable to recognize how the use of PPE affects their psychological and physiological abilities during a real crisis situation. It is shown how it looks in practice in Figure 4.





Figure 4: Photographs of outdoor training exercises at Vinca Institute, Serbia

The on-going challenge for instructors is to expose their trainees to the full range of potential CBRN threats in a way that is *safe, realistic and easily repeatable* (Pike, 2020) and to gain a common level of knowledge to work safely and effectively in a toxic environment.

The comprehensive approach in CBRN live agent training includes three consecutive phases. During the first phase the trainees get introduction in theoretical knowledge on the subject. The aim of the second phase is to provide a practical demonstration by highly educated and experienced personal, i.e. instructors. In the final stage, the trainees are involved in practical application of gaining knowledge from the previous phases in both indoor and outdoor simulations and complex scenarios.

CONCLUSION

The very fact that a CBRN agent has been released would cause a high level of fear and stress in the exposed population. This is a direct consequence of both the ignorance to the characteristics of this threat, and the lack of knowledge on protection behaviour, which are common to the general public. Additionally, there are other aggravating factors such as the seriousness of the consequences which include even death of people and long-lasting destruction of the environment. For this reason, states are making great efforts in developing adequate and comprehensive CBRN crisis management as one of the best proactive/reactive solutions for this type of crisis.

CBRN crisis management is a very complex activity because at the same time several very demanding tasks need to be realized. The following activities need to be implemented simultaneously: urgently gather relevant information in difficult conditions, isolate the scene of a CBRN event in order to mitigate consequences, protect contaminated victims and provide an operational response that includes identification and confirmation of used agents, establishing the level of contamination, providing medical support, treatment of casualties and other activities in the chain of custody.

In the case of a CBRN event, time and adequacy of responses are key factors for crisis management. For this reason, the expert approach of the first responder must not be questioned. First responders must have adequate theoretical and practical knowledge in order to apply properly timed and professional response. Such skills can be acquired only as part of comprehensive training during which the trainees must be familiarized with different types of threats, response protocols, techniques and equipment. After this initial stage of the training they should systematize the existing knowledge in the field by observing the trained instructors on how to act in certain situations, and, as the last step of the training, the trainees should practice all the necessary procedures under the supervision of highly educated instructors. In this way, the trainees will acquire the necessary knowledge and skills to behave in real situations which leave no room for improvisation.

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REFERENCES

1. Aloini, D., Dulmin, R., Minninno, V. (2007). Risk Management in ERP Project Introduction: Review of the Literature. *Information & Management*. 44, pp. 547-567.
2. Bhardwaj, J. R. (2010). Chemical, Biological, Radiological, and Nuclear disaster management. *Journal of Pharmacy and Bioallied Sciences*. 2(3), pp. 157-158.
3. Bland, S.A. (2014) Chemical, Biological, Radiological and Nuclear (CBRN) Casualty Management Principles. In: Ryan J. et al. (eds) *Conflict and Catastrophe Medicine* (747-770). London: Springer.
4. Blum, M., Richasdt, A., Kehke, K. (2013). CBRN Risk Management – Are We Prepared to Respond?. Richardt A. et al. (Eds.) *CBRN Protection - Managing the Threat of Chemical, Biological, Radioactive and Nuclear Weapons* (433-476). Weinheim: Wiley-VCH Verlag & Co. KGaA.
5. Calder, A., & Bland, S. (2015). Chemical, biological, radiological and nuclear considerations in a major incident. *Surgery (Oxford, Oxfordshire)*, 33(9), 442–448.
6. Carter, H., Drury, J., & Amlôt, R. (2020). Recommendations for improving public engagement with pre-incident information materials for initial response to a chemical, biological, radiological or nuclear (CBRN) incident: a systematic review. *International Journal of Disaster Risk Reduction*, 101796.



7. Coughlin, R.J, et al. (1992) The Impact of Toxic Agent Training on Combat Readiness. *U.S. Army Chemical School*. Fort McClellan, AL, USA.
8. Galatas, I. (2020). Prevention of CBRN Materials and Substances Getting into the Hands of Terrorists. In: Schmid, A. (ed.). *Handbook of Terrorism Prevention and Preparedness* (pp. 555-587). Hague: The International Centre for Counter-Terrorism.
9. Hoffman, F. G. (2010). "Hybrid Threats": Neither Omnipotent Nor Unbeatable. *Orbis*, 54(3), 441–455.
10. International Committee of the Red Cross ICRC (2020). *Chemical, Biological, Radiological and Nuclear Response –Introductory guidance*, E-book.
11. Joint Publication 3-41 (2016). *Chemical, Biological, Radiological, and Nuclear Response*.
12. Kaszeta, D. (2013). *CBRN and Hazmat Incidents at Major Public Events – Planning and Response*. New Jersey: John Wiley & Sons, Inc. Publication.
13. Lambakis S. (2005). Reconsidering Asymmetric Warfare. *Joint Forces Quarterly*, pp. 102-108.
14. Lele, A. (2014). Asymmetric Warfare: A State Vs Non-State Conflict. *OASIS*, 20, pp. 97-111.
15. Lemyre, L., Clément, M., Corneil, W., Craig, L., Boutette, P., ... & Krewski, D. (2005). A psychosocial risk assessment and management framework to enhance response to CBRN terrorism threats and attacks. *Biosecurity and bioterrorism: Biodefense strategy, practice, and science*, 3(4), 316-330.
16. NATO Civil Emergency Planning Civil Protection Group (2014). *Guidelines for First Responders to a CBRN Incident*.
17. NATO Civil Emergency Planning Civil Protection Group (2014). *Guidelines for First Responders to a CBRN Incident*.
18. Novossioloova, T., Martellin, M. (2021). Effective and Comprehensive CBRN Security Risk Management in the 21st Century. *Non-Proliferation and Disarmament Papers*. No. 75.
19. Pike, S. (2020). *Enhancing the simulation of real-life CBRN threats*, CBRN/HazMat Training Blog, Argon Electronics, Luton, published online.
20. Stolar, A. (2012) Live CBRN agent training for responders as a key role in a safe crisis recovery, in: *Correlation Between Human Factors and the Prevention of Disasters*, IOS Press p.58-66
21. Wheeler, E. (2011). *Security Risk Management: Building an Information Security Risk Management Program from the Ground Up*. Amsterdam, Boston: Elsevier.



MODELS OF SCHOOL-BASED PREVENTION POLICIES FOR REDUCING SCHOOL VIOLENCE

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Abstract: We experience the presence of violence as a reality, and we feel it even more by showing violence on television as a "normal" part of our daily lives. Garbarino argues that millions of children and adolescents around the world grow up surrounded by violence (Dogutas, 2011, p. 2), and even more frightening is the fact that it occurs in places that are perceived as safe, such as family and school.

School violence as a subject of public discussion has become dominant in the last few decades in the world (Show, 2004, p. 94) although this does not mean that it is a new problem in the societies. In fact, it is believed that since there are schoolyards, there are bullies in the school, there are fights between children, there are cases related to extortion of money or the children are experiencing harassment from other children. But dilemmas over whether any form of school violence is a normal part of every student's childhood are slowly disappearing, and research is focusing on exploring many different aspects of school violence. In addition to the analysis of the phenomenological and etiological characteristics of school violence, an even more important aspect of the analysis is which prevention policies, programs and measures are most effective in preventing or reducing it.

Therefore, the subject of this paper are the models of school-based preventive policies and programs which aim to prevent school violence, with the purpose to determine their effectiveness or their impact in terms of developing a positive child behaviour and reducing the violence in schools. Through the analysis of the literature, it can be noticed that in different countries and in different social contexts, different types of school-based prevention policies and programs that are applied show different results. Hence, the solutions to how to deal with school violence are very diverse, ranging from classroom conflict management to the development of national programs, from the creation of experimental schools to school-police-legal partnership teams. Certain preventive policies have aim to enact more rules, to tighten the sanctions (zero tolerance

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policy) (Carra, 2009, p. 105), to strengthen school safety through the involvement of the police and other security measures and some of the policies are focused on learning socio-emotional skills or they are based on principles of the restorative discipline. Therefore, from a scientific and applicative point of view, it is necessary to identify the positive aspects of different policies and programs and to apply them appropriately to prevent or reduce certain types of violence in a certain social context.

Keywords: models, school violence, prevention, children

INTRODUCTION

Violence against children and among children is an important topic in modern criminological and victimological research in recent decades. The data from some studies show that up to 50% of all children aged 2 to 17 years are thought to have been affected by a form of violence (physical, sexual, or emotional abuse) in the past year - the equivalent of 1 billion children (Hillis et al, 2016, cited in World Health Organization, 2019). Experiences of violence, particularly in childhood, can damage children's physical and mental health and affect their whole lives. Violence can also affect educational outcomes and children's potential to lead successful and prosperous lives (World Health Organization, 2019). In the hope that learning about violence in the early childhood can prevent it from occurring, schools often accept a mandate to offer violence prevention programs (Tutty, et al., 2005). There are several reasons why schools are places where prevention efforts should be implemented. First, early intervention is essential for learning nonviolent choices and the school is an ideal environment for that (Tutty, et al., 2005). Second, simply providing education and organized activities for children can help prevent violence: schools and education systems can help by encouraging parents and children to enrol and attend. Having quality education can increase the likelihood of taking part in organized activities, which can make it less likely that children will become involved in aggressive behaviour or violence (World Health Organization, 2019). The social, behavioural and academic success in school often predicts the adjustment and productivity of children in their adulthood (Tutty, et al., 2005). Third, skilled teachers can deliver violence prevention programs and act as significant role models outside the family or community life. Schools can reach parents, improving parenting practices that may be harmful to children's health and education (World Health Organization, 2019). Fourth, violence should be seen as a major health issue, which should be addressed in the school curriculum (Tutty, et al., 2005). Based on the above-mentioned reasons, schools should increasingly engage in the development of effective programs for the prevention of violent behaviour in children and school violence. Prevention programs should be adapted to the needs of school but it is also essential to have them evaluated occasionally in order for their effectiveness to be determined and the need for their modification, supplement, or complete replacement with some other school based prevention program.

MODELS OF SCHOOL-BASED PREVENTION POLICIES FOR SCHOOL VIOLENCE

Solutions for responding to school violence have emerged over the past two decades, from classroom conflict management to the development of national programs, from the creation of experimental schools to school-police-legal partnership teams. Certain preventive policies are oriented toward increasing the rules, tightening sanctions (zero tolerance policy) (Carra, 2009, p. 105), to strengthen



school safety through the involvement of the police and other security measures. On the other hand, there are models that are based on learning socio-emotional skills or on restorative discipline.

When we elaborate about different prevention policies for school violence, first there is a question whether schools need external or internal prevention programs. External prevention programs for violence prevention are usually offered to schools by an external agency that has expertise in that area. One advantage of externally offered programs is that those who present the program are most often professionals that know the material well and are comfortable with the topic (Tutty, et al., 2005). Staff from external programs can comfortably discuss the violence prevention concepts with children, thus relieving teachers of some of the responsibility to handle disclosures and potentially embarrassing material. A disadvantage of external programs is that the use of the program is voluntary; only a portion of the children in an area will have access to the program (Tutty, et al., 2005). Those most likely to need the information, the individuals who know little about the problem, are least likely to be aware of the programs. Another disadvantage of external programs is that staff is in schools for a limited time. Internal programs are integrated directly into the schools curricula, into health or family life education classes. Another advantage of internal programs is that teachers can integrate violence prevention concepts with other relevant topics, such as self-esteem and resolving conflict, or as issues emerge between students. A disadvantage of school-based curricula is that some teachers may feel that the topic area is beyond what they should be expected to teach (Tutty, et al., 2005). It may be ideal to integrate both external and internal prevention programs for school violence.

Regardless of whether they are internal or external prevention programs, they can be part of a variety of different models based on different approaches and principles regarding the prevention of school violence. One of the most famous, but also the most criticized model for prevention of violence in schools is the **model of zero tolerance**. This model is based on the basic premise of punishing any violation of the rules, which means that for various student offenses such as violence, carrying a weapon, cigarettes, alcohol or drug use, they will always be punished. Zero-tolerance policies have gained widespread popularity among the US politicians and administrators as they promise to find a good solution to a difficult problem (Skiba, et al., 2011, p. 24). A study by the National Center for Education Statistics found that 79% of the schools included in the study had zero-tolerance policies (Flaherty, 2001, pp. 41-43). This type of policies and programs are stimulated by many factors. Among the factors leading to zero tolerance policies (primarily in the United States) are the school tragedies that occurred at Littleton, Colorado, Jonesboro, Ark., and in West Paducah School, Kentucky (Ashley & Burke, 2009). *But is the zero-tolerance policy effective?* It is hard to imagine that if something is banned it is enough to solve a problem such as school violence. The spirit of zero-tolerance policy is a punitive reaction and results in exclusion, conflict and refusal, so with this type of policy, the school “shuts its eyes” to violence and reduces the value of taking appropriate and different intervention (Twemlow, SW and Sacco, FC, 2008, pp. 11-13). Due to lack of resources, school staff often relies on quick correction, low-budget disciplinary actions that push students out of the classroom (Skiba, et al., 2011, p. 24). **Accordingly, there is no evidence that zero-tolerance policies can improve student behaviour, school climate or overall school safety.** Numerous exclusions have not been shown to be effective in changing student behaviour or improving school safety. One researcher concluded that students, in order to reduce their exclusion rates, change schools instead of improving their behaviour (Skiba, et al., 2011, p. 24). These policies have been criticized for “throwing” the problematic students out of school on streets, where there is a potential danger of being under certain influences that may further enforce their tendency to commit violence (Ashley & Burke, 2009). These punishments, by excluding students from school, provide more opportunities for those who are away from school (often with little parental supervision) to socialize with peers who show violent or deviant behaviour.



Law Enforcement Model. Schools increasingly respond to the perceived increase in violence by incorporating a law enforcement model to reduce violence among children. **Measures underpinning this model of prevention policy include** *the use of metal detectors, increased police presence in schools, student and staff cards, a ban on cell phone use in schools, school uniforms and mandatory punishment.* However, a study comparing violent and safe schools found that safe schools were described not as schools with police presence or which use police tactics, but as schools with leadership that inspires in the students a “sense of fairness, belonging and empowerment for effective change” (Kelker, 2003, pp. 71-75). This model is more suitable in cases when there is a danger for student’s safety by third parties entering the school, but not in cases when there is an occurrence of psychological forms of violence in schools.

Model of learning social skills. The basic premise of the social skills learning model is that differences in opinion and conflicts exist between children in the school environment. Thus, if schools aim to improve children’s behaviour, a fundamentally different approach is needed, i.e., the one *which is oriented on integrating learning and strengthening socio-emotional skills in students’ daily interactions.* This approach assumes that conflict is inevitable, educators and students need to understand the dynamics of the conflict and be prepared to deal with disagreements in constructive ways. Therefore, students can receive training for development of their social skills, problem solving and peaceful conflict resolution.

In the focus of the programs based on this model is the learning of socio-emotional skills. Based on the review of such programs, skills can be grouped into three categories: **emotional processes, social/interpersonal skills, and cognitive regulation** (Jones & Bouffard, 2012). Emotional processes include emotional knowledge and expression, emotional regulation and behaviour regulation, and empathy. Social/interpersonal skills include understanding social cues, interpreting other people’s behaviour, managing social situations, positive interaction with peers and adults, and other pro-social behaviours. Cognitive regulation includes attention control, inhibition of inappropriate reactions, cognitive flexibility, or shifting (Jones & Bouffard, 2012).

When it comes to the positive effects of this approach/model, numerous studies highlight the positive results of applying exercises that are based on learning socio-emotional skills. In fact, this approach has several advantages such as, time efficiency, low cost, and integration in school curricula. In terms of effects, evaluations of the programs that are based on the model for improving behaviour through learning socio-emotional skills show promising results for students. Meta-analysis of evaluations found positive effects (Durlak et al., 2011). A meta-analysis of evaluations of 213 primary school prevention programs analysed the positive effects through six categories. In all six categories: socio-emotional skills, attitudes towards self and others, positive social behaviours, behavioural problems, emotional stress, school success - the results were positive. However, the authors of the evaluation found that **for effectiveness of the programs only the program characteristics are not enough**, but the key factors are **the persistence and quality of its implementation** (Jones & Bouffard, 2012), which means that they need to be included in daily interactions, relationships and school practices.

Based on the consistent evidence of effectiveness (Kelker, 2003), it can be concluded that this approach/model in education and in skills development can be the most effective approach for improving children’s attitudes and behaviour, especially in the field of primary prevention and for increase of emotional intelligence.

Model of restorative discipline. The basic philosophy of restorative discipline which is based on restorative justice (established for the peaceful settlement of disputes) has found its way into education, recognizing that **the traditional approach is inappropriate for preventing and resolving problems.**



In fact, restorative discipline is seen as alternative for the zero-tolerance policy that focuses on excluding students even for various types of inappropriate behaviour.

The model of restorative discipline is based on a different philosophy from traditional discipline approaches in schools. **The restorative discipline approach asks the questions:** What happened?; Who was injured and what are the effects?; How can the mistake be corrected?; What did we learn in order to take into account the different opinions next time?, **in contrast to the traditional response-oriented approach**, What happened?; Who is to blame?; What is the appropriate punishment? (Hopkins, 2004, cited in Meyer & Evans, 2012). **Acceptance of the use of restorative justice principles by teachers and families in schools is commonly referred to as restorative practices** (Meyer & Evans, 2012). The essential belief of restorative practices is that there will be positive changes in people (students) when those who are in competent position do things WITH THEM, rather than targeting THEM or FOR THEM. Therefore, successful restorative practices:

- recognize relationships as a centre for community building;
- build systems that recognize inappropriate behaviours and injuries in a way that strengthens relationships;
- focus on the injure, rather than just on the breaking of the rule;
- give voice to the injured person;
- include cooperation in problem solving;
- enhance change and development;
- emphasize responsibility (Restorative justice or Restorative practices, n.d.).

McCluskey et al (2008) describe some of the key features of the schools that use restorative practices to improve student's behaviour:

- There is a positive school climate, which includes all students, where students have a strong sense of belonging;
- Students have positive relationships with adults at school and feel confident with each other, have high respect for their school community and can fix things when they do something wrong;
- School staff focuses on enhancing student achievement, rejects explanations for failure, and takes action for successful educational outcomes;
- Families feel welcome at school, participate in activities designed for parents, regularly receive information about the student and are involved in supporting the child's appropriate education, including actively locating their problems;
- The average daily school attendance is high;
- Students receive support and encouragement for their educational and socio-emotional needs, including positive relationships with the peers and the teachers;
- There is a comprehensive system of restorative discipline policies and practices with clear definitions of behaviours and consequences, and they are known in the schools and in the families;
- There is an on-going support - including threat assessment, crisis management and school suspensions to deal with serious behavioural problems;



- Restorative practices and mutual respect are the basis for interaction between the members of the school community, not retribution and punishment (Meyer & Evans, 2012).

The effectiveness and the success that demonstrate the restorative discipline policies is a sufficient argument that this approach should be part of any school prevention policy that aims to prevent or reduce child violent behaviour.

WHICH MODEL OF PREVENTION POLICY IS MOST EFFECTIVE FOR REDUCTION OF SCHOOL VIOLENCE?

There is no single answer to this question. In essence, it can be concluded that there is no universal solution. As William Modzeleski of the US Department of Education emphasized, ***“There is no one program, no silver bullet, so that you can get one program up and say, here it is if you put this program in your school, you are going to resolve violence”*** (Volokh & Snell, 1998). If all schools were the same, with similar rates of violence, with the same students, with the same quality of teachers and similarly dedicated staff, similar budget funds, then they would be free to establish the same policy for all schools. But the schools are not the same!

The first step before deciding which approach the school will apply is the assessment of violence. This assessment should include multiple assessment methods and use multiple data sources. Capaldi et al. (1997) argue that data should be collected from a variety of sources (e.g., home, school, community) from multiple sources of information (observers, children, peers, parents, teachers) and using a variety of methods (lab tasks, classroom, playground, questionnaires, interviews, standardized tests, records) (Swearer & Espelage, 2004, pp. 2-4). After *analysing the context in which programs should be adopted and implemented* **schools can identify the optimal approach and particular programs (with positive results from evaluations) that can resolve the issue of school violence.**

Volokh & Snell point out that, *the ideal violence prevention policy should be adjusted to the needs of each school* (Volokh & Snell, 1998). *The schools need a range of approaches ranging from the daily routines for students to school's extensive efforts to promote a supportive and positive climate, from programs for learning of socio-emotional skills for all students to intensive services for the students who need them most.* Some of the schools should use multiple approaches, from daily exercises for learning socio-emotional skills to intensive interventions (Jones & Bouffard, 2012). Other schools can start with daily exercises and add other components (interventions) if there is a need for that (Jones & Bouffard, 2012). In fact, the best approach is the implementation of integrated prevention models, which would mean the fusion of independent strategies or programs into a coherent program or strategy in schools (Domitrovich, et al., 2010). These integrated programs that target multiple risk and protective factors in an integrated manner may have a synergistic effect on preventing children violent behaviour and school violence at all.

CONCLUSION AND RECOMMENDATIONS

When analysing the issue of models of preventive policies for school violence, we can conclude that there is no ideal model of prevention policy, because the needs and problems of each school are different. What should be emphasized is that every school prevention policy should not be oriented solely



on reaction to the violence, preventing repeated violent behaviour of students, intimidation and punishment of the students, but it is necessary:

- to contain a series of approaches, *from daily activities, i.e. to have an integrated model of prevention, based on the model of learning socio-emotional skills (as part of primary prevention and the foundation of any preventive policy) and restorative approach in reaction to the violence, which is based on reconciliation, correction, learning from mistakes and consequences, responsibility, renewal and building trust, active cooperation of all parties including the victim, parents, school staff and providing assistance and reintegration for the victim and student with violent behaviour;*
- to emphasize the active role of students, family, as well as the wider environment in *undertaking* coordinated activities and interventions and actions for improving child behaviour and prevention of school violence.

REFERENCES

1. Ashley, J., & Burke, K. (2009). *Implementing restorative justice: A guide for schools*. Chicago: Illinois Criminal Justice Information Authority.
2. Carra, C. (2009). European trends in research into violence and deviance in schools: achievements, problems, and outlook. (C. Carra, & M. E. Hedibel, Eds.) *International Journal on Violence and Schools*, 10(VIOLENCES IN SCHOOLS: EUROPEAN TRENDS IN RESEARCH), 97-110.
3. Dogutas, A. (2011). *School violence in Turkey, Multiple perspectives in multiple settings*. Retrieved september 10, 2011, from <http://www.kent.edu/ehhs/oaa/dissertations/upload/dogutas-abstract-8-26-11-2.pdf>
4. Domitrovich, C. E., Bradshaw, C. P., Greenberg, M. T., Embry, D., Poduska, J. M., & Ialongo, N. S. (2010, January). Integrated models of school-based prevention: Logic and theory. *Psychol Sch.*, 47(1), 71-88. doi:10.1002/pits.20452
5. Flaherty, L. T. (2001). School violence : assessment, management, prevention. In M. Shafii, & S. L. Shafii (Eds.), *School violence : assessment, management, prevention* (pp. 25-52). Washington DC: American Psychiatric Publishing, Inc.
6. Jones, S. M., & Bouffard, S. M. (2012). *Social and Emotional Learning in Schools*. Society for Research in Child Development.
7. Kelker, K. A. (2003). Resolving Conflicts in Schools: An Educational Approach to Violence Prevention. In M. S. Fishbaugh, G. Schroth, & T. R. Berkeley (Eds.), *Ensuring safe school environments : exploring issues, seeking solution* (pp. 69-88). New York: Lawrence Erlbaum Associates Publishers.
8. Meyer, L. H., & Evans, I. M. (2012). *The School Leader's Guide to Restorative School Discipline*. Thousand Oaks: Corwin.
9. *Restorative justice or Restorative practicies*. (n.d.). Retrieved October 23, 2013, from <http://www.fixschooldiscipline.org/toolkit/educators/restorative/>
10. Show, M. (2004). Comprahenzive approches to school safety and security: an international view. In OECD, *School safety and Security- Lessons in Dangers* (pp. 92-107). Organisation for Economic Co-operation and Development.



11. Skiba, R., Boone, K., Fantanini, A., Wu, T., Strussell, A., & Peterson, R. (2011, september 15). Preventing School Violence: A Practical Guide to Comprehensive Planning. E SAFE AND RESPONSIVE SCHOOLS PROJECT AT THE INDIANA EDUCATION POLICY CENTER.
12. Swearer, S. M., & Espelage, D. L. (2004). Introduction: A Social-Ecological Framework of Bullying Among Youth. In D. L. Espelage, & S. M. Swearer (Eds.), *Bullying in American schools : a social-ecological perspective on prevention and intervention* (pp. 1-12). New Jersey: Lawrence Erlbaum Associates, Inc., Publishers.
13. Tutty, L., Bradshaw, C., Thurston, W., Ashley, B., Marshall, P., Tunstall, L., . . . Nixon, K. (2005). *School based violence prevention programs: Preventing violence against children and Youth*.
14. Twemlow, S.W and Sacco, F.C. (2008). *Why school antibullying programs don't work*. Maryland: The Rowman & Littlefield Publishing Group, Inc.
15. Volokh, A., & Snell, L. (1998, January). School Violence Prevention: Strategies to Keep Schools Safe. *Policy Study*.
16. World Health Organization. (2019). *School-based violence prevention: a practical handbook*. World Health Organization.



TOPIC IV

SOCIAL, ECONOMIC AND POLITICAL FLOWS OF CRIME





THE ECONOMIC CRIME, SOCIAL COSTS AND ECONOMIC GROWTH

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Abstract: Economic crime is one of the most serious threats to the security and stability of the countries and regions in the world. The crimes are growing at an alarming rate, and they are connected to the growing integrity of the world's economy. Many scientific studies prove that expenses for dealing with economic crime, along with its social expenses from the negative consequences are enormous and inhibitory to societies that are willing to achieve a sustainable level of economic growth and development. This scientific research through using inductive and deductive methods, analysis, and synthesis, as the comparative analysis of historical trends, aims to illustrate the problem with economic crime as a regional and global problem, to give its review for the conditions with these offences in the Republic of North Macedonia, to strengthen the connection between the number of evidenced economic offences and the growth of GDP through tendentious processing of data and analysis for the period of 9 years, and to collect pieces of advice for preventing and lowering of economic offences.

Keywords: economic crime, world economy, social costs, economic growth and development.

INTRODUCTION

Economic crime is a multidimensional occurrence. Its multidimensionality is reflected primarily in the sociological, economic, financial, political, cultural, psychological, legal, security and criminological components that it incorporates. The development of propulsive technique and technology has a

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proportional impact on the overall level of economic and financial crime. Technology is increasingly being misused as an instrument for economic and financial crime, making the crime more sophisticated and more difficult to notice. With the processes of globalization and financial liberalization, national boundaries for incriminating actions are becoming irrelevant as world economies and financial systems become more integrated. The determinants and characteristics of economic crime indicate a wide range of criminogenic actions with a sophisticated manner of execution, difficulties in their defining, determination and recording. All of this entails difficulties in measuring the social damage and the consequences on economic growth from economic crime. In this paper, starting from the determinants, characteristics, international framework and models for combating economic crime, the authors will point out the weaknesses in identifying this type of crime, define its transmission channels of influence in the economy, give visibility of the difficulties in measuring the impact of economic crime in society, and underline the problems and needs of developing countries, with a special focus on the Republic of North Macedonia, while proposing measures to improve the situation.

DETERMINANTS OF ECONOMIC CRIME

There is difficulty in establishing a comprehensive definition of economic crime, as well as in measuring the social costs and losses of such crimes. The difficulty to give a clear and unique definition stems from the fact that it is one of the basic determinants of the structure not only of total crime, but also of the structure of society. It arises and is determined by the economic, social, legal, political and social component of society. As a consequence of the vague definition of the term, numerous other problems appear, such as theoretical ambiguities and the perception of economic crime as a crime of the upper social class. Economic crime is a socially-negative criminal phenomenon committed by persons who possess a certain amount of knowledge in the field of economics, finance and payment operations and who in a criminal way, by using the entrusted powers and positions, acquire certain economic and financial resources, thus causing damage to the state budget and the citizens as a whole. It also includes financial crime.

E.H. Sutherland (1949) defines this phenomenon as a crime that occurs in the field of economic operations and whose forms of offenses are related to the purchase and sale of various shares, false advertising goods, false expression of financial condition of individual corporations, bribery of business partners, direct or indirect bribes of civil servants, in order to provide favorable arrangements, embezzlement, misappropriation of funds, tax evasion and the like. According to the recommendation R. (81) 12 adopted by the Council of Ministers of the Council of Europe, the following offenses are defined as economic crime defines: cartel offenses; fraud and abuse of the economic situation by multinational companies; fraud by obtaining and misusing state and international grants; cybercrime (data theft, breach of confidentiality of data; establishment of fraudulent companies; falsification of financial statements of legal entities or book-keeping offences; fraud – false representation of the economic situation and corporate capital of companies; violation of employees' insurance and health protection standards; fraud to the detriment of creditors (fraudulent bankruptcies, breach of banking or industrial rights); consumer fraud; unfair competition; fiscal offenses and public procurement fraud; customs offenses; According to document A/CONF.203/7 of the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, economic and financial crime is generally defined as nonviolent act resulting in financial loss (Mojsoska, Nikolovska Vrateovska & Vitanova, 2012).



CHARACTERISTICS OF ECONOMIC CRIME

Economic crime contains three important properties that define it, namely: the occurrence of large-scale damage, special status of perpetrators as bearers of responsible activity, and a special modality of enforcement that implies a complicated manner of enforcement. The main features of economic crime are: low visibility, complexity, difficulties in detecting the process, mild punishment policy, legal inaccuracy and problems with the status of delinquents. The importance of economic crime can be discussed in terms of the severity of the consequences, i.e. the damage caused primarily financially and socially, as well as the fact that this type of crime causes distortive processes that lead to destabilization of social relations. The complexity of economic crimes stems from the fact that for a long time neither the duration of these acts nor the perpetrators, and most often the consequences, are known; they do not manifest themselves immediately, because they are skillfully concealed. Economic crime is constantly changing its manifestations, resulting in poor detection results. Such crimes do not have a direct impact due to their non-violent nature. Hence, they do not attract direct public attention. Typically, perpetrators of economic crime are educated and sophisticated, using financial resources to build connections with law enforcement officials. Authorities often have to deal with the influence of officials and corrupt public servants, which complicates investigations and makes them even more expensive. Therefore, economic and financial crime is often referred to as "white collar crime". The forms in which white collar crime manifests itself are as varied as the ways in which it is carried out. Acquiring huge illegal profits is a common motive that connects organized and economic crime. When talking about economic crime, one must emphasize that an area that requires special focus in the analysis is money laundering. Money laundering is linked to other areas of illicit activity in the economic and financial system, such as the final activity involving criminally obtained finances in the legal system by organized crime groups. Because dirty money is the easiest to recognize when entering the financial system, entities that have an initial insight into financial transactions are essential to tackling this crime. Estimates show that about \$1.5 trillion is laundered annually worldwide. This striking figure, as well as the fact that money laundering directly affects the integrity and functioning of financial systems, financial stability, economic and overall social development, show why concerns about this phenomenon are growing worldwide (Mojsoska, Nikolovska Vrateovska & Vitanova, 2012).

INTERNATIONAL FRAMEWORK AND MODELS FOR FIGHTING ECONOMIC CRIME

Economic crime poses a serious threat to the development of democracy, the rule of law and human rights, as well as to national security, stability and economic development. Strong political will, perseverance, comprehensive knowledge, interdepartmental and international cooperation and commitment of the authorities, are necessary in fighting such crime. Modern industrial societies are characterized by dense interaction of global business relationships, new and fast communication trajectories, and increased opportunities for manipulation and fraud. The growing pressure from domestic and international competition is proportionally dependent on the use of illegal methods and instruments to make more money.

As existing basic international instruments in the fight against organized crime, in the subfields of which the authors will include economic crime and in its context – financial crime (Sulejmanov, 2000), are the four United Nations conventions: Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, The Convention against Transnational Organized Crime, The Conven-



tion against Corruption, and The Convention for the Suppression of the Financing of Terrorism – all of which include provisions for the fight against economic crime and money laundering. At the OECD Summit in Paris in July 1989, the Financial Action Task Force (FATF) was formed. The creation of this body is a result of recognizing the real threat to the security and stability of the world financial system from money laundering, and the determination of the seven most developed countries to take steps to protect their financial institutions from abuse by crime. The 40 recommendations defined by the Tasks Force were approved and recognized as the sole international standard by the International Monetary Fund and the World Bank.

The following channels of international cooperation have been established:

- Global, multilateral cooperation through INTERPOL (international criminal police organization established in 1923 in Austria and with 186 member countries);
- European multilateral police cooperation through EUROPOL (European Police Agency established by the Maastricht Treaty in 1992, as an information exchange body);
- Bilateral and regional cooperation between the states through ratified treaties, agreements, conventions and memoranda of cooperation of the given institutions and bodies, in the specific states mentioned in the agreements.

In May 2006, the Convention on Police Cooperation in Southeast Europe was adopted in Austria, whose signatories are Albania, Bosnia and Herzegovina, North Macedonia, Moldova, Romania, Montenegro and Serbia. This international act is a step forward for the signatory countries in order to strengthen police cooperation and coordinated action in the fight against crime.

In practice, two types of international cooperation are recognizable:

- First model: *Administrative (intermediary) model* (independent government body as a link between financial institutions and the bodies of justice and prosecution); *Police model* with a special unit in the Police for cooperation with INTERPOL; *Court model* (interaction: institution-prosecutor – investigation – indictment) and *Mixed police-court model* (institution – coordination of the Prosecutor's Office and the Police);
- Second model: *Judicial Unit, Administrative Unit and Unit of Law Enforcement Authorities* (Police, Customs, Financial Police).

DETERMINING AND MEASURING THE IMPACT OF ECONOMIC CRIME ON SOCIETY

Difficulties and inaccuracies in defining economic crime imply problems in defining the methodology for monitoring and statistical recording of such crimes. In the fight against crime, not only the existence of a functional system of unified recording of economic crimes is essential, but also the existence of a system for identifying the consequences of economic and financial crime and determining the further impact on society of such consequences. Crime has a significant impact on society. On the one hand, the criminal activity allows the consumption of illicit goods or services which could not otherwise be consumed. On the other hand, crime imposes great costs to the public and private actors, such as stolen and damaged goods, lost lives, security spending, pain, and suffering. The estimation of such social cost of crime has become an important field of study in the last few decades (Czabanski,



2008), which shows how crime imposes a significant burden onto society. For example, Brand and Price (2000) estimate the total crime costs in Wales and England for the Home Office, through using survey data. They estimate a total expenditure that equals 6.5% of the Gross Domestic Product (GDP). Anderson (1999) finds that the total annual cost of criminal activity in the United States accounts for 11.9% of the GDP. A recent work of Brandano, Detotto, and Vannini (2018) evaluates the burden of a subset of criminal offenses in Italy (about 65% of all criminal offenses) during the year 2006. The estimated total social cost exceeds 2.6% of Italian GDP. Although the identification and the estimation of crime costs have received wide attention in economic literature, the detrimental effect of crime to the (legal) economic activity is still neglected.

TRANSMISSION CHANNELS OF THE IMPACT OF ECONOMIC CRIME ON THE ECONOMY

Economic crime negatively affects economic performance. Defined transmission channels of influence are: reduced positive rational expectations of economic agents, reduced motive for investment from domestic and foreign investors, reduced competitiveness and productivity of companies, distrust in the justice system, distrust in the overall social system, flight of existing investments, outflow of capital out of the country, improper allocation of resources, declining productivity, declining economic growth, rising unemployment, outflow of available labor from the country, etc. Some econometric researches have shown that on average, a 1% increase in crime rate reduces real economic growth by 0.005% per year. The negative impact of crime also has a cyclical component of influence, i.e. it is 5% stronger during recessions relative to its impact during economic expansion (Detotto, Otranto, 2010).

THE PROBLEM OF DEVELOPING COUNTRIES

Experience shows that criminals target those countries where there is a lack of strong regulations. Criminal organizations transfer significant amounts of money through countries where regulation does not provide for effective cash flow monitoring. Therefore, in addition to international cooperation, harmonization of legislation in all countries will be a key imperative in the global fight against economic crime. To effectively prevent the wave of financial and economic crime, developing countries need to receive adequate financial, educational and technical assistance from developed countries in harmonizing national regulations, measures and instruments with international ones. The fight needs to be conducted through both a repressive approach and a preventive approach. It is necessary to have legal expansion of the scope of illegal and incriminating activities and report suspicious transactions, improve the effectiveness of the analysis of transactions in the international financial markets, define models for information flow management, strengthening and expanding the power of bodies that supervise financial transactions, establishing additional measures and instruments for combating economic and financial crime, and in the context of the need for international cooperation – providing adequate legal and human resources that would respond to the requests of other countries. The international community would also have the task to consider the issue of economic exploitation of smaller nations and to set appropriate game rules in order to protect their interests. The international community needs to coordinate its efforts and work more closely together to tackle transnational organized crime. The enhanced international approach should include coordinated action and cooperation supported by free exchange of information, exchange of experiences, mutual legal assistance and extradition measures.



THE CASE OF THE REPUBLIC OF NORTH MACEDONIA

The existing domestic regulations and the established available instruments and mechanisms for fight against economic crime in the Republic of North Macedonia have the following nomenclature:

- The first pillar is represented by the so-called subjects. Subjects are persons who are obliged to take measures and actions to prevent money laundering and terrorist financing provided by the Law on Prevention of Money Laundering, namely financial institutions, real estate agencies, auditors, accountants, notaries, lawyers, casinos, citizens' associations and others. According to the activity they perform, they can be financial subjects and non-financial subjects.
- The second pillar is presented through the Financial Intelligence Unit, originally established in 2001 as a Directorate, in 2008 it was transformed into the Office for Prevention of Money Laundering and Financing of Terrorism, and in 2012 it was renamed the Financial Intelligence Unit (within of the Ministry of Finance).
- The third pillar incorporates the law enforcement agencies: Public Prosecutor's Office, Ministry of Interior, Financial Police Directorate, Customs Administration, Financial Intelligence Directorate and State Commission for Prevention of Corruption, as well as indirectly competent bodies: Public Revenue Office, State Foreign Exchange Inspectorate, State Audit Office, State Market Inspectorate and State Labor Inspectorate.

The concise understanding of the phenomenon (manifestation forms) and the etiology (reasons for committing) of economic crime are in function of their more efficient detection and processing. The legal framework for the phenomenological analysis of economic crimes in the country is in Chapter 25 of the Criminal Code of North Macedonia: crimes against public finances, payment operations and economy, and in Chapter 30: crimes against official duty (Criminal Law, Official Gazette RNM, 2014). Among the emerging forms of economic crime in our country, according to their frequency and harmfulness, the following stand out: embezzlement in foreign trade and banking activities by violating the regulations on business, foreign exchange and credit-monetary system of the country, illicit trade in large quantities of excise goods (oil, coffee, cigarettes, alcohol, etc.), abuse of official duty, forgery of documents, tax evasion, embezzlement, financial fraud, causing bankruptcy (as a form of economic crime, as a consequence of economic crime and as a form of cover-up of economic crime), subsidy fraud and credit fraud, abuse of tax regulative and tax evasion, misuse of the system of export subsidies in trade in food products, competition violations, fraud, bribery, usury, counterfeiting, counterfeiting commissions and avoiding their reporting, etc. (Sulejmanov 2000).

The registered economic crime in the country in the period from 2005 to 2010 is in stagnation with small variations from year to year, in the interval from 2010 to 2013 it is decreasing (when the total volume of crime is increasing), while from 2014 and 2015 there is a slight growth trend, followed by a slight downward trend until 2017. Economic crime in the period from 2010 to 2014 averaged 5.1% of the total crime in the country (MOI, 2020).

To illustrate the correlation between economic crime and economic growth in the country, for the purposes of this paper, a series of data were processed in a time interval of 9 years on the number of registered acts in the field of economic crime at the Ministry of Interior of the Republic of North Macedonia (for the purposes of this paper, to be graphically workable and comparable, the absolute figures are divided by 100), as well as data on GDP growth rates in the country, also analyzed within the same nine-year time frame.



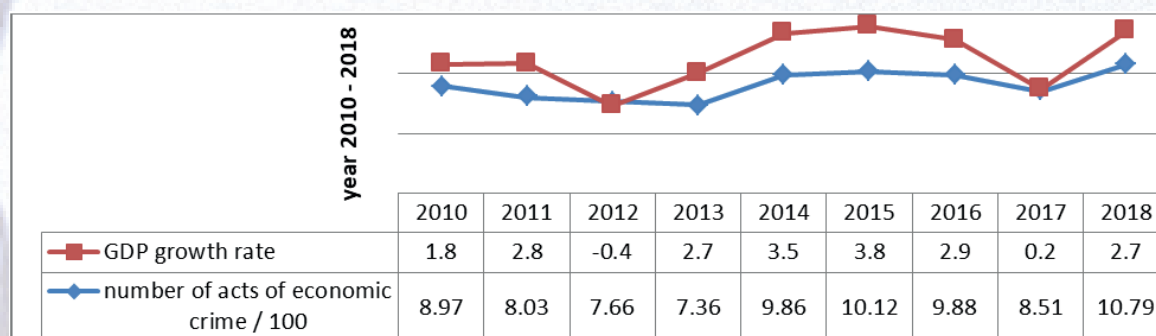


Chart No. 1. *Trend analysis of economic crime and GDP growth rate in the interval 2010–2018 in the Republic of North Macedonia Source: MOI, SSO, processed by the authors*

The trend analysis indicates a proportional relationship between the number of recorded economic crimes and the GDP growth rate, which is visible from Chart 1. From the graphic presentation it can be concluded that the intensification of the economic activity in the country is followed by a proportionally adequately increased growth in the number of registered acts in the field of economic crime. From this it can be concluded that the Republic of North Macedonia is facing the challenge of effectively tackling economic crime. Economic crimes in the country as an organized form of action are continuously present and represent a serious destruction not only for the rule of law, democracy and human rights, but also for the correct economic flows, the normal and smooth functioning of the economic subjects and for the sustainable economic growth and development.

CONCLUSION

Medium- and long-term economic crime continuously undermines effective economic governance, transparency and the rule of law. It also negatively affects the level of security, human well-being, equality and the degree of respect for human rights and freedoms. It benefits only a small number of individuals, leaving the majority poorer and with fewer resources. Determining the notion of economic crime, its phenomenology and etymology are important because their determination is the basis for planning and taking operational measures for its prevention, detection and sanctioning. The need for a serious comprehensive national, regional and international approach in both prevention and early detection and prosecution, stems from the enormous societal costs of tackling this type of crime, as well as the far-reaching negative impacts that economic crimes reflect on the social system as a whole. The difficulties in understanding the economic crime occur in the case of the Republic of North Macedonia, reflecting in the difficulties to introduce a single data bank that will aim to keep an eye on economic crimes, but also to generate data that will enable efficient and accurate monitoring and measurement of social costs for dealing with this type of crime, as well as for measuring the costs of the consequences it causes within the political, legal and economic system. All this entails the need to establish mechanisms at national, regional and international level to improve the collection of data on economic crime by creating models for measuring the overall social costs of this crime, providing effective technical assistance to developing countries in order to improve their capacity to solve the problem, and by strengthening international cooperation and the global legal framework for combating economic and financial crimes.

The views expressed in this paper do not necessarily reflect the views of the institutions where they are employed.



REFERENCES

1. Anderson, D. (1999). The Aggregate Burden of Crime. *Journal of Law and Economics*, 42(2), 611–642.
2. Brand, S., Price, R. (2000). *The economic and social costs of crime*. London: Home Office Research Study 217, Development and Statistics Directorate.
3. Brandano Giovanna, M., Detotto, C. and Vannini, M. (2010). Counting the Cost of Crime in Italy. *Global Crime Journals*, 11(4), 421–435.
4. Criminal Law (2014), Official Gazette RNM, No. 132/14.
5. Czabanski, J (2008). *Estimates of cost of crime: History, methodologies, and implications*. USA: Springer.
6. Detotto, C., Otranto, E. (2010). Does Crime Affect Economic Growth? *Kyklos*, 63 (3), 330–345.
7. Mojsoska, S., Nikolovska Vrateovska, D. and Vitanova, G. (2012). Money Laundering on the Financial Markets. International Scientific Conference – Security and Euroatlantic Perspectives of the Balkans – Vol., (pp. 477–486). Criminal Justice Abstract with Full Text in EBSCO database. Ohrid: University St. Kliment Ohridski Bitola, Faculty of Security.
8. Ministerstvo za vnatresni raboti na Republika Severna Makedonija (2020) Zbirna analiza za vkupni-ot kriminalitet po oblasti i sektori sporedbeno 2010–2019, <https://mvr.gov.mk/analiza/kriminal/55>. Accessed on February 16, 2020.
9. Republic of North Macedonia State Statistical Office MAKStat Database of the Republic of North Macedonia, <http://makstat.stat.gov.mk/PXWeb/pxweb/mk/MakStat/?rxid=46ee0f64-2992-4b45-a2d9-cb4e5f7ec5ef>. Accessed on February 16, 2020.
10. Sutherland, E. (1949). *White Collar Crime*. New York: Dryden Press.
11. Sulejmanov, Z. (2000). *Makedonska Kriminologija*. Skopje: Grafohartija.



LEGAL FRAMEWORK FOR WHISTLEBLOWING

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Abstract: The paper, apart from the introduction, conclusion and list of used literature, consists of three logical units. Starting from the fact that corruption endangers the democratic values of a society, the first part of the paper presents the foundations on which the systemic approach in combating corruption is built. The second part is dedicated to the legal framework for whistleblowing within the legal system of the Republic of Serbia. Special attention is paid to the analysis of factors that have negative impact on the number of whistleblowers, i.e. the problems that whistleblowers encounter in the whistleblowing process, in particular the absence of adequate protection and harmful consequences suffered by the whistleblower. The third part presents the characteristics and types of whistleblowing. Finally, the conclusion provides the opinion regarding improvement of the position of whistleblowers with amendments to the Law on Protection of Whistleblowers.

Keywords: public administration, corruption, whistleblower, whistleblowing, proving corruption.

INTRODUCTION

Corruption in the public administration endangers the fundamental values of a society and presents an indicator for assessing the degree of its democracy. Timely information on the commission of corruption, along with the efficient reaction of the competent public authorities, is a key precondition for a successful fight against corruption. The existence of a dark figure and the fact that there are no dissatisfied parties in corrupt activities unequivocally indicate that there are problems in detecting corruption. The present phenomenon of the “law of silence” poses a special problem. That is the reason why the importance of whistleblowers is significant for detecting and proving corruption. Personnel in administrative bodies is at the source of information and the first to get information about corruption. Reporting a colleague of corruption is often considered an unethical act and a reflection of disloyalty to the public authority in which the whistleblower is employed. On the other hand, there are legitimate concerns and many problems to which whistleblowers are exposed.

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In order to determine the contribution of whistleblowers to prevention, and especially to detecting and proving corruption, the subject of analysis is the enforcement of the Law on Protection of Whistleblowers (Official Gazette of RS, 2014), starting with understanding of the internal whistleblowing procedures in the administration, authorized persons and awareness of employees of its existence, presence of pressure to act in a certain manner, problems in the protection of whistleblowers.

TACKLING SYSTEMIC CORRUPTION

Effective fight against corruption in the administration, in terms of its content, implies an organized and long-lasting process of implementing previously thoroughly designed anti-corruption measures. The Constitution of the Republic of Serbia (Official Gazette of the RS, 2006) defines the National Assembly as the highest legislative body. In addition to the legislative function, the functions of the National Assembly pertaining to control and elections are extremely important in the implementation of anti-corruption measures. The control function is reflected in the supervision of the work of the Government, security services, the Protector of Citizens, as well as other bodies and authorities, in accordance with the Law on the National Assembly (Official Gazette of RS, 2010). Deputies have several control instruments, starting from asking parliamentary questions, all the way to direct participation in parliamentary bodies or committees (see more: Milenković, 2013). One of the systemic anti-corruption measures is the budget function of the National Assembly. It includes planning of budget, expenditures and justification of budget funds spent by direct and indirect budget users.

In the implementation of the envisaged anti-corruption measures, the role of independent control bodies is very important: the Protector of Citizens, the Commissioner for Information of Public Importance and Personal Data Protection, the Commissioner for Protection of Equality, the Agency for Prevention of Corruption, the State Audit Institution and the Republic Commission for Protection of Rights in public procurement procedures.

Representatives of the executive authorities are in charge of the implementation of the adopted anti-corruption laws and represent a very important segment in the implementation of the envisaged anti-corruption measures.

Public administration reform, envisaged by the Public Administration Reform Strategy in the Republic of Serbia (Official Gazette of RS, 2014), especially in the area of establishing an efficient system for prevention and fight against corruption, should contribute to reduction of opportunities for corruption within public administration.

The independence of the judiciary, as a constitutional category, in addition to being a fundamental value of the rule of law, is an unavoidable factor in the efficiency of the systemic fight against corruption. In order to strengthen the independence of the judiciary, it is necessary to institute a constitutional reform, which is also part of the obligations that the Republic of Serbia has undertaken to fulfill in the process of accession to the European Union.

The systemic fight against corruption in the administration, in principle, includes coordination of all stakeholders in taking anti-corruption measures. If there is no connection between the legislative, executive and judicial powers, the expected effects of the systemic fight against corruption in the administration will not be achieved. It is necessary that each of the mentioned authorities, in accordance with the constitutional principles and legal competencies, commences with implementation of the planned anti-corruption activities.



THE CONCEPT AND PROTECTION OF WHISTLEBLOWERS

The most important condition for an effective fight against corruption is the timely disclosure of information on corruption. The whistleblower is at the source of information on corruption, the whistleblower is an individual who, in the public interest, detects corruption in the administration authority. In order to remain constant in that readiness, the whistleblower must have clear information that gathering documentary evidence will be initiated and that all mechanisms to ensure their protection will be activated.

With the adoption of the Law on the Anti-Corruption Agency² in 2008 (Official Gazette of the RS, 2008), the first step was made in terms of the legal regulation of the issue of whistleblowers. In accordance with the Law, the Rulebook on the Protection of Persons Reporting Suspicions of Corruption (Official Gazette of the RS, 2011) was adopted and provided formal protection to whistleblowers. However, the Constitutional Court decided (Constitutional Court, IUz-295/2013) that the provision of Article 56 paragraph 5 of the Law on the Anti-Corruption Agency, as well as the Rulebook on the Protection of Persons Reporting Suspicions of Corruption, are not in accordance with with the Constitution.

Following the ratification of the UN Convention against Corruption (Official Journal of Serbia and Montenegro-International Agreements, 2005) and the Civil Law Convention on Corruption (Official Gazette of the RS-International Agreements, 2007), an obligation was created to have legally regulated protection of persons who report justified suspicions of corruption to the competent authorities. The adopted National Strategy for the Fight against Corruption for the period 2013-2018 stipulates the establishment of effective protection of whistleblowers, professional development of workers employed in the public sector, and undertaking activities aimed at raising public awareness of the rights and protection of whistleblowers.

There is no generally accepted definition of whistleblowers even among Member States of the European Union. The absence of a single, uniform definition of whistleblowers results in the absence of a single, uniform standard of protection (see more: Worth, 2019). The Law on Protection of Whistleblowers (Official Gazette of RS, 2014) defines a whistleblower as a natural person who engages in whistleblowing in the context of their work-based relationship, employment/recruitment procedure, use of services rendered by public and other authorities, holders of public authority or public services, as well as business cooperation or the right of ownership in a company, and whistleblowing as the disclosure of information about violations of regulations, human rights, as well as exercising public authorization contrary to the entrusted purpose³.

According to the current legal solution, legal entities do not have the possibility to be granted the status of the whistleblower, and, accordingly, to exercise the right to judicial protection on that basis⁴. The law provides for the possibility of protection of certain categories of persons who are not whistle-

2 By the Law on prevention of Corruption from 2019 the Agency for fight against corruption changed its name into the Anti-Corruption Agency.

3 The definition is very often identified with the English formulation "whistleblowing/ whistleblowers" which, in its essence, comprises disclosure of bad management, commission of illegal actions that are most often committed by persons employed within a public authority or a private run company.

4 There is a real possibility that the act of whistleblowing is initiated by a responsible person of another legal entity. As a consequence, there is a real probability that harmful consequences take place, which can be brought to a direct relation with the act of whistleblowing, for example, in the termination of business cooperation, non-fulfillment of the contractual obligation or non-exercise of rights despite the fulfillment of conditions.



blowers in terms of this law. These are connected persons, who suffer a harmful consequence due to the misconception that they are whistleblowers.

A special problem poses the absence of judicial protection of whistleblowing during the procedure of proving allegations of corruption. The judicial protection is possible for a limited time. It covers a period of six months from the day of learning about the impending harmful action and lasts for a maximum of three years from the day when the harmful action was taken. However, this deadline is insufficient. The possibility of judicial protection should be harmonized with the existing legal deadlines pertaining to the occurrence of relative or absolute obsolescence of criminal prosecution (Nenadić, 2017).

*The establishment of an effective whistleblower mechanism in the administration will largely depend on whether the whistleblower will suffer harmful consequences. It is unlikely that someone will decide to become a whistleblower if they know that previous whistleblowers were not protected and that they suffered harmful consequences. On the other hand, there is the problem of solidarity. For example, whistleblowing in the police is not generally approved by police officers (Workman-Stark, 2017). Some authors (Bouza, 2001) find the explanation in loyalty, where the public interest is subordinated to the *vow of silence* about corrupt practices.*

Whistleblowers exercise the right to judicial protection by filing a lawsuit for protection in connection with the whistleblowing. When it comes to compensation of damage, the provisions of the Law on Obligations⁵ are applied. Judicial protection is achieved by filing a lawsuit with the competent court, for protection in connection with the whistleblowing. The place of undertaking the harmful action, or the place of residence of the plaintiff, is determined by the jurisdiction of the acting court. The mentioned lawsuit can be filed within six months from the moment of learning about the harmful action, that is, three years from the moment when the harmful action was taken. The established deadlines for exercising the right to judicial protection may in certain situations prevent the exercise of the mentioned right⁶. Judicial protection procedure is urgent and is carried out with the similar application of the Law on Civil Procedure ("Official Gazette of RS" No. 72/2011), which regulates court proceedings in cases of labor disputes. In order to fully protect whistleblowers, revision as an extraordinary legal remedy is always allowed.

The lawsuit for protection in connection with the whistleblowing, among other things, contains the definition of the harmful act or its repetition, with the elimination of the consequence that occurred in the process. A lawsuit cannot challenge the legality of an individual act of the employer. The whistleblower may file a lawsuit to assess the legality of an individual act of the employer which decides on the rights, obligations and responsibilities of the whistleblower on the basis of work, if its adoption poses a harmful act in connection with the whistleblowing. The defendant bears the burden of disputing the stated claims of the plaintiff. During the procedure, as well as after its completion, and until its execution, the court may issue a temporary measure in accordance with the Law on Enforcement and Security ("Official Gazette of RS", 2015). A significant number of resolved cases has led to the establishment of court practice regarding certain rights of whistleblowers.⁷

5 Official Journal of SFRY no. 29/78, 39/85, 45/89-decision USJ, 57/89, "Official Journal of the FRY" no. 31/93 and "Official Journal of Serbia and Montenegro" no. 1 / 2003.-Constitutional Charter, Article 200.

6 For example, there is a possibility that the whistleblower, after the act of whistleblowing, be suspended by the employer from paying additional insurance. Since they were not informed about that, they can find out about the stated harmful consequence only when s/he meets the conditions for retirement. At the moment they find out that, the whistleblower has probably lost the right to judicial protection, in accordance with the Law on the Protection of Whistleblowers.

7 Court practice pertaining to determined, necessary facts has been established in order to prove the cause-



Published statistical data of the Supreme Court of Cassation, regarding the application of the Law on Protection of Whistleblowers, for the period from June 2015 to July 2017, apart from the trend of growth of resolved cases, show a trend of decreasing inflow of new cases⁸.

The implementation of the Law so far has not yielded the expected results. Insufficient motivation of persons to appear in the role of whistleblowers and the absence of an effective mechanism for protection of whistleblowers were noticed. These problems have also been recognized in EU countries, which has resulted in the adoption of the New EU Directive on the Protection of Whistleblowers (see more: Obradović and Bergant, 2018).⁹

CHARACTERISTICS AND TYPES OF WHISTLEBLOWING

The position of the whistleblower and the whistleblowing procedure itself are complex and depend on a large number of factors. In addition to a clearly defined procedure of whistleblowing, especially internal and external whistleblowing, the concretization of the subject of whistleblowing is of key importance.

Accordingly, establishing the existence of a suspicion of the existence of a corrupt act, whether it has been committed, or is being committed, by employees in administrative authorities, is a sufficient basis for whistleblowing. The effect of whistleblowing is largely conditioned by the quality of the evidence gathered. In doing so, a distinction should be made with regard to the attached relevant evidence collected by the whistleblower, in relation to which he indicates, and which are not in his possession at the time of initiating the act of whistleblowing. In order to concretize their claims, the whistleblower, before starting the act of whistleblowing, tries to document his claims as much as possible. In doing so, he must take care not to commit any criminal offense in the process of gathering evidence, including

and-effect relationship of the whistleblower and their putting in a less favorable position by the employer, by confirming that the employee has acquired the status of whistleblower, by disclosing information to the competent public authority. In this particular case, the whistleblower addressed the Ministry of the Interior, and thus started the procedure of external whistleblowing. After that, the employer passed an individual document which served in the decision making process pertaining to the right arising from labor relations, which resulted in putting the whistleblower in a less favorable position than he had before the initiation of the whistleblowing procedure. Decision of the Court of Appeals in Novi Sad, Gž Uz 6/17 dated 22 May 2017. Judicial practice has been established in the case of acquiring the status of whistleblower by an official who, in the performance of official duties, provided information that where the subject of whistleblowing. The officials took the position that the person had the right to judicial protection as whistleblower, if they made it probable that harmful action was taken against them, due to the submission of such information. Judgment of the Court of Appeals in Novi Sad, Gž Uz 6/17 dated 22 May 2017. Previous court practice has established the right to obtain the status of a whistleblower to a person related to the whistleblower, which makes it probable that a harmful action was taken against him, due to providing assistance and support to the whistleblower when taking a whistleblowing action. Judgment of the Court of Appeals in Novi Sad, Gž Uz 7/17 of 20.06.2017.

8 In the period from June 2015 to June 2016, in all acting courts were received 249 cases of which 158 cases were resolved. In the period from July 2016 to July 2017, were received 194 cases while a total of 218 cases, received by then, were resolved.

9 It is stipulated to establish new, protective mechanisms: a three-level reporting system, the obligation of feedback from the authorities, the prohibition of all forms of retaliation against whistleblowers, with mandatory stricter sanctions, provision of free legal aid to whistleblowers, more effective protection of whistleblowers in court proceedings, especially in terms of release from responsibilities regarding disclosure of information, etc.



the disclosure of the contents of documents marked with the degree of secrecy¹⁰. Possession of quality evidence is of particular importance if the whistleblower chooses to whistleblow the public, whether it is the media or other means of public information. If such disclosed information is not sufficiently substantiated, the certainty of the criminal or other responsibility of the whistleblower is almost inevitable.

The whistleblower may use the right to protection, if they disclose the information within one year, from the day of learning about the performed action due to which the whistleblowing is performed, i.e. within ten years, from the day of the performed action. At the same time, the information that is disclosed, in terms of content, must be such that a person with average knowledge and experience as a whistleblower believes in its truthfulness. The stated legal solution may, in practice, due to the lack of objective parameters, necessary for a realistic assessment of the acting court, result in the absence of judicial protection, although the whistleblower was conscientious and believed in the truthfulness of the information he disclosed, and vice versa. (See more: Nenadić, 2017).

The whistleblower has the right to actively participate in the procedure of verifying the allegations that are the subject of the whistleblowing. Various modalities of their active participation are possible, starting with the right of the whistleblower to be informed about the stage of the procedure of performed checks. Also, the whistleblower can provide assistance, whether it is to clarify existing facts, or to establish new circumstances that confirm the incriminated act.

During the disclosure of information, the whistleblower is not obliged to reveal his identity, which enables the so-called anonymous whistleblowing. In the event that the whistleblower left their personal data when the whistleblowing procedure began, the obligation to preserve the identity of the whistleblower has been established. Only in exceptional situations, the personal data of the whistleblower can be handed over to the competent authority. These cases are more closely defined by the provisions of the Law on Personal Data Protection. However, these provisions do not provide for criminal liability in cases of illegal disclosure of personal data. Therefore, the possibility of revealing the identity of the whistleblower even without his consent, very often leads to an increase in the number of cases of anonymous whistleblowing. This significantly reduces the quality of disclosure of information through the aforementioned whistleblowing procedure (Nenadić, 2017).

To reveal information, in essence, means to announce something new. When disclosing information, the whistleblower does not know whether that information is unknown to its recipient. If it is already known information, it is not about disclosure, but about notification, which results in the absence of the possibility of acquiring the status of whistleblower, and thus the envisaged mechanisms for protection of whistleblowers. The information that is disclosed must be such that a person with average knowledge and experience as a whistleblower would believe in its truthfulness. Disclosure of information that the whistleblower knows to be untrue, as well as seeking unlawful compensation in the event of whistleblowing, constitute a misuse of whistleblowing (Whistleblower Protection Act, 2014). It is necessary for the whistleblower to believe in the truth of the information which he intends to disclose. For example, the disclosure of documents, which indicate a violation of regulations, without providing additional comments by the whistleblower, will undoubtedly be a case of whistleblowing. However, if on that occasion the whistleblower had information, which he kept silent, that, for example, the disputed document was supplemented, which eliminated the illegality, it will be a case of abuse of whistleblowing. Regarding the request of the whistleblower for the payment of financial compensation,

10 In order for a whistleblower to document information about a corrupt crime in a satisfactory manner, he very often resorts to copying accounting and financial documentation, recording it or photographing it. On the other hand, very often, individual or general acts of administrative authorities oblige employees, including whistleblowers, to keep business or official secrets that they came across while performing their work tasks.



it is important to note that the Law on the Protection of Whistleblowers does not provide for such a possibility. In case of submitting such a request, it will be rejected as unfounded. It is clear that this is more about submitting an unfounded rather than an illegal request.

INTERNAL WHISTLEBLOWING

Internal whistleblowing exists when information about corruption within an administrative authority is provided by a whistleblower working in that administrative authority. Employers, i.e. leaders of administrative authorities, have a legally established obligation to act on information that is the subject of whistleblowing. The procedure comprises not only checking the allegations from the received information that is the subject of whistleblowing, but also taking all necessary measures in order to protect the identity of the whistleblower.

The Law on Protection of Whistleblowers obliges employers who have more than ten employees to adopt an internal act on whistleblowing (Rulebook on the manner of internal whistleblowing, the manner of appointing an authorized person to the employer, as well as other issues of importance for internal whistleblowing to employers with more of ten employees, Official Gazette of RS, 2015). Therefore, employers with a smaller number of temporarily or permanently employed persons, as well as persons who may find themselves in the role of whistleblowers, are exempted from the obligation to adopt the said internal act. Also, the obligation to place this act in a visible place, and depending on the technical possibilities, on the website, has been defined. The mentioned Rulebook, in essence, defines the manner of internal whistleblowing, with the obligation of the employer to appoint an authorized person to receive information that is the subject of whistleblowing.

The issue of selecting an authorized person to receive information and conduct proceedings in connection with the whistleblowing, is not, in terms of content, covered by the said Rulebook. This creates problems in practice, when it comes to internal whistleblowing. Namely, there is a possibility that the leaders of administrative authorities appoint unprofessional persons or persons of special trust. They represent the persons who are first contacted by whistleblowers. In the case of persons appointed by the leaders of the administrative authorities with the clear task of thwarting any attempt at whistleblowing, the expected effects of internal whistleblowing, especially when it comes to information regarding corruption in the administration, will be absent. Therefore, not only will no whistleblower protection mechanisms be undertaken, but it will actively participate in thwarting any serious attempt at whistleblowing. If we add to that the certainty of retaliation, the reduction of the number of whistleblowers can be expected (see more: Đurović, 2018)¹¹.

The above mentioned Rulebook provides for the possibility of submitting information that is the subject of whistleblowing, orally or in writing, with the obligation of the authorized person to make a confirmation of receipt of information. At the same time, the consent of the whistleblower is required, so that his identification data is stated in the confirmation of receipt of information.

In cases of anonymous internal whistleblowing, the Rulebook states that in order to verify the allegations of information, appropriate measures are taken, of which the employer is notified. However, the Rulebook does not cover all possibilities for anonymous reporting. This primarily refers to the decades-long practice of using special mailboxes in which, among other things, written information

11 A total of 65 cases of internal whistleblowing were recorded in the ministries, of which 29 cases of internal whistleblowing were recorded in the Ministry of the Interior, while 24 cases of whistleblowing were recorded in the Ministry of Defense, and in all other ministries a total of 12 cases of internal whistleblowing were recorded.



about corrupt criminal acts committed by employees in administrative bodies has been deposited. On the other hand, the introduction of online applications, through which information on the existence of suspected corruption is collected, has also proved to be very useful. Therefore, preventing the commencement, above all, of internal anonymous whistleblowing in administrative authorities, with the use of the above-mentioned methods, remains without a real justification (Nenadić, 2017).

Receipt of letters containing information on internal whistleblowing is of great importance, given that deadlines for action are running since then. Acting, in the full sense of the word, can mean a very long process of verifying the allegations of the whistleblower. In that sense, a general deadline of 15 days has been set, in terms of commencement to perform checks. There is no time limit for performing checks. Upon completion of the checks, the employer is obliged to inform the whistleblower about its outcome within 15 days.

The whistleblower is authorized to request and receive a notification on the course and actions taken in the procedure of performing checks, with the possibility of gaining insight into the case files. The employer is obliged to determine and correct all irregularities pointed out by the whistleblower. The procedure of internal whistleblowing in the Ministry of the Interior is defined by the Rulebook on the procedure of internal whistleblowing in the Ministry of the Interior. The said Rulebook, among other things, defines that internal whistleblowing has not been performed, if the information has been submitted to an unauthorized person. Before providing information on the subject of whistleblowing, the obligation of the authorized person is to instruct the whistleblower to provide information under full material and criminal responsibility, and to inform him that giving false testimony is a criminal offense, provided by the provisions of the Criminal Code. This obligation may be a limiting factor in deciding whether to conduct an internal whistleblowing. Indicating that giving a false statement is a criminal offense, is a category that is applied in the procedure of compiling the minutes on the receipt of a criminal report. Apart from the above mentioned, there are no justifiable reasons for anticipating the three-day deadline left for the whistleblower to declare himself, after the report on the actions taken in the conducted verification procedure has been submitted to him.

Statistical data¹² indicate that after a noticeable increase in recorded cases of internal whistleblowing in 2016, such a trend did not continue in 2017. It is obvious that the fear of retaliation prevailed over the decision of the whistleblowers to disclose information about corruption in the Ministry of the Interior through the procedure of internal whistleblowing.

The Law on the Protection of Whistleblowers explicitly prohibits the employer from placing the whistleblower and other persons related to him in a less favorable position, even if it refers to the violation of employment rights.

Provisions that violate the right of the whistleblower or persons related to him, and which are within the framework of the adopted general act, are null and void. However, the legislator failed to use the opportunity to determine the need to strengthen the capacity of a certain public authority, which would monitor the implementation of the Law on the Protection of Whistleblowers. Therefore, the role of administrative inspection (Law on Administrative Inspection, Official Gazette of RS, 2011) in performing administrative supervision over the implementation of laws and other regulations, and especially with regard to adopted administrative acts which put whistleblowers or related persons at a disadvantage, becomes very significant. However, the effects of the administrative controls performed

12 According to the official data of the Ministry of the Interior, during 2015, 2 cases of internal whistleblowing were recorded. During 2016, 18 cases were recorded while by July 2017, 9 cases of internal whistleblowing were recorded. See further: Lazar Đurović, cited work, page 14.



so far regarding the application of the Law on the Protection of Whistleblowers have not yielded the expected results.¹³

EXTERNAL WHISTLEBLOWING

External whistleblowing, in a conceptual sense, implies the disclosure of information to an authorized body, i.e. a representative of a public authority who is responsible for acting on information that is used for whistleblowing. In the case where the whistleblowing refers to persons employed in the authorized administrative authority, the whistleblower shall address the leader of that authority. If the whistleblowing refers to the head of the authorized administrative body, the whistleblower shall address the leader of the immediately superior authority.

Despite the clearly defined legal formulation of the manner of performing external whistleblowing, in practice there may be some doubts regarding the definition of whether it is internal or external whistleblowing, especially in the case of non-state entities exercising public authority, entrusted with certain administrative powers. (more: Milkov, 2016, 96-105).

For example, the submission of information to the supervisory board of a public company regarding the commission of corrupt criminal acts by the director of that company is essentially a form of external whistleblowing. This claim is confirmed by the fact that the supervisory board has a controlling role in relation to the director. It is the superior position of the supervisory board that can determine the decision of the whistleblower to perform the whistleblowing in the mentioned manner. If the director of a public company has an influence on the work of the supervisory board, which in practice is the rule, and not the exception, there will be no professional approach to verifying the merits of allegations of committing a corrupt crime. The whistleblower may inform other authorities about the existence of corruption.¹⁴

The obligation of the non-competent body, to which the information on the subject of the whistleblowing was delivered, is to forward the information to the competent public authority without delay. Given the obligation to act on the received information which is the subject of whistleblowing, the set deadlines for performing checks on the merits of allegations, acting on anonymous information, feedback on the course and outcome of performed checks, as well as providing insight into the case with review of undertaken activities, the legislator makes no difference in relation to the procedure of internal whistleblowing (Nenadić, 2017).

Due to the fact that there is no legal obligation to keep records of external whistleblowing, it is not possible to perform an objective analysis of the actual effects of external whistleblowing. Records kept

13 In the analysis of the effects of the application of the Law on the Protection of Whistleblowers, the Administrative Inspectorate performed a total of 56 inspections in the period from June 2015 to June 2017, of which 30 inspections were performed ex officio. No irregularities were found after the inspections. See more: Lazar Đurović, cited work, p. 8-9.

14 If the subject of whistleblowing is the disclosure of information on the existence of corruption in, for example, the conducted public procurement procedure, such information may be submitted to the Public Prosecutor's Office, the State Audit Institution, the State Attorney or the Ministry of the Interior. From the point of view of exercising the right to protection, in accordance with the Law on Protection of Whistleblowers, it is irrelevant which of the mentioned bodies will act on the received information.



by publicly available anti-corruption portals indicate a significant number of recorded cases of external whistleblowing.¹⁵

PUBLIC WHISTLEBLOWING

Public whistleblowing is an alternative method of whistleblowing, which can be applied after internal and external whistleblowing have taken place. However, the law allowed the possibility that in case of imminent danger to life, public health, safety, environment, large-scale damage, as well as the existence of imminent danger of destruction of evidence, public alarm could be resorted to, although no internal or external whistleblowing has been carried out.

Insufficient precision of the existing legal provisions enables the whistleblower to fulfill the obligation of internal and external whistling only in the realization of the intention to address the public. In order to realize the initial intention, the whistleblower does not leave a reasonable deadline for acting in the stated initiated whistleblowing procedures. A logical question arises as to the real reason for resorting to this type of *covert abuse of the whistleblowing procedure*. As above mentioned, the legislator gave the acting body a period of 15 days to commence the procedure of verifying the allegations of the received information, which is the subject of whistleblowing. At the same time, at least the deadline for determining the validity of the allegations from the information was not left. Accordingly, the legislator provided a *comfortable position for the competent authorities* in terms of delaying the inspections. In addition to the growing dissatisfaction of whistleblowers, a process of even greater weakening of trust in the competent institutions for the suppression of corruption is developing at the same time. Therefore, the ultimate goal of the whistleblowers, in the described situation, is to provide the *allys-public* by alerting the public, most often by addressing the media, which will put a kind of pressure on the competent state bodies in terms of performing the mentioned checks. If they succeed in that, it will provoke a kind of *chain reaction* of new cases of public alarm, despite the already started procedures of internal and external alarm. Although this is a form of illicit pressure on the competent authorities, the ultimate motive of the whistleblower seems understandable.

In cases of disclosure of information containing classified information, the Law on Protection of Whistleblowers sets precise restrictions, not only in terms of the procedure of whistleblowing, but also the manner of using such information (Law on Data Secrecy, Official Gazette of RS, 2009). If the subject of whistleblowing is information that contains secret information, the obligation to respect the order of the whistleblowing procedure has been established, starting from the internal, and after that, with the fulfillment of the legally prescribed conditions, external whistleblowing. In the mentioned way, the whistleblower is, almost completely, deprived of the possibility of whistleblowing the public. This restriction is in line with existing EU standards (Martić and Šarac, 2015).).

¹⁵ According to the available data of the anti-corruption portal “Pištaljka” (*Whistle*) in the period between June 05, 2016 and June 5, 2017, 186 cases of external whistleblowing were recorded. Of this number, 54 information was sent to inspection services, 39 to public prosecutors, 36 to courts, 18 to the Corruption for Fight against Agency (now the Anti-Corruption Agency), 17 to the Ministry of the Interior, and 18 information was to other relevant ministries. See more: Lazar Đurović, cited work, p. 19-20.



CONCLUSION

Trust in the competent institutions is one of the basic preconditions for a person to decide to disclose information regarding corruption in the administration, and to accept the status of whistleblower. It is necessary to provide conditions for the whistleblower to show readiness to react, as an individual in the society, in order to fulfill the public interest, disclose corrupt practices to representatives of administrative authorities. In order to remain constant in that readiness, the whistleblower must be convinced that throughout the entire whistleblowing procedure, if necessary, all the provided protective mechanisms relating to the whistleblower and other persons related to him will be activated.

Although the Law on the Protection of Whistleblowers has been assessed by the domestic and international professional public as modern, the expected effects, especially when it comes to the procedure of whistleblowing which indicates the appearance of the so-called systemic corruption, are absent. Adequate categorization of persons who can appear in the role of whistleblowers has not been performed. The probability of retaliation against the troublemakers in the administration is high. Moreover, the practice so far has mostly shown that whistleblowers in administrative authorities, both by managers and by a significant number of employees, have not been recognized as a *corrective, but as a disruptive factor*.

Also, it remains unclear whether the disclosure of information on the commission of corrupt crimes in all situations is an act of voluntary decision of the person who possesses such information or there is an obligation to report commission of corrupt crimes. The assumption was confirmed that the law did not provide ways to motivate whistleblowers, especially financial motivation, which is an important, limiting factor.

In the process of gathering evidence, especially if it is marked with a certain degree of secrecy, the whistleblower is exposed to possible criminal liability.

In order for the institute of whistleblowing to give the expected results, it is necessary to make the right choice and efficient reaction of the authorized person in taking the necessary measures according to the information and measures for the protection of the whistleblowers. The absence of a deadline for checking the information has created conditions for unjustified delay of that procedure. Previous expert analyzes of the Law on Protection of Whistleblowers have indicated the inadequacy of judicial protection of whistleblowers and persons related to them. In the process of enacting the Law on the Protection of Whistleblowers, the legislator failed to use the opportunity to include *new criminal offenses* within the framework of penal provisions in order to establish more efficient protection of whistleblowers. This would, in a more explicit way, point out the importance of respecting the legal provisions, especially in the part of preventing any kind of retaliation against whistleblowers in the administration due to the act of whistleblowing. In contrast, the Law provided for misdemeanor liability for non-compliance with the stated obligations.



REFERENCES

1. Antoni Bouza, *Police Unbound: Corruption, Abuse And Heroism by the Boys in Blue*, Hammond, IN USA: Prometheus Books, 2001.
2. Đurović Lazar, *Primena Zakona o zaštiti uzbunjivača-drugi izveštaj*, 2018.
3. Worth Mark, *Whistleblowing in Europe: Legal protections for whistleblowers in the EU*, Berlin, 2013.
4. Martić Mirjana, Šarac Mirjana, *Komentar Zakona o zaštiti uzbunjivača*, Službeni glasnik, 2015.
5. Milkov Dragan, *Upravno pravo I-uvodna i organizaciona pitanja*, Pravni fakultet u Novom Sadu, Centar za izdavačku delatnost, 2016.
6. Milenković Dejan, „Javna uprava-odabrane teme“, *Fakultet političkih nauka*, Beograd, 2013.
7. Nenadić Nemanja, *Zakon o zaštiti uzbunjivača-koje je značenje normi i gde se mogu poboljšati*, Transparetnost Srbija, 2017.
8. Obradović Tilen, Bergant Andrijana, *Aktuelni međunarodni razvoj: Nova pravila o zaštiti uzbunjivača u EU*, Bankarstvo, broj 3., 2018.
9. Workman-Stark Angela, „Inclusive Policing from the Inside Out“, Ottawa, ON, Canada: Springer International Publishing, 2017. Godina
10. Ustav Republike Srbije, „Službeni glasnik RS“, br. 98/2006.
11. Zakon o ratifikaciji Konvencije UN protiv korupcije, „Sl. List SCG-Međunarodni ugovori“, br. 12/05.
12. Zakon o potvrđivanju Dodatnog protokola uz Krivičnopravnu konvenciju o korupciji, „Službeni glasnik-Međunarodni ugovori“, br.102/2007.
13. Zakon o potvrđivanju Građanskopravne konvencije o korupciji, „Sl. Glasnik RS-Međunarodni ugovori“, br. 102/07.
14. Zakon o Narodnoj skupštini, „Službeni glasnik RS“, br. 9/2010.
15. Zakon o Agenciji za borbu protiv korupcije, „Službeni glasnik RS“, br. 97/08, 53/10, 66/11-odluka US, 67/13-odluka US, 112/13-autentično tumačenje i 8/15-odluka US.
16. Zakon o zaštiti uzbunjivača, „Službeni glasnik RS“ br. 128/2014.
17. Pravilnik o zaštiti lica koje prijavi sumnju na korupciju, „Službeni glasnik RS“ br. 56/11.
18. Odluka Ustavnog suda IUz-295/2013, od 23.10.2014. godine, „Službeni glasnik RS“ br. 8/2015.
19. Pravilnik o postupku unutrašnjeg uzbunjivanja u Ministarstvu unutrašnjih poslova, 2015.

THE RIGHT TO FREEDOM OF MOVEMENT DURING THE COVID-19 PANDEMIC

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Abstract: We have entered the second year of a global pandemic in the world, which has resulted in the adoption of various measures that limited certain human rights, especially freedom of movement. This limitation was felt by everyone - employees, children, and especially people older than 65. It therefore seems necessary to try to answer the question of where the limits of restrictions on human rights and freedom of movement are during a pandemic, what are the differences in restrictions imposed by some states, and what is the content of court decisions in situations where this issue is a subject to court proceedings. Also, the paper will analyze the latest judgment of the European Court of Human Rights regarding the protection of freedom of movement during the pandemic in the case of *Terheş v. Romania*.

Keywords: COVID - 19, freedom of movement, human rights, state of emergency, case law, Constitutional Court, European Court of Human Rights.

INTRODUCTION

Although we know that rights guaranteed by the Constitution may be restricted only when this is permitted by law, to the extent stipulated by the Constitution, without encroaching upon their substance and without lowering their attained level (Article 20 of the Serbian Constitution), while it is possible to prescribe by law the manners of their exercising when this is expressly stipulated by the Constitution and necessary due to the nature of the right itself, a year and a half spent in a pandemic has given rise to many questions with regard to compliance with these generally accepted right-related provisions. Is there always a proportionate relation between a possible right restriction and its purpose, that is

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to say, do we resort to lesser restrictions if the purpose can be attained by means of them, or does it happen that state authorities abuse the powers vested in them by the will of citizens in situations when we are faced with particularly challenging circumstances that could not be accurately anticipated and regulated during legal standardization in different areas? Derogations from guaranteed rights are permitted during the state of emergency or war to the extent deemed necessary and they cease to be effective upon ending of the state of emergency or war (Article 202 of the Serbian Constitution), and on 15 March 2020, the President of the Republic, the President of the National Assembly, and the Prime Minister passed a Decision on the proclamation of the state of emergency in the territory of the Republic of Serbia, which was effective until 6 May 2020, when it was abolished by the Decision of the National Assembly. On 10 March 2020, the Serbian Government passed a decision proclaiming COVID-19 a contagious disease.

Decree on measures in the state of emergency (Official Gazette of the Republic of Serbia no. 31/2020-3, dated 16 March 2020) restricted and prohibited the movement of people with this virus, as well as persons under suspicion of being infected; it prohibited the organization of indoor assemblies and restricted the organization of outdoor assemblies. Decree on the restriction and prohibition of movement for persons in the territory of the Republic of Serbia (Official Gazette of the Republic of Serbia, nos. 34/2020, 39/2020, 40/2020, 46/2020, and 50/2020) prohibited movement within a period longer than 24 hours for all persons in the country's territory.

Similar situations happened in many countries, whose population was - over a period of several months - for the first time disabled to freely move in a particular period of time during daytime, but also in a period of several successive days, due to which first court rulings appeared and dealt with the justifiability of the extent of movement restrictions during the pandemic. Given the current events, several new waves of the pandemic, and new virus variants that are emerging despite the ongoing vaccination, or the fact that the people have been inoculated with vaccines made by different manufacturers in a surprisingly short span of time, a long-term solution to this, first of all, health but also financial crisis, whose full consequences are yet to be revealed in the upcoming period, does not seem to be on the horizon. The initial euphoria over "a return to normal life" after vaccination and the hope and trust of a large number of citizens in the efficacy of the measures taken are now replaced by suspicion, uncertainty, and fear of the things that the future might bring. We cannot tell whether the coming autumn will bring new movement restrictions due to the new variant that spreads more quickly than the previous ones, but we can suppose so. Until then, there is little else for us to do but see what kind of a stance was assumed by the European Court for Human Rights in its most recent ruling concerning the legitimacy of movement restrictions during the pandemic in Romania, but also by the Constitutional Courts of certain states, whose decisions basically differ from one another, primarily decisions rendered by the Constitutional Court of the Republic of Serbia and the Constitutional Court of Bosnia and Herzegovina. Given that the exceptional measures taken by the state during the emergency situation have to be legal, necessary, consistent, necessary for the accomplishment of a legitimate goal as based on scientific evidence, and in accordance with international guidelines (Valerio, 2020), a question arises whether the prescribed measures were arbitrary, discriminatory in their application, that is to say, whether human dignity was respected during the challenging months behind us.

THE RIGHT TO FREEDOM OF MOVEMENT – THE CONCEPT AND LEGISLATION

The right to freedom of movement includes the right to freedom of movement in a country for those who are lawfully staying in that country, the right to exit any country and the right to enter a country of which you are a citizen (Pécoud, 2013).

In its Article 5, the European Convention on Human Rights guarantees liberty and security, prescribing that everyone has the right to liberty and security of person, and that no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by the law. These cases are given in the following order: the lawful detention of a person 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 in order to secure the fulfilment of any obligation prescribed by law; the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful, and everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation (The European Convention on Human Rights, 1950).

Protocol 4 to the 1963 European Convention on Human Rights secures certain rights and liberties that are not included in the Convention and its first Protocol. Article 2 of this Protocol guarantees freedom of movement and stipulates that everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and to choose his residence, and it also stipulates that everyone shall be free to leave any country, including his own. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. In similarity with Article 15 of the Convention as prescribing the possibility of derogation from guaranteed rights under emergent circumstances, Article 2 of the Protocol stipulates that the rights in particular areas may be subject to restrictions imposed in accordance with law and justified by the public interest in a democratic society. Derogations refer to the time of war or other public emergency threatening the life of the nation, but to the extent required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. In that case, any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor; it shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 13 of the Universal Declaration of Human Rights (UDHR) deals with internal and international mobility and stipulates as follows: (1) “Everyone has the right to freedom of movement and resi-



dence within the borders of each state” and (2) “Everyone has the right to leave any country, including his own, and to return to his country” (Universal Declaration of Human Rights, 1948).

Article 12 of the International Covenant on Civil and Political Rights prescribes that everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence, that everyone shall be free to leave any country, including his own, and that no one shall be arbitrarily deprived of the right to enter his own country. Here, too, it is precisely emphasized that the above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant (The International Covenant on Civil and Political Rights, 1966).

Within the European Union, the legal framework for the free movement of people also consists in Article 3 (2) of the Treaty on European Union (1992), Article 21 of the Treaty on the Functioning of the European Union (2009), and Article 45 of the Charter of Fundamental Rights of the European Union (2000). The establishment of an internal market with a free movement of people begins after the conclusion of the Schengen Agreement on 14 June 1985 and the Convention implementing the Schengen Agreement, which was signed on 19 June 1990 and came into effect on 26 March 1995. The Schengen area, which is one of the fundamental achievements of the European Union, has recently faced a threat to its survival due to the COVID-19 pandemic, given that the member-states were closing their borders in an attempt to prevent the spreading of the virus, but also due to the inflow of refugees and migrants into the EU and the increasing frequency of terrorist attacks. Directive 2004 /38 / EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the European Union was adopted on 29 April 2004 for the purpose of consolidating different laws and taking into consideration a large number of court practices related to the people's freedom of movement (Directive 2004/38/EC of the European Parliament and of the Council).

In our internal law, of importance is Article 39 of the Constitution of the Republic of Serbia which guarantees that everyone shall have the right to free movement and residence in the Republic of Serbia, as well as the right to leave and return. Freedom of movement and residence, as well as the right to leave the Republic of Serbia may be restricted by the law if necessary for the purpose of conducting criminal proceedings, protection of public order, prevention of spreading contagious diseases or defense of the Republic of Serbia (Constitution of the Republic of Serbia, 2006).

In addition, Article 133 of the Criminal Code incriminates the violation of freedom of movement and residence, prescribing a fine or imprisonment up to one year for a person that unlawfully denies or restricts freedom of movement or residence in the territory of Serbia to a citizen of Serbia, and its paragraph 2 envisages a qualified offence for an official person in discharge of duty and imprisonment up to three years (Criminal Code, *Official Gazette of RS*, no. 85/2005, 88/2005 - corrected, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019).

Imprecise and broad formulations in international and internal law, such as “public danger”, “public security”, “national security”, “public health”, always allow for the possibility of abuse in critical situations, as has been the case with the latest ongoing pandemic, not only when it comes to freedom of movement but also when it comes to other rights and liberties guaranteed by the Constitution and law. This is also perceived as even more topical when we take into consideration certain hints at the possibility of introducing compulsory vaccination for particular categories of the population in an ever-increasing number of countries worldwide, as well as the possibility of introducing COVID passports and health passes as prerequisites for the free crossing of borders, travelling, visiting different cultural events, but also restaurants. Because of all these events and, as it seems, ever-more repressive



measures taken by the authorities, a question arises as to where the borderline is, one that must not and may not be crossed in relation to the respect, inalienability and inviolability of natural human rights, which have not been given to men by the state and which men, as a result, do not owe to the state, and as to when and where a man's right but also his duty to future generations to uncompromisingly protect these rights begins.

THE EXTENT OF RESTRICTIONS OF FREEDOM OF MOVEMENT IN PARTICULAR COUNTRIES DURING THE COVID-19 PANDEMIC AND PROTECTION BY CONSTITUTIONAL COURTS

Between March 2020 and June 2020, most EU member-states, 19 of them, adopted the constitutional emergency state, the emergency regime prescribed by the law, or both, while a smaller number of countries, 8 of them, made it possible for their governments to adopt measures of restriction by means of special or common legislation (Diaz Creo & Kotanidis, 2020). Out of the 17 member-states with a constitutional clause that is convenient for responding to the pandemic, 10 decided to use it in the first wave of the pandemic (Bulgaria, Czechia, Estonia, Finland, Hungary, Luxembourg, Portugal, Romania, Slovakia, Spain), 7 member-states (Croatia, Germany, Lithuania, Malta, Holland, Poland, and Slovenia) decided not to proclaim the state of emergency, while legal regimes were applied in 14 member-states (Bulgaria, Croatia, France, Germany, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovenia, and Slovakia) (Diaz Creo & Kotanidis, 2020). Special legislative authorities that were exercised by the executive branch were used only in a few countries: Belgium, Greece, Italy, Romania, and Spain (Diaz Creo & Kotanidis, 2020).

Belgrade Centre for Human Rights analyzed the way and the extent to which European countries restricted the right to freedom of movement for the purpose of preventing the spreading of the disease, and the results show that the measures of restriction and prohibition of freedom of movement for the citizens of Serbia were certainly among the most drastic ones in Europe. At the Belgrade Centre for Human Rights, it was stated that frequent changes in the scope and temporal restrictions of freedom of movement, as well as illogicalities in the sequence of introducing and removing the measures, created confusion among the citizens, who often had difficulties adapting their behavior to currently valid restriction measures, which is testified to by a large number of cases where citizens were penalized because of their violations of movement restriction measures (Belgrade Centre for Human Rights, 2020). So, in a study which included 39 European states, it is stated that 69% of the states introduced measures restricting freedom of movement, only 18% of the states introduced a curfew, and 15% of the states introduced measures additionally restricting freedom of movement for elderly persons (Belgrade Centre for Human Rights, 2020).

By means of Order on the restriction and prohibition of freedom of movement in the territory of the Republic of Serbia, a curfew was introduced in Serbia during the state of emergency, and the citizens of Serbia were prohibited to move during business days from 5 PM (for several days also from 3 PM) to 5 AM, and during the weekend, from 5 PM on Friday to 5 AM on Monday. Full prohibition of movement for persons older than 65 lasted for as many as 34 days, with the possibility of going to a grocery shop once a week, on a particular day, from 4 AM to 7AM. Professor Marinković emphasizes that this order violates the right to freedom of movement as guaranteed by the Constitution, but also the right to private assembly of all citizens, and that it regulates a matter which may only be the subject of a decree that the Government passes with the President as a co-signatory (Article 200, paragraph 6 of the Constitution), and by no means the subject of the order issued by a minister, so this very fact is



enough to dispute the order before the Constitutional Court. Also, he argues that the Minister of the Interior introduces new violations into the legal system although the Constitution clearly prescribes that “criminal actions and criminal sanctions are determined by the law, from which it is impossible to derogate even in the state of emergency” (Marinković, 2020). A similar opinion was shared by those who unsuccessfully tried, before the Constitutional Court of the Republic of Serbia, to dispute the constitutionality and legality of the Order, but also of the Decision on the proclamation of the state of emergency.

So, in a decision of the Constitutional Court of the Republic of Serbia, dated 22 May 2020 (IYo-42/2020), with regard to the initiatives for evaluating the constitutionality and legality of the Decision on the proclamation of the state of emergency, the Council of judges rejected the initiatives for launching a procedure for the evaluation of the constitutionality and legality of the Decision on the proclamation of the state of emergency (Official Gazette of RS, no. 29/20), as well as the demands for cancelling the execution of individual acts and actions undertaken on the basis of the disputed Decision. Submitters of the initiatives believed that the disputed decision was made although the conditions for the proclamation of the state of emergency had not been met, and that, contrary to the Constitution, the state of emergency was proclaimed with the President of the National Assembly, the Prime Minister, and the President of the Republic as co-signatories, instead of it being proclaimed by the National Assembly. Also, with respect to the existence of an epidemic as a reason for the National Assembly not to convene, the submitters of the initiatives pointed out that it was a legally unacceptable argument, since the Order on the proclamation of the COVID-19 contagious disease epidemic (Official Gazette of RS, number 31/20) was passed on 19 March 2020, after the disputed decision, and the general prohibition of retroactivity (Article 197 of the Constitution) does not allow for justifying the National Assembly’s alleged inability to convene by a retroactively proclaimed epidemic. In the explanation of the Constitutional Court’s decision it is stated that “the Constitutional Court must remind that, in its procedure of evaluating constitutionality and legality, it judges neither based on the facts nor about the facts, but, bearing in mind the things mentioned earlier about the constitutional condition for the proclamation of the state of emergency, the Constitutional Court decides that the COVID-19 contagious disease could be considered a public danger threatening the existence of the state or citizens, in terms of Article 200 of the Constitution... and in relation to this decides that the peculiarity of the state of emergency resides exactly in the fact that it permits derogation from the regular regime of human rights in order to overcome the emergency circumstances as effectively as possible and re-establish the disrupted public order... The Constitutional Court concludes that the allegations made by the submitters of the initiatives are not based on constitutional law” (Decision on Rejecting the Initiative of the Constitutional Court of the Republic of Serbia, No. IYo-42/2020). In a separate opinion expressing agreement with the aforesaid decision, judge Jovan Ćirić states that “the general institute of extreme necessity does not have to be solely connected with criminal law ... that it was possible for extreme necessity to be valid during the coronavirus pandemic... Under the circumstances of a relatively high COVID-related mortality rate, absence of medications, and insufficient knowledge of the entire coronavirus phenomenon, the deprivation of freedom of movement presented itself as a measure of extreme necessity and purposefulness.”

According to data of the World Health Organization, as of 19 July 2021, close to 190,000,000 confirmed cases of COVID-19 infection have been registered, as well as around 4,000,000 deaths, which makes a mortality rate of about 2.15% (World Health Organization, 2021). According to the same data, as of 19 July 2021, a total of 718,465 cases of COVID-19 infection have been registered in Serbia, of which 7,080 deaths, which makes a mortality rate lower than 1%, so it is not quite clear what the statements about a “relatively high mortality rate”, which are used as justification for the extremely restrictive measures taken by the authorities, were based on. The argument of “insufficient knowledge of



the entire coronavirus phenomenon” pointed out by judge Ćirić seems like more reasonable and more truthful, given that even today, a year and a half after the beginning of the pandemic, we are witnessing a general confusion and the absence of consensus, even among the members of the medical profession, all over the world. High expectations and hopes that vaccination (which 50% of the population have undergone) and a collective immunity acquired after a certain number of people have recovered from the virus would restore “normal life” in the world are slowly losing their credibility as new variants multiply with every coming “wave”. At the same time, questions arise as to which vaccine (made by which manufacturer) protects from which variant and in what period of time, so that states are faced with a complex task of determining more precisely the conditions for travelling and border-crossing. Moreover, it is necessary to know that, in all the EU member-states that proclaimed the constitutional state of emergency, with the exception of Estonia and Slovakia, the national parliament participated in deciding to proclaim or prolong the state of emergency, because the parliament had to proclaim the state of emergency (Bulgaria), approve the proclamation of the state of emergency (Finland, Portugal, Romania, and Czechia), or approve the prolongation thereof (Diaz Creo & Kotanidis, 2020).

In the second decision of the Constitutional Court of the Republic of Serbia no. IYo-45/2020, dated 17 September 2020, the procedure for establishing the unconstitutionality of the Order on the restriction and prohibition of movement in the territory of the Republic of Serbia was cancelled. In terms of the allegations stated in particular initiatives, according to which the measures of movement prohibition deprived the elderly (persons aged 65 or more) of their freedom and so encroached upon their constitutional right to freedom and personal liberty (Article 27 of the Constitution), that is, upon their additional rights in case of deprivation of freedom without a court decision from Article 29 of the Constitution, the Court finds that the measures which included derogation from the constitutional right of freedom of movement, and which were necessary for the suppression and prevention of the spreading of the COVID-19 contagious disease and the protection of the population from that disease during the state of emergency, do not constitute the deprivation of freedom of said persons, and thereby these measures cannot be brought into legal connection with the violation of guaranteed rights from Articles 27 and 29 of the Constitution. In the Court’s explanation it is stated that “the prescribed measures of prohibition of movement for particular categories of persons do not constitute deprivation of freedom neither according to their purpose nor according to their contents... Similarly to this, patients who effectively suffer from certain diseases that, according to the rules of the medical profession, require staying in hospital – which, in particular situations, includes a longer stay in a hospital room or even attachment to particular devices used for conducting therapy, maintaining vital functions or making a diagnosis, and for the purpose of carrying out relevant medical interventions which also sometimes include a longer stay in hospital for the purpose of recovery and the like – are definitely not deemed as persons who have been deprived of freedom.” Moreover, it is stated that “not even from the contents of prescribed measures does it follow that they are aimed at deprivation of freedom... The contents of those measures essentially boil down to creating necessary conditions for effective protection from a dangerous contagious disease under specific circumstances, targeting elderly citizens, which in the largest number of cases is directly related to particular chronic diseases that are typical of elderly people” (Decision of the Constitutional Court, No. IYo-45/2020). In a separate opinion, judge Tamaš Korhec points out that even “if, after the cessation of validity of the measures and regulations by means of which they were regulated, we confirm legal flaws, even formal-law flaws of these regulations, with this we will legitimize the violation of law, relativize the significance of respect for the procedure, the competence of various bodies, and the constitutionally established relationship between the branches of government, and even the relationships within the same branch of government... the court must not confirm the constitutionality of a state body’s order, not even when the latter constitutes a justifiable exercising of power under emergency circumstances; the courts exercise legal authority, and they

have to stick with the constitution and the law, or otherwise they become instruments of a certain political ideology.”

Judges of the Constitutional Court of Bosnia and Herzegovina had a somewhat different opinion. By orders of the Federal Department of Civil Protection of 20 and 27 March 2020, which ordered a prohibition of movement for persons under 18 and above 65 years old in the territory of the Federation of Bosnia and Herzegovina, the right to freedom of movement from Article II/3.m of the Constitution of Bosnia and Herzegovina and from Article 2 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, in relation to appellants and all other persons in the relevantly same factual and legal situation, was violated, as decided by the Constitutional Court of Bosnia and Herzegovina on 22 April 2020 with Decision no. AP 1217/20 (Official Gazette of BiH, no. 26/20). Also, the Government of the Federation of Bosnia and Herzegovina and the Federal Department of Civil Protection were ordered to harmonize, within 5 days of receipt of decision, the Order of the Federal Department of Civil Protection with standards from the Constitution of Bosnia and Herzegovina and Protocol 4 to the European Convention, and also to notify, within three days, the Constitutional Court about the execution of the order from this decision. According to the opinion of the Constitutional Court, the disputed measures do not meet the requirement of consistency from Article 2 of Protocol 4 to the European Convention on Human Rights, because it is not possible to see from the disputed orders what the estimations of the Federal Department of Civil Protection were based on, estimations that the disputed groups the measures refer to are at a higher risk of contracting or spreading the COVID-19 infection, and at the same time the possibility of introducing more relaxed measures was not considered if such a risk justifiably exists, they were not strictly restricted in terms of time, and the obligation of their regular reevaluation was not established for the purpose of ensuring that they last only as long as it is “necessary” in the sense of Article 2 of Protocol 4 to the European Convention on Human Rights, that is to say, that they are eased or abolished as soon as the situation allows for such a thing to take place.

Eight months later, the constitutional Court of Bosnia and Herzegovina once again stands on the first line of defense of human rights and fundamental freedoms of its citizens. By Order of the Constitutional Court of Bosnia and Herzegovina AP-3683/20, dated 22 December 2020, on the violation of the human rights to private life and freedom of movement, and in relation to the wearing of protective masks and the so-called curfew, violations of the right to “private life” from Article II/3.f of the Constitution of Bosnia and Herzegovina and from Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms are established, due to Orders on mandatory wearing of masks and the right to freedom of movement from Article II/3.m of the Constitution of Bosnia and Herzegovina and from Article 2 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In this manner, a legal basis was provided for all the citizens and legal entities in the Federation of Bosnia and Herzegovina who were penalized for a misdemeanour to file lawsuits in a civil action against the Federation of Bosnia of Herzegovina and the Canton of Sarajevo on the grounds of unjust enrichment. Also, in case of the issuance of misdemeanour citations in a court proceeding, citizens may invoke the Decision of the Constitutional court of Bosnia and Herzegovina number AP-3683/20 and submit a request for the cancellation of a misdemeanour proceeding, based on which the court is obliged to render a decision on rejection of the misdemeanour citation. However, the Constitutional Court of Bosnia and Herzegovina did not annul the unconstitutional and illegal Orders of the Crisis Staff of the Ministry of Health of the Sarajevo Canton no. 01-33-6301/20, dated 9 November 2020, and the Orders of the Crisis Staff of the Ministry of Health of the Sarajevo Canton no. 62-20/2020, dated 12 October 2020, because it found that by means of such annulment, “given the undoubted public interest in introducing the necessary measures of protection of the population against the pandemic”, negative consequences might arise before the legislative and



the highest executive authorities take measures within their powers and obligations". In its Decision based on Article 72, paragraph 4, of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina ordered the Parliament and Government of the Federation of Bosnia and Herzegovina to take action, immediately and no later than 30 days from the date of receipt of Decision, in order to harmonize their activities with standards from Article II/3.f of the Constitution of Bosnia and Herzegovina and from Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as with standards from Article II/3.m of the Constitution of Bosnia and Herzegovina and from Article 2 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of BiH, no. 85/2020).

On 25 June 2020, at the request of the Romanian Ombudsman, the Constitutional Court of Romania evaluated as unconstitutional the legal provisions in the area of healthcare and the provisions of the government's urgent order, which gave the minister of health the power to take certain measures that would restrict fundamental freedoms, such as the measures of involuntary hospitalization and quarantine. In the explanation behind the Court's decision, it is stated that "the extraordinary and unpredictable nature of the state of affairs does not justify disrespect for the conditions under which it is possible to restrict the exercise of fundamental rights and freedoms, so the referred to measures should have been based on an act that has the force of law, with clear and effective protective measures against abuse or discretionary or illegal actions" (Court of Justice of the European Union - Research and Documentation Directorate, 2021).

A similar standpoint can be found in the Constitutional Court of Spain, which in July 2021 rendered a decision on the unconstitutionality of a lockdown (with six votes for and five votes against), which in 2020 was declared in response to the pandemic; owing to this decision the people who were penalized for violating the rules were given the possibility of suing the state for the purpose of regaining the money that had been taken from them in the form of fines. On the other hand, charges filed by the persons and companies that wanted to sue the government because of the money they had lost due to the lockdown would not be accepted. The decision was a response to the charges pressed by the right-wing political party Vox. On 14 March 2020, the Spanish Government declared the state of emergency and, according to emergency rules, nearly all people in the country were ordered to stay home, and leaving home was possible only for basic reasons until June 2020. In its explanation the Court said that the state of emergency was not enough to provide constitutional support for such restrictions. In order to legally restrict freedoms of the people to the extent in which this was done, as the Court emphasized, the Government would have to proclaim the state of exception instead of the state of emergency. In Spain, the government may proclaim the state of emergency – in Spanish known as "the state of alarm" – and apply it before it gets to be debated in the parliament, which enables the government to establish new rules relatively quickly, but when talking about the state of exception, the proposal should be first submitted to the parliament, given the fact that Spain has three levels of the state of emergency: the state of emergency, the state of exception, and the highest level or the level of siege (BBC News, 2021).

On 23 July 2020, the Bulgarian Constitutional Court assumed the stance that the right to free movement, economic liberty, and the right to work are not absolute rights and that their restriction was just temporary, for the purpose of a consistent legitimate goal of guaranteeing life and the protection of citizens' health, for which reason the intervention of the state is in accordance with the Constitution, justified by a legitimate cause and in the public interest (Court of Justice of the European Union - Research and Documentation Directorate, 2021).



THE STANCE OF THE EUROPEAN COURT FOR HUMAN RIGHTS IN THE CASE TERHEȘ VERSUS ROMANIA

The European Court of Human Rights rejected the application submitted by Cristian Terheș, with a unanimous decision against this European MP, who believed that a seven-week restriction of movement during the pandemic in Romania can be compared to house arrest. The Court stated that “the level of restrictions of freedom of movement, as presented by the applicant, was not such as to make it possible to deem the general lockdown ordered by the authorities as deprivation of freedom”.

Mr. Terheș was elected to the position of a member of the European Parliament in 2019, representing Romania's Social Democratic Party. On 16 March 2020, the Romanian President issued Decree no. 195/2020, which introduced a thirty-day state of emergency in Romania and a restriction of certain fundamental rights, including freedom of movement. On 14 April 2020, the Romanian President issued Decree no. 240/2020 on the prolongation of the state of emergency by thirty days, and the state of emergency ended on 14 May 2020, at midnight.

On 7 May 2020, Terheș pressed charges with the Bucharest County Court based on Article 5, paragraph 4 of the European Convention on Human Rights (the right to a quick decision on the legality of detention), emphasizing that he was subjected to “administrative detention” and demanding from the court to establish his right to leave his home for any possible reason without the necessity of having a document which would confirm a valid reason for doing so and without the possibility of being punished. The Court established that the initiation of his procedure was without purpose because the lockdown had been abolished in the meantime. On 8 and 25 May 2020, the applicant filed requests for reconsideration of decrees and the parliamentary decisions by means of which they were justified, as well as of other decrees issued by the Minister of the Interior, but the applications were rejected with the explanation that said acts were not subject to administrative review.

On 17 March 2020, Permanent Representation of Romania to the Council of Europe notified the Secretary General of the Council of Europe about their intention to apply derogation as envisaged by Article 15 of the Convention, and, following this, the Romanian authorities notified the Secretary General in regular intervals about the various measures adopted until the end of the state of emergency at midnight on 14 May 2020.

At the beginning, the European Court of Human Rights noticed that the applicant had not invoked Article 2 of Protocol 4 (freedom of movement) to the Convention, but rather wanted to prove that the generally imposed lockdown constituted deprivation of freedom, rather than merely a restriction of the right to freedom of movement. The Court noted that Romania had announced its intention to derogate, based on Article 15 of the Convention, from the obligations arising from Article 2 of Protocol 4 to the Convention on guaranteeing freedom of movement. As Article 5, paragraph 1 of the Convention was not applied in this case, the Court deemed it unnecessary to evaluate validity of the derogations that Romania had reported to the Council of Europe.

The Court found the complaint to be incompatible with the provisions of the Convention and decided that, for this reason, the application should be rejected. Over the course of the lockdown in Romania, the authorities advised the people not to leave their homes between 6 AM and 10 PM, and residents could legally leave their homes during the curfew provided they had an official form stating in detail their reasons, their address of residence, and the period of time for their activities. These measures were in force until 14 May 2020 and the applicant claimed that his right to freedom according to Article 5 of the European Convention was violated.



The court found that the measures were applicable to all, and not only to the applicant, and that there were no special measures directed against the applicant, such as intensified surveillance, or any special aggravating circumstances in the applicant's life which amplified the negative conditions of his detention. Moreover, the Court noted that the applicant could leave his home for different reasons and that he could go to different places. In accordance with that, the measures cannot be equated with house arrest, for which reason the ECtHR not only established that the violation of Article 5 did not take place but also that in this case it is not possible to refer to Article 5 because there was no deprivation of freedom.

Before this, Terheş, a former Roman Catholic priest, had spoken against the possibility of introducing COVID-19 passports. He committed himself to "carry on this struggle for defending the rights and freedoms of all Romanians and Europeans" and said that "with this decision, the ECtHR has created a precedent after which Europe will no longer be a space of freedom, but of massive lockdowns and surveillance, as is the case with Russia and China, and based on this precedent governments can violate the freedom of Europeans".

Greene believes that the explanation of the judgment is "for concern, given that the Court emphasized that Romania's lockdown regime cannot be compared with house arrest, which entails that house arrest – whatever that means – is a threshold that the regime must reach before Article 5 is even activated" (Greene, 2021). The Court implies, since the measures were applied to all in Romania, and not specially to the applicant, that the lockdown measures are actually in the direction of "restrictions", rather than "deprivation" of freedoms, for which reason the Court's emphasis that there was no evidence regarding how the measures specially affected him is the Court's error (Greene, 2021). He goes on to conclude that, in this way, "space is created for the introduction of similar measures for other crises that the state presents as necessary and which may be less objective than the present pandemic – for instance, terrorism – and as such a fertile ground for the violation of human rights" (Greene, 2021). Instead of raising the standards of human rights, the approach of the ECtHR to this case shows how the standards on human rights were expanded so that they could be adapted to exceptional authorities. Court practice as flexible as this then "lies almost like a loaded gun, ready for the hands of any organ that might make a trustworthy claim about an urgent necessity" (Greene, 2021).

CONCLUDING REMARKS

"The only way to deal with an unfree world is to become so absolutely free that your very existence is an act of rebellion."

Albert Camus

The scenario that EU member-states are faced with because of the coronavirus pandemic is "a real stress test for most legal systems in the EU" (Diaz Creo & Kotanidis, 2020). What is left is the open question of whether such rigorous measures of restriction and prohibition of movement were necessary in order to attain the goal – the suppression of the spreading of the coronavirus, that is, whether the same result could have been achieved with measures that encroach upon the rights of the citizens to a lesser extent, and also whether the state in this case acted in contrast to the Constitution and the provisions of international law. The author Simões notes that the efficiency of travel restrictions is not supported by scientific evidence, and that it is very difficult to justify certain measures that were adopted in the name of public health (Simões, 2021). Prohibitions on entry into a country and prohibitions on exit from a country indirectly prevent family members from exercising one more right – the



right to family unity (Simões, 2021). Individual authors remind that the economic and social interests of the region are better achieved under the circumstances of free movement and conclude that we are witnessing “an instrumentalization of the pandemic due to short-term economic perfectionism” (Hamadou, 2020).

Is “the elite manipulating our fear as we witness the defense of mankind against an elitist coup for the purpose of taking away fundamental rights and freedoms, conquered after several centuries of fighting” (Burrowes, 2020), while tyranny and the end of freedoms as we know them are taking place before our very eyes (Pimenta, 2020)? Without any doubt, this is not a time to neglect human rights, but a time when they are needed more than ever, for the sake of steady sustainable growth and peace-keeping (United Nations, 2020), because the global health crisis cannot be resolved with nationalist measures, but only with international solidarity and cooperation (Mezzadra, Stierl, 2020).

Today it is more than clear that the policy of fear is spreading across the planet with ever-more restrictive measures, many of which will survive threatening many fundamental rights and freedoms even after the pandemic ends, for which reason it is possible to talk about widespread authoritarian tendencies (Mezzadra, Stierl, 2020). In the 21st century, in the era of pandemics, global financial and other turbulences that are in most cases hardly understood by a common man, words of some of our great predecessors on this earthly stage of life sound livelier and clearer than ever before. Aristotle knew that “only he who has overcome his fears will truly be free” and Martin Luther King warned that “freedom is never given voluntarily by the oppressor”. Abraham Lincoln said that “those who deny freedom to others, deserve it not for themselves” and Voltaire wittily remarked that “it is difficult to free fools from the chains they revere”.

The present situation caused by the pandemic is a test for states and legal systems, but it also is and is yet to become a test for people around the world. That is why we need to timely ask ourselves whether we are at risk of “becoming a society of perfectly healthy robots or slaves” where our health condition will be confirmed with QR codes and mobile applications (Čović, 2020), what is the worth of an enslaved person’s health and to whom is it useful? When we talk about the means by which someone can legitimately protect himself well, they depend on the worth of the good itself, and the fact is that there is no greater and more important good than freedom. When it is absent and taken away, all other goods and rights lose their meaning and become useless.

REFERENCES

1. Burrowes, R. (2020, April 13). The Elite’s COVID 19 Coup Against a Terrified Humanity: Resisting Powerfully, Global Research. Available at <https://www.globalresearch.ca/elite-covid-19-coup-against-terrified-humanity-resisting-powerfully/5709479>
2. Court of Justice of the European Union. Research and Documentation Directorate. (2021). Covid 19 - Overview of Decisions in the period April - September. Available at http://www.aca-europe.eu/flash/COVID/en/Flash-Covid-2021-01_EN.pdf
3. Čović, A. The Right to Privacy and Protection of Personal Data in the Age of the Covid – 19 Pandemic. *Sociological Review*. Vol. LIV, no. 3/2020, 670 - 697. DOI: 10.5937/socpreg54-27284
4. Dias Simões, F. (2021). COVID-19 and International Freedom of Movement: a Stranded Human Right? The Chinese University of Hong Kong Faculty of Law Research Paper No. 2021-07, Available at SSRN: <https://ssrn.com/abstract=3781792> or <http://dx.doi.org/10.2139/ssrn.3781792>



5. Diaz Creo, M. & Kotanidis, S. (2020). States of Emergency in Response to the Coronavirus Crisis. EPRS - European Parliamentary Research Service. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU\(2020\)659385_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf)
6. Greene, A. (2021, Jun 18). Falling at the First Hurdle? Terheş v Romania: Lockdowns and Normalising the Exception. Available at <https://strasbourgobservers.com/2021/06/18/falling-at-the-first-hurdle-terhes-v-romania-lockdowns-and-normalising-the-exception/#more-5403>
7. Hamadou, A. (2020). Free Movement of Persons in West Africa Under the Strain of COVID-19. *AJIL Unbound*. Volume 114, 337 - 341. DOI: <https://doi.org/10.1017/aju.2020.66>
8. Mezzadra, S, Stierl, M. (2020). What Happens to Freedom of Movement During a Pandemic? Open Democracy. Available at <https://www.opendemocracy.net/en/can-europe-make-it/what-happens-freedom-movement-during-pandemic/>
9. Pécoud, A. (2013). Freedom of Movement. *The Encyclopedia of Global Human Migration* (ed. Ness I.). Blackwell Publishing Ltd. DOI: <https://doi.org/10.1002/9781444351071.wbeghm241>
10. Pimenta D M, E. (2020). Brief Reflections on Covid-19, Tyranny and the End of Freedom. Available at https://www.academia.edu/44567633/Brief_Reflections_on_Covid_19_Tyranny_and_the_end_of_Freedom
11. United Nations. COVID – 19 and Human Rights – We are all in this together. (2020). Available at https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf
12. Valerio. C. (2020). Human Rights and Covid-19 Pandemic. *JBRA Assisted Reproduction*. 24(3): 379–381. DOI: 10.5935/1518-0557.20200041

LIST OF REGULATIONS AND ACTS

1. Charter of Fundamental Rights of the European Union. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT>
2. Constitution of the Republic of Serbia, (*Official Gazette of RS*, no 98/2006).
3. Criminal Code, *Official Gazette of RS*, no. 85/2005, 88/2005 - corrected, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.
4. Decree on Emergency Measures (*Official Gazette of RS*, No. 31 / 2020-3 of March 16, 2020).
5. Directive 2004/38/EC of the European Parliament and of the Council, (2004, 29 April). Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0038>
6. The European Convention on Human Rights, 1950, Council of Europe. Available at https://www.echr.coe.int/Documents/Convention_ENG.pdf
7. The International Covenant on Civil and Political Rights, 1966, the United Nations General Assembly. Available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
8. Order on Restriction and Prohibition of Movement of Persons on the Territory of the Republic of Serbia (*Official Gazette of RS*, No. 34/2020, 39/2020, 40/2020, 46/2020 and 50/2020).
9. Treaty on European Union. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>



10. Treaty on the Functioning of the European Union. Available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>
11. Universal Declaration of Human Rights (1948). United Nations General Assembly.

COURT DECISIONS

1. Terheş v. Romania Application (No. 49933/20). Available at <https://www.juridice.ro/wp-content/uploads/2021/05/Decision-Terhes-v.-Romania-lockdown-ordered-by-the-authorities-to-tackle-the-COVID-19-pandemic-could-not-be-equated-with-house-arrest.pdf>
2. Decision on Rejecting the Initiative of the Constitutional Court of the Republic of Serbia, (2020, May 22) No. IYo-42/2020. (*Official Gazette of RS*, No.77/2020). Available at <http://www.ustavni.sud.rs/page/predmet/sr-Latn-CS/16219/?NOLAYOUT=1>
3. Decision of the Constitutional Court of the Republic of Serbia (2020, September 17). No. IYo-45/2020, (*Official Gazette of RS*, No. 126/2020). <https://www.propisi.net/odluka-ustavnog-suda-rs-broj-iuo-45-2020/>
4. Decision of the Constitutional Court of Bosnia and Herzegovina of 22 April 2020, no. AP-1217/20 (*Official Gazette of BiH*, No. 26/20). <http://sluzbenilist.ba/page/akt/7XvnB8uDg48=>
5. Decision of the Constitutional Court of Bosnia and Herzegovina, No. AP-3683/20 of 22 December 2020, (*Official Gazette of BiH*, No. 85/2020). Available at <http://sluzbenilist.ba/page/akt/4EeZhR-WYGo0=>

INTERNET SOURCES

- BBC News. (2021, July 14) Covid: Spain's Top Court Rules Lockdown Unconstitutional. Available at <https://www.bbc.com/news/world-europe-57838615>
- Belgrade Centre for Human Rights. (2020, May 7). Restriction of Freedom of Movement of Serbian Citizens during the COVID-19 Virus Pandemic one of the Most Drastic in Europe. Available at <http://www.bgcentar.org.rs/ogranicenje-slobode-kretanja-gradana-srbije-za-vreme-pandemije-virusa-covid-19-jedno-od-najdrasticnijih-u-evropi/>
- Marinković, T. (2020, April 4). Unconstitutional Order on the Prohibition of Movement. Available at <https://www.danas.rs/drustvo/vladavina-prava/neustavna-naredba-o-zabrani-kretanja/>
- World Health Organization (2021). WHO Coronavirus (COVID-19) Dashboard. Available at <https://covid19.who.int>

SOCIO-PATHOLOGICAL IMPLICATIONS OF COVID 19 PANDEMIC

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Abstract: The world is going through the worst crises since the World War Two. Covid 19 Pandemic has changed our societal life overnight. This paper tackles the socio-pathological consequences of the Covid 19 pandemic, notably with implications on several socio-pathological phenomena such as suicide, alcoholism and violence, especially domestic violence. Theoretically, the paper rests mainly on the structural and functional theory of societal anomie as well as the contemporary theory of risk society. Methodologically, the paper will use comparative theoretical analyses, as well an empirical analysis of secondary data concerning the state of these socio-pathological phenomena before and during the Covid 19 crises in Macedonia. The findings presented in this paper will serve as the basis for future research in this field, as well as to help better understand the socio-pathological implications of Covid 19 crises.

Keywords: *Covid 19 pandemic, societal pathology, suicide, alcoholism, domestic violence*

INTRODUCTION

We are living in a unique sequence of societal history marked by the explosion of risks. The risk society thesis elaborated by the seminal German sociologist Ulrich Beck has become our everyday (Bek, 2001). We are confronting with numerous security risks, which are constantly increasing, becoming worse and more and more unpredictable. The most evident proof of this thesis is the Covid 19 pandemic with which the world struggles for more than one and a half year. Most notable scientists believe that the world will never be the same as we knew it previously, meaning that the Covid 19 pandemic will cause lasting consequences on the world and society. We are talking about the tectonic changes with serious consequences, especially on the structure and functioning of society. We have become so preoccupied with our everyday fears for our physical existence that, in fact, COVID-19 has

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reduced us to a 'society of survival', as stated by famous Korean intellectual Byung-Chul Han (Siguenza & Rebollo, 2020). Han's controversial thesis of the 'burnout society' has recognized the so called 'dialectic of negativity' with which we are faced every day in order to beat the Corona virus (Хан, 2016: 11). "An open society is a society exposed to the blows of fate", remarked Zygmunt Bauman, thus, in some way announcing what could turn wrong with globalized and postmodern society at its peak (Бауман, 2016: 11). And it proved right. The open world suddenly became a closed world, reminiscent of the closeness of medieval society, for instance. But it is man who actually provoked Covid 19 with their invasiveness as a species. After all, as Sari Hanafi rightly concludes, "COVID-19 is a disease not only of globalization, but also of Anthropocene" (Hanafi, 2020: 3). Could this be a water-shedding event that might denote the end of humankind, of homo sapiens as we know it? (Харапи, 2018: 442).

Among the most crucial implications of Covid 19 crises, we could surely mention the ones towards the societal relations and societal deviance. In fact, the sheer discussion of the so called 'new normality' is in its nature a debate about the normality or deviance of the social moment in which we live. It is even much deeper and more important considering the interest of sociology and social pathology than relation of Covid 19 with sociopathological phenomena only. Nevertheless, the object of interest in this paper will gravitate around the more direct relatedness between Covid 19 pandemic and sociopathological phenomena. Precisely, we could agree that the Covid 19 crisis causes evident and serious consequences in many sociopathological phenomena, amongst them especially visible are the consequences on suicide, alcoholism and violence, most notably on domestic violence. Even without some profound scientific research we can observe an increase of these sociopathological phenomena by just following the reports and news from the media in the given period. Of course, a more serious scientific approach is needed in order to prove and closely analyse the trends in this sphere and bring conclusions.

This paper actually elaborates all of the previously mentioned questions in the lines to follow. We put significant emphasis on analysing the state with suicide, alcoholism and domestic violence in the period of Covid 19 pandemic in Macedonia, with some parallels on global level, mainly using up to date official secondary data from Macedonia's statistical sources and statistical data from WHO (World Health Organization). Our intention is to give a glimpse on this relation and to compare the implications of Covid 19 pandemic on these socio-pathological phenomena on both levels. By doing so, we believe that we could provide some answers considering the correlation between Covid 19 and the abovementioned socio-pathological phenomena, as well as enabling better understanding of this nexus.

SOCIO-PATHOLOGICAL PHENOMENA AND COVID 19 PANDEMIC

The sociopathological phenomena, generally speaking, have been in constant increase worldwide in the last couple of decades. This increase is mainly due to the disturbances of societal order in times of globalisation and postmodern neoliberal society. The contemporary society has in itself built-in flaws, distortions and unresolved structural strains that produce societal deviance. The postmodern and neoliberal quest for individualization and self-realization are often viewed as the driving forces for societal deviance, both on societal and cultural level (Тејлор, 2012: 51). The societal deviance was researched a decades ago by some eminent social thinkers, in the notions of "ill society" by Erich Fromm, or "culture of narcissism" of Christopher Lasch (From, 1980; Lasch, 1979). Obviously, our world has never been short of troubles. To make things worse, the Covid 19 pandemic appeared last year and is still here. For the first time since the Great Plague of 14th century, the world experienced



quarantines, a dramatic and sobering way of showing how fragile our world has become. The negative impact of Covid 19 towards societal relations is obvious. We only have to analyze deeper the scale of this correlation, causes and consequences.

The paradoxical ambivalence of Covid 19 crisis could be summarized in the strange dialectic of societal isolation and societal solidarity. They are present both and they all contribute to the societal pathology and its resolving at the same time. Think of this irony of separation and unification as two different sides of the same token (Жижек, 2020: 39). For instance, the Corona virus has made us more worried, shrouded in fear and suspense for our survival, which could lead to anxiety, depression and in some cases even to suicide if this lasts for a longer time. But, at the same time, this societal isolation has pulled the people together within their primary family ties, thus alleviating this negative effect and even providing prevention and protection against suicide.

Without referring directly to some conspiracy theories, it is more than evident that the Corona virus outbreak was not so sudden event after all. For decades, scientists have been constantly warning us of the disastrous consequences of the uncontrolled interference of man in nature. Anthony Giddens called this “the manufactured risk”, while Yuval Noah Harari speaks more precisely of the so called “ticking bomb in the laboratory” (Гиденс, 2002: 24; Харари, 2019: 303). In other words, all the preconditions for some global mankind tragedy were set and it was just the matter of time when this would happen.

Covid 19 pandemic left serious, and one could argue, lasting consequences to societal relations. Owing to the pandemic, some of the previously known societal disorganizations worsened, such as societal anomie and alienation. People were forced to stay in lockdown, to limit their societal interactions and to replace them with virtual communication. This unnatural societal situation was a powerful blow to the world and way of living the people previously knew and lived, since the globalization was at full swing. Now, all of a sudden, people were forced to accept this new societal momentum as so called “new normality” and even to adapt to it as a state that could become our reality for certain indefinite time in the future. This caused additional pressure and increased fear, anxiety and uncertainty that were already present in times of risk society. All of these dramatic structural changes in societal relations could not stay without any consequences on societal relations. Most of them were manifested in the spheres of sociopathological phenomena, most notably as additional increase in the rates of suicide, alcoholism and violence, especially domestic violence.

IMPLICATIONS OF COVID 19 PANDEMIC ON SUICIDE, ALCOHOLISM AND DOMESTIC VIOLENCE

Unfavourable influence of Covid 19 pandemic can be most visibly seen in the sphere of societal pathology. The disturbances in societal relations during Covid 19 are so great that they can be seen as separate factor that contributes significantly, if not entirely, to the rise of several sociopathological phenomena, in specific, suicide, alcoholism and domestic violence. Although the time distance is relatively short to give some stronger conclusions on these correlations, nevertheless, by using some statistical comparison from WHO and Macedonian statistical sources, as well as some recent scientific and professional studies in this field, we will attempt to highlight these correlations.

In terms of many sociopathological phenomena that are affected by Covid 19 crises, such as suicide for example, we can see confirm the Robert Merton's strain theory as being pretty useful in explaining the deviant adaptation. Namely, as the time passes and the strain between societal norms and values becom-



ing more and more accentuated, deviant behaviour becomes possible way of adaptation of individuals and societal groups to a new societal reality, or the so called “new normality” (Merton, 1938: 672-682; Ташева, 1999: 472; Герасимоски, Бачановиќ и Аслимоски, 2019: 86). Disparity between societal values and societal norms is a significant, if not crucial factor of societal deviance, and it was observed more than a century ago within the so called structural-functionalist sociological and sociopathological theories, such as in the theory of societal anomie and the strain theory, elaborated in the works of Emile Durkheim and Robert Merton, respectively (Durkheim, 1982; Merton, 1938). In the newest sociological thought, these ideas can be seen in the work of the renowned sociologist Zygmunt Bauman in liquid modernity theory and the idea of interregnum (Bauman, 2012: 49-56; Gerasimoski, 2020: 12).

Suicide is rightly considered as the worst sociopathological phenomenon simply because it takes human lives and causes serious trauma for families and wider societal community. Since Emil Durkheim’s anthological study on suicide, the modern world has been struggling with this deviance for more than a century, mostly with the so-called anomic form of suicide (Durkheim, 2005). The suicidal rates have been in constant rise since then and Covid 19 pandemic only worsened the unfavorable societal conditions which lead to increased suicide rates and suicide attempts.

There are a lot of recent significant studies, statistics and findings in terms of suicide and its relatedness with Covid 19 pandemic. WHO reports that there were around 700,000 deaths globally caused by suicide in 2019, i.e. before the outbreak of the Covid 19 pandemic (WHO, 2021: 33). Concerning the relation between Covid 19 pandemic and suicide rates, it is difficult to draw some single conclusion, but what is common in majority of them is the fact that in most of the countries the initial stage of the pandemic was even marked by the decrease of the suicidal rates, explained by the so called pulling-together effect, whereby individuals undergoing a shared experience might support one another, thus strengthening social connectedness (Reger, Stanley & Joiner, 2020: 1094). However, in the later stages of the pandemic the increase of suicidal rates was observed only in some countries (Pirkis et al., 2021: 584). This is especially evident in case of Japan, for instance (Sakamoto, Ishikane, Ghaznavi & Ueda, 2021: 8; Tanaka & Okamoto, 2021: 233). Stay-at-home orders and the push for physical distancing seen internationally during this pandemic have led to or worsened the sense of social isolation for a remarkable percentage of the world’s population. Social isolation and confinement are particularly harmful when imposed, since they are typically used for punishment and they can be experienced as traumatic. Consequently, loneliness, lack of belonging, and lack of connections to others are all risk factors for depression and suicide (Abi Zeid Daou, Rached & Geller, 2021: 312). There is a high probability that suicide rates will increase in many countries of the world as the Covid pandemic progresses. This problem may be especially difficult in the US (Sher, 2020: 710).

As far as Macedonia is concerned, the numbers show no significant rise of suicidal rates during Covid 19 pandemic. According to the Ministry of Interior, the pre-Covid and post-Covid suicide rate statistics is constant. But even in this case, the numbers do not say more than what should be determined by experts, for example, is this a consequence of disorders caused by quarantine conditions and other restrictions, or is it the result of reasons unrelated to the current situation. To determine this, it is necessary to inspect the profile of the person who reached or tried to reach for their own life and it requires much deeper investigation and research. Moreover, the time distance is essential, especially since many of these acts do not occur now/immediately, but after a certain period, when the latent dissatisfaction will accumulate to the extent that the person considers it unbearable for him or her (Блажевска, 2020). One curious fact about the suicide in Covid 19 times in Macedonia is related to the knowledge that there was an increase in suicide deaths caused by poisoning (Тумановска, 2020). If the Corona 19 pandemic continues, it is reasonable to suppose that the suicidal rates in Macedonia will also rise.



Considering the scale of its consequences and the huge stress-related burden, COVID-19 pandemic can be considered as a mass trauma, which can lead to psychological problems, health behaviour changes, and addictive issues, including alcohol consumption. Most of the research studies done in the period after the outbreak of Covid 19 pandemic, as well as comparison of statistical data, show an increase of alcohol use worldwide and worsening the situation with alcoholism as socio-pathological phenomenon. In US and United Kingdom the alcohol consumption increased to 17%, in Canada 20%, in Greece around 30%, while in Poland a staggering 146% (Calinaa et al., 2021: 529-530). We should mention that all of this numbers are not to be attributed solely to the usage of alcohol as response to the Covid 19 stress and societal deprivation, but also to the increased consumption of alcohol as disinfectant. In general, the main reason for increased usage of alcohol is to be found in perceiving and understanding of alcohol as alleviator of the stress caused by Covid 19. To make matters worse, the increased alcohol use further weakens the immune system of the organism, thus acting as risk factor to Corona virus (WHO, 2020: 1-2).

The increased use of alcohol during Covid 19 pandemic is also associated as risk factor for heightening domestic violence. Emergency calls about domestic violence, for which harmful alcohol consumption is a risk factor, rose by 60% in EU countries (OECD, 2021: 1-2). We can compare similar findings in Macedonia. A psychic disorder is cited as the main cause of domestic violence, followed by the abuse of alcohol in second, and only a small percentage is attributed to the abuse of drugs in third place (Здравковска, 2021). One interesting research paper by professor Jan Konvalinka from the University of Prague, found certain correlation between high rates of deaths from Covid 19 and abuse of alcohol. Namely, he concludes that the Czech Republic records highest rate of deaths from Covid 19 in the world, correlating it with the unhealthy lifestyle of many Czechs which also contributes to the high mortality rate. This EU member is the first in the world in terms of consumption of beer with 200 litres per capita per year. In his research, he also mentions other countries for which he believes he found similar correlations, such as Hungary, Bosnia and Herzegovina, Montenegro, Bulgaria, Belgium and Macedonia (Палата, 2021). In the case of Macedonia, we cannot generalize this conclusion since we do not have the exact numbers of the alcohol consumption from last year. It is considered that in Macedonia the consumption of alcohol is 5-7.4 litres per capita on an annual level (Институт за јавно здравје на Република Македонија, 2020: 9). According to the estimations from the commercial entities, there was a noticeable increase in alcohol consumption last year.

Domestic violence is a very complex sociopathological phenomenon. Covid 19 pandemic has only worsened the situation with domestic violence since it created favourable conditions for it to happen and intensify. The forced cohabitation of many families around the world has shown signs of a real 'emergency in an emergency' (Sacco et al., 2020: 72). Women, children and elderly are mostly affected by domestic violence. According to the UNDP data, 243 million women and girls have been subjected to sexual and/or physical violence perpetrated by an intimate partner in the previous 12 months since the outbreak of the Covid 19 pandemic. Even if we know that all of this domestic violence could not be attributed to Covid 19 pandemic solely, it is in fact a valuable datum. Domestic violence has risen from 25% up to 33% in different parts of the world compared to the pre Covid 19 period (UNDP, 2020: 1, 4). For instance, in Asia and Pacific region the domestic violence against women in the last 12 months ranged between 4.9 to 47.6% depending on the country (ESCAP, 2020: 7). In India alone, there has been a 47.2% increase in domestic violence complaints (Maji, Bansod & Singh, 2021: 4). Globally, in some countries there was an increase from 10% up to 50% to domestic violence helplines (C3O, 2020: 1).

In Macedonia, the number of reported cases of domestic violence during Covid 19 pandemic is relatively smaller compared to worldwide data, but, nevertheless, there was an increase in domestic vio-



lence from 8% to 10%. However, it is assumed that the number is much higher, since a lot of victims do not report the domestic violence, mainly due to the gender stereotypes, stigmatization and family tradition that are still present and because it is also deemed that domestic violence as something acceptable to certain individuals (Здравковска, 2021).

CONCLUSIONS

With all of its peculiarities, Covid 19 Pandemic is a phenomenon one of its kind in the humankind history. It has brought changes to societal sphere so immense and probably lasting that we have only started to feel its implications. Probably this is just the beginning of the series of implications that will be much more negative and severe in its nature as the pandemic progresses. Considering the topic of our paper, we could draw several conclusions related with the implications of Covid 19 pandemic on the sociopathological phenomena analysed in this paper (alcoholism, suicide and domestic violence). The conclusions could be summarized in the following:

- the sheer discussion of the so called 'new normality' is in its nature a debate about the normality or deviance of the social moment in which we live;
- there's a correlation between Covid 19 pandemic and sociopathological phenomena, such as suicide, alcoholism and domestic violence;
- it is difficult to analyse global patterns of correlation between Covid 19 pandemic and sociopathological phenomena, especially in terms of phenomenological aspects;
- worldwide, in most of countries, the first several months of Covid 19 pandemic were not followed by the rise of suicide rates, even a contrary, in many countries there was a decrease; in some countries such as Japan, an increase of suicidal rates was recorded in the later period of Covid 19 pandemic, while in North Macedonia, we cannot claim significant difference between suicidal rates before and after the outbreak of Covid 19 pandemic, although there are present factors that could correlate Covid 19 pandemic with suicide in the time to follow;
- most of the countries in the world, including North Macedonia, reported an increase of the use of alcohol and rise of alcoholism due to Covid 19 pandemic; similar as with the suicidal rates, the reasons for this can be found in the lockdown, heightened sense of societal deprivation, anxiety and fear;
- almost all the countries in the world, as well as North Macedonia, found the clear correlation between Covid 19 pandemic and rise of the domestic violence, especially violence towards women, children and elderly; the aetiology of domestic violence during Covid 19 pandemic is very similar to that of the other socio-pathological phenomena analysed in this paper.

REFERENCES

1. Abi Zeid Daou M., Rached G. & Geller J. (2021). COVID-19 and Suicide: A Deadly Association. *The Journal of Nervous and Mental Disease*, 209(5), 311-319.
2. Bauman, Z. (2012). Times of Interregnum. *Ethics & Global Politics*, 5(1), 49-56.
3. Bek, U. (2001). *Rizično društvo*. Beograd: Filip Višnjić.



4. Calina D., Hartung T., Mardare I., Mitroi M., Poulas K., Tsatsakis A., Rogoveanu I., Oana Doceaj A. (2021). COVID-19 Pandemic and Alcohol Consumption: Impacts and Interconnections. *Toxicology Reports*, 8, 529–535.
5. Durkheim, E. (1982). *The Rules of Sociological Method*. New York: The Free Press.
6. Durkheim, É. (2005). *Suicide: A Study in Sociology*. London & New York: Routledge.
7. ESCAP (2020). *The Covid-19 Pandemic and Violence Against Women in Asia and the Pacific*. Policy Paper. No. 2020/12. Bangkok: ESCAP.
8. From, E. (1980). *Zdravo društvo*. Beograd: Rad.
9. Gerasimoski, S. (2020). Societal Deviance in the Era of Distorted Values and Norms: European and Macedonian Paralels. Proceedings of International Scientific Conference The Euro-Atlantic Values in the Balkan Countries. Security Horizons. (11-22). Skopje: Faculty of Security.
10. Hanafi, S. (2020). *Global Sociology and the Coronavirus*. Madrid: ISA Digital Platform.
11. Lasch, C. (1979). *The Culture of Narcissism: American Life in an Age of Diminishing Expectations*. New York & London: W.W. Norton & Company.
12. Maji S., Bansod S. & Singh T. (2021). Domestic Violence During COVID-19 Pandemic: The Case for Indian Women. *Journal of Community Applied Social Psychoogy*. pp: 1–8.
13. Merton, R. K. (1938). Social Structure and Anomie. *American Sociological Review*, 3(5), 672-682.
14. OECD (2021). *The Effect of COVID-19 on Alcohol Consumption, and Policy Responses to Prevent Harmful Alcohol Consumption*. Paris: OECD.
15. Pirkis J., Ann J., Sangsoo S., Marcos DelPozo-B., Vikas A., Pablo Analuisa-A., Louis A., (2021). Suicide Trends in the Early Months of the COVID-19 Pandemic: An Interrupted Time-series Analysis of Preliminary Data From 21 Countries. *Lancet Psychiatry*, 8, 579–588.
16. Reger M. A., Stanley I. H. & Joiner T. E. (2020). Suicide Mortality and Coronavirus Disease 2019: A Perfect Storm?. *JAMA Psychiatry*, 77(11), 1093-1094.
17. Sacco M. A., Caputo F., Ricci P., Sicilia F., De Aloe L., Bonetta C. F., Cordasco F., Scalise C., Cacciatore G., Zibetti A., Gratteri S., Aquila, I. (2020). The Impact of the Covid-19 Pandemic on Domestic Violence: The Dark Side of Home Isolation During Quarantine. *Medico-Legal Journal*, 88(2), 71–73.
18. Sakamoto H., Ishikane M., Ghaznavi C. & Ueda P. (2021). Assessment of Suicide in Japan During the COVID-19 Pandemic vs Previous Years. *JAMA Network Open*, 4(2), 1-10.
19. Sher, L. (2020). The Impact of the COVID-19 Pandemic on Suicide Rates. *QJM: An International Journal of Medicine*, 707–712.
20. Siguenza, C. & Rebollo, E. (2020, May 24). Byung-Chul Han: COVID-19 Has Reduced us to A 'Society of Survival'. *EURACTIV*. Accessed on May 19, 2021. http://Byung-Chul%20Han_%20COVID19%20has%20reduced%20us%20to%20a%20'society%20of%20survival'%20-%20EURACTIV.com.html
21. Tanaka, T. & Okamoto, S. (2021), Increase in Suicide Following an Initial Decline During the COVID-19 Pandemic in Japan. *Nature Human Behaviour*, 5, 229–238.
22. UNDP (2020). *Gender-Based Violence and COVID 19*. New York: UNDP.
23. WHO (2020). *Alcohol and Covid 19: What you need to know*. Geneva: WHO.



24. WHO (2021). *World Health Statistics*. New York: WHO.
25. Бауман, З. (2016). *Флуидни времиња: живот во доба на несигурност*. Скопје: Слово.
26. Блажевска, К. (2020, 30-ти април). Какви приказни се кријат зад бројките на МВР?. *Deutsche Welle*. Accessed on May 15, 2021. http://2021/Влијание%20на%20Ковид%2019%20пандемија%20врз%20социопатолошките%20појави/Какви%20приказни%20се%20кријат%20зад%20бројките%20на%20МВР_%20_%20Македонија%20_%20DW%20_%2030.04.2020.html
27. Герасимоски С., Бачановиќ О. и Аслимоски П. (2019). *Социјална патологија*. Скопје: Факултет за безбедност.
28. Гиденс, Е. (2002). *Забеган свет: како глобализацијата ги преобликува нашите животи*. Скопје: Филозофски факултет.
29. Жижек, С. (2020). *Пандемија! Ковид 19 го тресе светот*. Скопје: Арс Ламина.
30. Здравковска, Ж. (2021, 2-ри февруари). Пандемијата го зголеми семејното насилство. *Радио Слободна Европа*. Accessed on May 17, 2021. <http://2021/Влијание%20на%20Ковид%2019%20пандемија%20врз%20социопатолошките%20појави/Пандемијата%20го%20зголеми%20семејното%20насилство.html>
31. Институт за јавно здравје на Република Македонија (2020). *Информација за сотојбата со болестите на зависност во Република Македонија: 2017-2019*. Скопје: Институт за јавно здравје на Република Македонија.
32. Палата, Л. (2021, 19-ти април). Во борбата против корона вирусот се брои секој килограм. *Deutsche Welle*. Accessed on May 17, 2021. http://2021/Влијание%20на%20Ковид%2019%20пандемија%20врз%20социопатолошките%20појави/Во%20борбата%20против%20корона вирусот%20се%20брои%20секој%20килограм%20_%20Свет%20_%20DW%20_%2019.04.2021.html
33. СЗО (2020). *Спречување на насилството врз децата, жените и постарите лица за време на пандемијата со Covid 19: клучни активности*. Скопје: СЗО.
34. Ташева, М. (1999). *Социолошки теории*. Скопје: Универзитет “Св. Кирил и Методиј”.
35. Тејлор, Ч. (2012). *Болестите на модерното време*. Скопје: Или-Или.
36. Тумановска, М. (2020, 9-ти декември). Пандемијата ги зголеми обидите за самоубиства со труење. *Радио Слободна Европа*. Accessed on May 15, 2021. <http://2021/Влијание%20на%20Ковид%2019%20пандемија%20врз%20социопатолошките%20појави/Пандемијата%20ги%20зголеми%20обидите%20за%20самоубиства%20со%20труење.html>
37. Хан, Б. Ч. (2016). *Папсано општество*. Скопје: Табахон.
38. Харари, Ј. Н. (2018). *Сapiенс: кратка историја на човечкиот род*. Скопје: Три.
39. Харари, Ј. Н. (2019). *Хомо деус: кратка историја на иднината*. Скопје: Три.

INFORMAL EMPLOYMENT AS A FORM OF GRAY ECONOMY IN THE TIME OF COVID 19 PANDEMICS

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Abstract: Even as a field of study, the informal employment, as one aspect of the shadow economy, is a complex phenomenon. Shadow economy and informal employment are among major challenges that the countries are facing worldwide. Informal employment is primarily related to the underdeveloped and developing countries, but it is also present in highly developed countries, only to a lesser extent. The size of informal employment has varied in time, depending on many factors. The COVID-19 pandemic increased global poverty and it hit informal firms and informally employed workers particularly hard. The objective of this paper is to show the size of informal employment in the time of COVID-19 pandemic, with particular emphasis on Serbia. In this paper we will also discuss the measures that result in reduction of the size of informal employment. It is the state that holds the position at the very top of the economic pyramid and that can have a direct or indirect impact on the size of informal employment by implementing specific measures. Nevertheless, the state must first consider the complex and often opposed relations that might result from its decisions.

Keywords: informal employment, shadow economy, informal firms, COVID 19 pandemic, Serbia.

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INTRODUCTION

All the countries around the world regardless of whether they are big or small, wealthy or poor, developed or developing, are facing the consequences of the coronavirus COVID-19 crisis. The on-going COVID-19 pandemic has revealed the fragility of healthcare systems, the instability of economic structures and the vulnerability of the society. The measures necessary for containment and mitigation of the consequences of the pandemic have been implemented in order to limit the spread of the virus and save human lives, but they brought about the reduction of economic activity. The interaction of supply and demand shocks combined with political response to COVID-19 pandemic, such as closing national borders, triggered a series of negative impacts on both national and global economy.

The negative economic impacts of COVID 19 pandemic could surpass the global financial crisis of 2008-2009. The fact that the COVID-19 pandemic will not come to an end any time soon is of a particular concern. In the near future the pandemic will add to the human and economic suffering, but in the long run it will contribute to reduced growth and increasing inequality.

The global economy has been experiencing a recession ever since the pandemic outburst. According to the World Bank projections, in 2020 a global economic downturn was -3.1% (IMF, 2021b: 6). The downturn of economic activities in 2020 was the sharpest in the developed countries (-4.5%) and it was higher in Euro zone (-6.3%) than in the USA (-3.4%). The countries with the sharpest downturn in the Euro zone included Spain (-10.8%), Italy (-8.9%) and France (-8%). The emerging markets and developing economies have also experienced a decline (-2.1% on average). There were also the differences in economic downturn among the countries belonging to this group. China was the only country to experience a 2.3% economic growth in the time of COVID-19 pandemic in 2020, although there was a 3.7% drop at the same time compared with 2019, when it achieved the 6.0% growth. Concerning Serbia, the total economic activity in 2020 measured by the actual gross domestic product trends dropped by 1.1% compared with 2019 (Statistical Office of the Republic of Serbia, 2020b).

In addition to continuous fighting against coronavirus by vaccination, the recovery from negative economic activity flows will also depend on the efficiency of the economic policy implementation. Serbia is one of the leading countries in the direct combat with the pandemic caused by the coronavirus (procurement of vaccines and vaccination of the population in Serbia). Furthermore, Serbia is accomplishing good results on the economic level, which is supported by IMF's projection – a 5% growth of GDP in 2021 that should not go below 4% until 2026 (International Monetary Fund, 2021a: 132). The unemployment rate in Serbia in 2020 has slightly increased (9.9%), compared to 2019 (9.7%) (RZS, 2020c). Similar situation is in the EU countries too, 6.7% in 2019, compared with 7.1% in 2020.

THEORETICAL ASPECT OF THE SHADOW ECONOMY AND INFORMAL EMPLOYMENT

The study of the shadow economy requires a scientific multidisciplinary approach not only to economy but also to anthropology, political science, sociology, psychology, public administration, criminology. The ubiquity of shadow economy is mainly connected to the developing and transition countries, even though the shadow economy activities are a daily occurrence everywhere in the world, even in the most developed countries.



The shadow economy is a complex phenomenon, and its activities are as old as humanity itself. Historically, all employment, businesses and economic activities were informal until policies and laws were introduced that created a divide between formal and informal, that is, between economic units that are registered with relevant administrative authorities and those that are not and between workers with employment-based social protection and those without it (Chen & Carré, 2020: 1).

Shadow economy is often called black market, parallel economy, informal and irregular sector, hidden economy, etc. The professional literature does not provide a single, unique definition, but instead offers quite a few definitions of “shadow economy” that are often conflicting. Many authors agree that shadow economy is “those economic activities and the income derived from them that circumvent or otherwise avoid government regulation, taxation or observation” (Schneider, 2012: 5). According to the OECD, shadow economy encompasses activities that are illegal, underground, informal and other unregistered production activities that cannot be captured by the statistical system of the country (OECD, 2002).

Informal economy is completely opposite to formal economy that is observed as a sum of all economic transactions. Regardless of so many definitions of the shadow economy, it can be said with certainty that it represents a market-based part of the legal economy that operates illegally and comprises all illegal activities, starting with unreported income from production of goods and services, via financial transactions and bartering arrangements, all the way to self-organized business activities (Schneider, 2011: 3).

Informal economy includes all unregistered economic transactions that take place out of the institutionalized economic environment. The “shadow economy” consists of several types of criminal activities, such as drug sales, bribery, smuggling, prostitution, loan sharking, casino gambling, bookmaking and other unlawful enterprises (Gharleghi & Jahanshahi, 2020: 2). In that informal sector (illegal firms) there are too many people operating outside the line of sight of the state. This “informal” sector constitutes more than 70 per cent of total employment in emerging market and developing economies and roughly one-third of output (Ohnsorge & Yu, 2021: XV). In 2020, 2 billion people work in the informal economy: 6 out of 10 workers. Informality concerns close to 9 out of 10 workers in sub-Saharan Africa and Southern Asia. As of 22 April 2020, close to 1.1 billion informal economy workers live and work in countries in full lockdown with the additional 304 million in countries in partial lockdown. These workers together represent 67 per cent of informal employment (ILO, 2020a: 1).

Employment in the informal sector includes all jobs in informal sector enterprises or all persons who, during a given reference period, were employed in at least one informal sector enterprise, irrespective of their status in employment and whether it was their main or a secondary job (Husmanns, 2004: 2). The COVID pandemic has exposed and exacerbated many of the pre-COVID inequities and injustices faced by informal workers and their families.

METHODOLOGY FOR ESTIMATING THE INFORMAL EMPLOYMENT

Labour force survey is the only source of information on informal employment. This survey provides insight into the situation and enables monitoring of labour market changes by using internationally established indicators, including employment and unemployment rates. Additionally, this survey gives insight into socio demographic characteristics of the employed, the unemployed and persons outside of the labour force. As of 2021, the Statistical Office of the Republic of Serbia has been using a



new, redesigned methodology of the labour force survey. The survey was redesigned based on and in compliance with the new European Parliament and Council Regulation that entered into force on 1 January 2021 (Statistical Office of the Republic of Serbia, 2021a).

Informal employment rate represents a share of persons working without a formal employment contract in the total number of employed persons. This category includes persons employed in an unregistered firm, persons employed in a registered firm but without a formal employment contract and without a social and pension insurance, as well as the household members performing unpaid household services (Statistical Office of the Republic of Serbia, 2020a: 65). Statistically speaking, working age population can be classified into employed, unemployed and economically inactive persons, and the employed persons can be sub-classified according to their employment status, informal or formal nature of their jobs, the type of production units (formal sector firms, informal sector firms or households) in which the activities are performed, etc. Labour force survey does not take into consideration the formal employment status of the respondent, but it defines his/her working status based on the actual activity performed in the reference period.

Informal employment estimates are made additionally complex by the fact that the questions for identifying informal employment must refer not only to respondents' main jobs, but also to their secondary jobs. Furthermore, there is a problem with identifying persons that can be classified as informally employed only if they have been identified as employed in the first place. Children and the elderly persons who are identified as inactive population are often engaged for the activities in the informal sector, and such incompleteness of data included in the Labour force survey further complicates and obscures the informal employment data.

Informal employment is typically measured in relation to a short reference period (such as one week) which may not be representative for the whole year. Improved representativeness in the time dimension can be achieved by repeating the measurement several times during the year in the case of quarterly, monthly or continuous surveys, or by using a longer reference period such as one year in the case of annual or less frequent surveys (Husmanns, 2004: 10). When implementing a labour force survey, it is also important to include the adequate number of regions where informal workers live. It can therefore be concluded that there are certain limitations to the use of labour force surveys as a source of data on informal employment.

ANALYSIS OF INFORMAL EMPLOYMENT DURING THE PANDEMIC

Informal economic activity is pervasive in the developing economies, accounting for one-third of GDP on average (Ohnsorge & Yu, 2021: 203). The two basic forms of covert economic activities are undeclared earnings and undeclared income, i.e. illegal trade in products (Krstić & Radulović, 2018: 14). Undeclared earnings are earnings generated by covert activity in the informal sector. They are a direct product of informal employment.

The causes of an individual's informality cannot be attributed to one factor, but more often to a whole set of factors - from the sectoral structure of the economy, historical context, the possibilities and quality of inspection supervision, to the tax system and social protection system. In that sense, the tax system and the social protection system in Serbia are often highlighted in the literature as one of the main causes of informality (Udovički & Medić, 2021: 7).

For the purposes of this paper, for the analysis of informal employment, we will refer to the research of the International Labour Organization, Impact of Lockdown Measures on the Informal Economy, from 2020 (ILO, 2020a). Almost 1.6 billion informal economy workers or 76 per cent of informal employment worldwide are significantly impacted by the lockdown measures and/or working in the hardest-hit sectors (Table 1).

Table 1: *Informal economy workers significantly impacted by lockdown and physical distancing measures (2020)*

| | Informal employment (millions) | Significantly impacted informal workers (millions) | Informal significantly impacted (%) |
|-------------------------|--------------------------------|--|-------------------------------------|
| World | 2.060 | 1.564 | 76 |
| By Region | | | |
| Africa | 391 | 325 | 83 |
| Americas | 192 | 169 | 88 |
| LAC | 158 | 140 | 89 |
| Arab States | 31 | 27 | 89 |
| Asia and Pacific | 1.346 | 988 | 73 |
| Europe and Central Asia | 100 | 65 | 64 |
| By income group | | | |
| High-income | 117 | 86 | 73 |
| Upper-middle-income | 716 | 395 | 55 |
| Lower-middle-income | 971 | 914 | 94 |
| Low income | 256 | 197 | 77 |

Source: ILO, 2020a: 1.

Of the total number of informally employed in the world in 2020 (2,060 million), the number of significantly affected informal workers in the COVID-19 pandemic was 1,564 million (76% of the total number of informally employed). For them, stopping work or working remotely at home is not an option. Staying home means losing their jobs and, for many, it has also meant losing their livelihoods. To die from hunger or from the virus is the all too real dilemma faced by many of those earning their living in the informal economy (ILO, 2020a: 1). Speaking of the regions, the largest number of informal employees is in Asia and Pacific (1,346 million), Africa (391 million), Americas (192 million), LAC - Latin America and the Caribbean (158 million), Europe and Central Asia (100 million) and the Arab States (31 million). Although the Arab States have the lowest number of informally employed, the share of significantly affected informally employed by the COVID-19 pandemic is the largest in the world (89% of the total number of informally employed). Latin America and the Caribbean (89%), Americas (88%), Africa (83%), Asia and Pacific (73%) also have a high share, while Europe and Central Asia have the lowest share (64%). If the analysis is performed according to the type of income, the group of lower-middle-income (971 million) has the largest number of informal employees. It is fol-



lowed by the groups of upper-middle-income (716 million), low-income (2,656 million) and high-income (117 million). The order of significantly affected informally employed by the COVID-19 pandemic by groups is as follows: lower-middle-income (94%), low-income (77%), high-income (74%) and upper-middle-income (55%).

Table 2: Labour income among informal workers as a result of COVID-19

| | Median monthly labour earnings (2016 PPP\$*) | | |
|---------------------------------------|--|---|----------------|
| | Before COVID-19 | During COVID-19 (the expected level of earnings in the first month of the crisis) | |
| | Informal workers | Informal workers | Difference (%) |
| World | 894 | 359 | -59.8 |
| By region | | | |
| Africa | 518 | 96 | -81.4 |
| LAC | 364 | 74 | -79.7 |
| Northern America | 2,312 | 429 | -81.5 |
| Asia and the Pacific | 549 | 430 | -21.6 |
| Europe and Central Asia | 1,253 | 387 | -69.1 |
| By Income Group | | | |
| High-income countries | 1,834 | 445 | -75.8 |
| Upper-middle-income countries | 497 | 359 | -27.7 |
| Lower-middle and low-income countries | 479 | 89 | -81.5 |

* Purchasing Power Parity

Source: ILO, 2020a: 2.

The COVID-19 pandemic has led to a loss of income for informal employees. The earnings of informal employees worldwide before the COVID-19 pandemic were \$ 894 PPP (Purchasing Power Parity in 2016), while during the COVID-19 pandemic (the expected earnings in the first month of the crisis) was \$ 359 PPP, a drop in revenue from -59.8%. This decline by region is the largest in Northern America (-81.5%), Africa (-81.4%), Latin America and the Caribbean (-79.7%), Europe and Central Asia (-69.1%) and Asia and Pacific (-21.6%). Lost earnings would result in an increase in relative poverty (proportion of workers with monthly labour income below 50 per cent of median monthly labour income in the population) for informal workers and their families more than 21 percentage points in upper-middle-income countries, around 52 percentage points in high-income countries and 56 percentage points among lower-middle- and low-income countries.



Table 3: *Relative poverty among informal workers as a result of COVID-19*

| | Relative poverty (incidence within group) | | |
|---------------------------------------|---|---|----------------|
| | Before COVID-19 | During COVID-19 (expected level of earnings in the first month of the crisis) | |
| | Informal workers | Informal workers | Difference (%) |
| World | 25.6 | 59.4 | 33.7 |
| By region | | | |
| Africa | 20.7 | 82.9 | 62.1 |
| LAC | 36.1 | 90.1 | 54.0 |
| Northern America | 17.6 | 77.3 | 59.7 |
| Asia and the Pacific | 21.9 | 36.3 | 14.4 |
| Europe and Central Asia | 34.1 | 80.2 | 46.1 |
| By Income Group | | | |
| High-income countries | 27.5 | 79.7 | 52.1 |
| Upper-middle-income countries | 25.9 | 47.1 | 21.2 |
| Lower-middle and low-income countries | 18.2 | 74.4 | 56.2 |

Source: ILO, 2020a: 2.

Assuming there is no alternative income, lost wages would result in an increase in relative poverty of informally employed and their families globally by 33.7%, in upper-middle-income countries 21.2%, in high-income countries 52.1% and in lower-middle and low-income countries 56.2%. As for the region, the largest decline in relative poverty was recorded in the African region (62.1%), while the smallest decline was recorded in the Asia and the Pacific region (14.4%).

As far as Serbia is concerned, the share of informal employment in total employment in 2019 was 18% (530,000 people). The volume of informal employment has decreased over the past few years, so that the number of informally employed persons in 2019 was about 25,000 lower than in 2018 (Branković & Pločić, 2020: 6). That share in 2020 fell to 16.4%.

Table 4: *Informal unemployment rate in Serbia, 2016-2020, (%)*

| Years | 2016 | 2017 | 2018 | 2019 | 2020 |
|-------|------|------|------|------|------|
| Total | 22.0 | 20.7 | 19.5 | 18.2 | 16.4 |

Source: RZS, 2021b.

The situation regarding the composition of informal employment in Serbia is shown in Table 5.



Table 5: *Composition of informal employment:
What is the prevalent form of informality in Serbia, in 2019?*

| | | |
|------------------------|--------------------------------------|--------|
| In the Informal Sector | Independent workers – IE/IS | 27.4% |
| | Employees – IE/IS | 3.3% |
| | Contributing family – IE/IS | 2.7% |
| In the Formal Sector | Employees – IE/FS | 20.2% |
| | Contributing family – IE/FS | 22.6% |
| In Households | Independents – IE/ Households | 21.7 |
| | Employees – IE/ Households | 2.2% |
| | Contributing family – IE/ Households | 0.0% |
| | Total | 100.0% |

Note: IE=Informal Employment, IS-Informal Sector, FS-Formal Sector

Source: ILO, 2020b: 1.

The agricultural sector participates with over 40% in total informal employment. It is followed by the domestic sector with 24.4%, while the other 8 sectors have a share of less than 10% (Table 6).

Table 6: *The sectoral dimension: the 10 sectors represented
the most in the informal economy – Serbia (2019)*

| No. | Sector | % |
|-----|-------------------------|------|
| 1. | Administrative Support | 1.3 |
| 2. | Transport | 1.7 |
| 3. | Art, recreation | 2.4 |
| 4. | Other services | 2.6 |
| 5. | Accommodation & food | 3.3 |
| 6. | Manufacturing | 5.0 |
| 7. | Wholesale, retail trade | 5.8 |
| 8. | Construction | 8.4 |
| 9. | Domestic workers | 24.4 |
| 10. | Agriculture | 40.5 |

Representation of sector X in total informal employment

Source: ILO, 2020b: 2.

Distribution of informal and formal employment by enterprise size in Serbia is such that enterprises that have 50+ employees account for 2% share in the total informal employment. Enterprises that have:

- 10-49 employees account for 8%,
- 2-9 employees, for 34%,
- 1 employee, for 56%.

Concerning formal employment in enterprises, the situation is as follows:

- 50+ employees: 33%,
- 10-49 employees: 35%,
- 2-9 employees: 18%,
- 1 employee: 14%.

This distribution shows that a share of informal employment decreases with enterprise size, while it is the other way round with formal employment, i.e. the share of formal employment increases with the size of enterprise.

Table 7: *The rural-urban dimension on informality – Serbia (2019)*

| | | Rural | Urban |
|-----------------------|----------|-------|-------|
| Excluding agriculture | Formal | 30.9 | 69.1 |
| | Informal | 55.6 | 44.4 |
| Including agriculture | Formal | 36.2 | 63.8 |
| | Informal | 68.3 | 31.7 |

Source: ILO, 2020b: 2.

The situation in the sectors in which agriculture is included, in relation to the sectors that do not include agriculture, indicates the growth of informal employment in rural areas, while the representation of formal employment in urban areas is lower.

From the above analysis, it can be concluded that the impact of the pandemic on informal employment was fierce, both in the world and in the regions and national economies. The main burden of the COVID-19 pandemic was undoubtedly borne by informal employees. At the beginning of the implementation of pandemic measures, a large number of informal entities could not operate or operated with reduced capacity. This has led to a reduction in the number of informal employees. However, the number of informally employed does not tell us anything about the working hours of informal workers, and there are indications that they also dropped significantly during the crisis, as did wages. In many sectors, such as hotels and restaurants and personal services in the first place, informal workers are still largely without employment or with reduced wages. During the state of emergency, informal workers had to be affected significantly more not only because of the lower level of protection but also because informal workers could not be directly covered by economic measures. One of the problems is that they could not get permission to move during curfew, and continue working.

We note that even before the pandemic, informal workers were generally in a significantly more difficult position than formal employees. On average, informally employed earn 30% less than formally employed (Ohnsorge & Yu, 2021: 38). Informal employment characterized labour-intensive production, less educated and more poorly paid workers, limited access to financial and medical service, and poor or non-existent coverage by social security. These features are likely to intensify the spread of COVID-19 among informal workers and worsen its adverse health and economic impacts (Nguimkeu & Okou, 2019).



MEASURES FOR MITIGATING THE ECONOMIC CONSEQUENCES OF PANDEMIC IN INFORMAL SECTORS

Lockdowns of countries and social distancing as government measures to prevent the spread of COVID 19 have had significant impact on majority of informal workers worldwide. Informal workers are most often out of reach of social support programs. If unreachable through benefits programs, informal workers are likely to feel compelled to continue working, despite the health risks (Maloney & Taskin, 2020).

Informal workers are most often employed in activities and at locations where social distancing is difficult to implement. They are compelled to work to earn a living as they do not have access to formal social benefits. Informal workers are forced to make desperate decisions and to choose whether to die of hunger or of a virus. Although they usually fall outside the tax net, such workers are often not eligible for basic social security, nor protected by basic employment rights (Oxford Business Group, 2020). Unconditional support programs and implementation of efficient delivery channels for supporting informal workers and companies is one of the main measures in fighting the disease spread. High informality and the low coverage of social protection schemes imply very weak automatic social stabilizers. This strengthens the case for discretionary support to affected workers (Diez, Duval, Maggi, Ji, Shibata & Medes Tavares, 2020: 1). Considering their limited resources, many countries with low income are compelled to ask for increased international financial resources for efficient implementation of such programs. In the time of COVID 19 pandemic, the assurance of welfare of most endangered workers, i.e. informal economy workers at this moment, is of crucial importance.

As an essential first step, governments should put a moratorium on the inspection, fines, confiscation and evictions of informal workers and their working activities. Adhering to this "Do No Harm" principle will require little (if any) financing (WIEGO, 2021). A lot of countries worldwide implement the following measures to support the informally employed persons: short-term recovery cash grants; food assistance; payment moratoriums and debt forgiveness: e.g. utility bills, rent, tuition, fines and fees; recovery stimulus packages including zero or low-interest loans and reduced taxes; provide trainings and professional certification for informal workers to improve their capacities and earning power; simplification of procedures to obtain licenses and work permits; expansion and upgrading of the existing social assistance programmes by increasing benefit levels and expanding to cover new groups of people.

Every country, including Serbia, should primarily focus on stimulating transition of informal companies and workers into formal economy. In addition to the measures aiming at mitigation of economic consequences in informal economy caused by COVID 19 pandemic, Serbia must continue with the implementation of the existing measures against shadow economy. Incentive measures are also of extreme importance, and they include further reduction of tax burden on labour, the creation of public registry for non-tax charges, the stimulation of cashless payments, the expansion of system for registering seasonal and occasional workers in construction, tourism and catering and domestic work, and the regulation of non-standard forms of work. These measures should also include tax reliefs, such as tax exemption in the first operating year, especially for priority categories, such as flat-rate businesses or specific activities, regulation of the field of crafts, digitalization of administrative procedures and a series of educational campaigns.

By adopting the National Program for Countering Shadow Economy for 2019/2020, the creators of economic policy in Serbia have set goals and principles for suppression of the informal employment and inclusion of the employees into formal flows (NALED, 2019). The action plan also includes sup-



portive fiscal measures as an incentive for self-employment and for survival of newly opened and registered firms. Incentives for employment of young, competent people are an especially important segment.

The expert group of the Government of Serbia has started drafting a new National Program for Countering Shadow Economy, the adoption of which will give a new encouragement to the improvement of inspection supervision, reduction of illegal work and informal employment (NALED, 2021).

It is necessary to regulate new forms of work engagement by enabling the employment by foreign employers, work via web portals or part-time work. This type of work is not adequately regulated and leads to informal employment. The increased flexibility of employment will help avoid the abuse of employment through leasing agencies and youth cooperatives (NALED, 2019: 38). The inclusion of informal economy into formal flows should be continued (social insurance, subsidizes loans, special tax treatment for certain categories in certain conditions, major employment reliefs via refunding a part of paid income tax and a part of paid social insurance contribution in order to encourage employers to legalize informal employees, etc.).

Since the informal employees proved to be especially vulnerable in the circumstances of pandemic outbreak, it is necessary to define additional measures that would include these extremely fragile categories of women and men. Instead of linear distribution of the same sum of money to all adult citizens, money should be distributed more carefully and given to those who need it the most. One of the categories that should be given particular support and major financial assistance are the households that do not have any formally employed members (Agency for Gender Equality and Women's Empowerment, 2020: 29).

As a country, Serbia is committed to reducing informal employment to the socially and economically acceptable level, considering the fact that there is not a single country without informal employment. The country must create such environment that would make legal operating the easiest and the most profitable form of doing business, by providing equal conditions and clear and logical rules that are not difficult to comply with but also by imposing certain sanctions on those who fail to conform despite everything.

CONCLUSION

Informal employment is presents in all the countries in the world to a smaller or greater extent. In Serbia, approximately one in five persons (out of total number) is informally employed, while the unregistered firms make up for over 17% of the total number of business entities. In Serbia, there was not a great increase in the number of informally employed during the lock down and the beginning of the pandemic, but in many countries in the region there was. The COVID-19 pandemic has focused attention on informal workers around the world. It has also exposed and exacerbated many of the pre-COVID inequities and injustices faced by informal workers and their families. The activities focused on reducing the share of unregistered subjects in the total number of business entities, as well as on continuous reduction of those subjects and their employees' share in the total economy scale represent a priority in combating informal employment. There is no single overarching policy intervention to address the concerns associated with the informal employment. Every country considers and implements its own measures for informal employment reduction within its own capacity. Since the main causes of informal employment are the tax system and the social protection system, the measures for reduction of informal employment should include not only incentives but also the



modification of the specified factors. The main goal is to accomplish the transition from informal into formal, which implies shifting informal workers to formal jobs; registering and taxing informal enterprises; providing business incentives and support services to informal enterprises; securing legal and social protection for the informal workforce; recognizing the organizations of informal workers; and allowing their representatives to take part in rule-setting, policymaking, and collective bargaining processes.

REFERENCES

1. Agencija za rodnu ravnopravnost i osnaživanje žena. (2020). *Uticaj COVID-19 pandemije i mera za njeno sprečavanje na zaposlenost i uslove rada žena i muškaraca u Srbiji*, Publikacija u okviru projekta „Ključni koraci ka rodnoj ravnopravnosti“, Beograd, UN Women.
2. Branković, A. & Pločić, J. (2020). *Kretanja na tržištu rada u 2019. godini – prema Anketi o radnoj snazi*, Beograd, Parlamentarna budžetska kancelarija.
3. Chen, M. & Carré, F. (2020). *The Informal Economy Revisited Examining the Past, Envisioning the Future*. New York: Routledge.
4. Dašić, D., Jeličić, G., Buzurović, D. (2017). *Analysis of entrepreneurs and small and medium enterprises in Serbia*. “Quality-Access to success” Journal of the Romanian Society for Quality Assurance, vol. 18 (S1), 318-323.
5. Diez, F., Duval, R., Maggi, C., Ji, Y., Shibata, I. & Medes Tavares M. (2020). *Options to Support the Incomes of Informal Workers During COVID-19*. Washington, IMF.
6. Gharleghi, B. & Jahanshahi, A. A. (2020). *The Shadow Economy and Sustainable Development: The Role of Financial Development*, Journal of Public Affairs, Volume 20, Issue 3.
7. Hussmanns, R. (2004). *Defining and Measuring Informal Employment*, Geneva, ILO.
8. ILO. (2020a). Impact of Lockdown Measures on the Informal Economy. Downloaded October 15, 2021 https://www.ilo.org/global/topics/employment-promotion/informal-economy/publications/WCMS_743534/lang-en/index.htm
9. ILO. (2020b). Overview of the informal economy in Serbia. Downloaded July 8, 2021 https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/genericdocument/wcms_751317.pdf
10. IMF. (2021a). World Economic Outlook, Managing Divergent Recoveries, Downloaded July 13, 2021 <https://www.imf.org/en/Publications/WEO/Issues/2021/03/23/world-economic-outlook-april-2021>
11. IMF. (2021b). *World Economic Outlook, Recovery During a Pandemic*, Washington, International Monetary Fund.
12. Krstić, G. & Radulović, B. (2018). *Siva ekonomija u Srbiji 2017 Procena obima, karakteristike učesnika i determinante*. Beograd: NALED
13. Maloney, W. & Taskin T. (2020). *Determinants of Social Distancing and Economic Activity during COVID-19: A Global View*. Working Paper 9242. Washington: World Bank, DC.

14. NALED. (2019). *Nacionalni program za suzbijanje sive ekonomije u Srbiji 2019/20*. Downloaded July 15. 2021 https://naled.rs/images/preuzmite/Nacionalni_program_Akcioni_plan_SE_2019-2020.pdf
15. NALED. (2021). *Stručna grupa Vlade Srbije počela izradu novog nacionalnog programa za suzbijanje sive ekonomije*. Downloaded October 15. 2021 <https://naled.rs/vest-strucna-grupa-vlade-srbije-pocela-izradu-novog-nacionalnog-programa-za-suzbijanje-sive-ekonomije-5156>
16. Nguimkeu, P. & Okou, C. (2019). *Informality in The Future of Work in Africa: Harnessing the Potential of Digital Technologies for All*. Washington, DC: World Bank.
17. OECD. (2002). *Measuring the Non-Observed Economy - A Handbook*. Downloaded July 14. 2021 <https://www.oecd.org/sdd/na/1963116.pdf>
18. Ohnsorge, F. & Yu S. (2021). *The Long Shadow of Informality, Challenges and Policies*. Washington, World Bank Group.
19. Oxford Business Group. (2020). *A Covid-19 'new deal' for informal workers?*. Downloaded Jul 13, 2021, <https://oxfordbusinessgroup.com/news/covid-19-new-deal-informal-workers>
20. RZS. (2020a). *Bilten – Anketa o radnoj snazi u Republici Srbiji 2020*, Beograd, RZS.
21. RZS. (2020b). *Ekonomska kretanja u Republici Srbiji*. Downloaded October 13, 2021 <https://www.stat.gov.rs/vesti/20201230-ekonomska-kretanja-2020/>
22. RZS. (2020c). *Kretanja na tržištu rada u četvrtom kvartalu 2020*, Downloaded October 12, 2021 <https://www.stat.gov.rs/sr-latn/vesti/20210226-anketa-o-radnoj-snazi-iv-kv-2020/>
23. RZS. (2021a). *Anketa o radnoj snazi – nova metodologija 2021*. Downloaded October 12, 2021 <https://www.stat.gov.rs/sr-latn/oblasti/trziste-rada/anketa-o-radnoj-snazi/>
24. RZS. (2021b). *Stopa neformalne nezaposlenosti*, Downloaded October 12, 2021 <https://data.stat.gov.rs/Home/Result/240002090208?languageCode=sr-Latn>
25. Statista, *Unemployment rate in the European Union and the Euro area from 2010 to 2020*, Downloaded October 12, 2021, <https://www.statista.com/statistics/267906/unemployment-rate-in-eu-and-euro-area/>
26. Schneider, F. (2011). *The Shadow Economy and Shadow Economy Labor Force: What Do We (Not) Know?*. Discussion Paper No. 5769. Linz. Austria.
27. Schneider, F. (2012). *The Shadow Economy and Work in the Shadow: What Do We (Not) Know?*. IZA Discussion Paper No. 6423, Bonn.
28. Udovički, K. & Medić, P. (2021). *Uticaj COVID-19 krize na zaposlenost: Fokus na ranjive kategorije*, Beograd, Tim za socijalno uključivanje i smanjenje siromaštva Vlade Republike Srbije.
29. WIEGO. (2021). *There is no Recovery Without Informal Workers Covid Recovery and Post-Covid Reforms: Demands of Informal Worker Organizations*, Downloaded October 16, 2021 <https://www.wiego.org/sites/default/files/resources/file/Informal%20Worker%20Demands%20-%2012-City%20Study.pdf>



THE ROLE OF INTELLECTUAL PROPERTY RIGHTS IN THE (UN)AVAILABILITY OF VACCINES DURING THE PANDEMIC

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Abstract: Intellectual property law is dedicated to promoting inventions, while ensuring the protection of socio-economic interests. The financial aspects of research and the lack of alternative protection for investments impose the need for their patent protection. Many countries, especially developing ones, have resisted the patent protection of pharmaceutical products, fearing that these products would become inaccessible to them, as patent protection increases the price of medicines. However, it is exactly the rules of intellectual property that, through the institute of compulsory licensing, enable the renunciation of the monopoly over pharmaceutical products, in the time of epidemics and pandemics. The institute of compulsory licensing in the period of pandemics gives priority to human lives over the profits of several pharmaceutical companies. The question then arises as to why organisations and countries such as the EU, the United States and others rebelled within the WTO against the proposal of South America, Africa and India to implement the institute of compulsory licensing for covid-19 vaccines.

Keywords: *monopolies, patents, compulsory licensing, pharmaceutical products, vaccines.*

INTRODUCTION

Pharmaceutical products are specific with regard to their purpose. They are used for treatment and improvement of population health. Their production is a serious work that requires large investments in research and development, from which a big profit is expected. Therefore, patent protection for pharmaceutical products was established under the pressure of pharmaceutical industry.

In order to regain invested means, innovative companies pay special attention to patent protection of their products. The protection lasts for 20 years and in that period generic companies cannot produce

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medications based on the original ones. After the protection expires they can put remedies on the market. They are equivalent to the original medicines. They are also of the same quality, safety and efficacy as the innovative medicines but they are cheaper since the generic companies are devoid of research and development expenses. Because of this, innovative companies tend to defend against the generic companies by producing their own generic medicines or by disputing their bioequivalence.

Preclinical and clinical trials are the most expensive phases of developing a medicine. These trials require permission by Medicines and Medical Devices Agency that also issues the permission for putting the products on the market. The Agency was established by The Law on Medicines and Medical Devices and operates according to the guidelines of The Good Clinical, Laboratory and Manufacturing Practices. They are published by the Ministry authorised for health matters.

PATENTS

Patent is a right belonging to physical persons or legal entities via which a certain invention is protected. Patent holder acquires exclusive and absolute right of usage and disposal together with the right of accomplishing compensation if another person uses the invention (legal-property authorisations). If a holder of the right to a patent is also the inventor, he holds the moral right to be marked as such in all documents regarding the patent.

Besides positive authority to economically exploit the invention, a titleholder has the negative authority to ban exploitation of the protected invention by all third parties. But patent also succumbs to limitations that represent an attempt to balance between interests of a titleholder and interests of the community. The limitations may be predicted for many reasons. They can be ethical; with purpose of acknowledging the needs of an individual; originate from the need for undisturbed unfolding of international traffic; with the goal of enabling further technical development.

An invention must fulfil the conditions set by Article 10, 12 and 13 of the current Patent Law so it has privilege of protection in the form of a patent. Those are novelty, inventivity and industrial applicability the Patent Law (Official gazette RS, no. 99-2011, 113-2017- other law, 95-2018 and 66-2019).

An inventor must create something original that is based on studies and imagination even if he relies on the old data and inventions during the process (Idris, 2003:71).

Most of Patent Laws in the world don't contain definition of an invention. Such is the case with Serbian Patent Law that contains a mixture of elements for definition of an invention and conditions needed to protect the invention with a patent. Once the mentioned conditions are separated, an invention becomes a technical solution for a certain problem (Markovic, 1997: 63).

An invention must be clearly and precisely exposed together with its technical parameters, with clearly and precisely described characteristics that define it and make it different from other inventions. This is needed so that an authorised person of an authorised organ could inspect the mentioned conditions. Important characteristics are the ones that are altogether necessary. When they are taken in total, they are enough to make a subject of the invention more different and inventive than other solutions from a known state of the art (Saraboh, Tesankic, 2009: 2).

An invention is new if it is not contained within the state of the art. This state is composed of two technical solution groups that became available for the public (by written or oral description, use or in



any other way) before the date of submitting application for patent acknowledgment anywhere in the world (absolute novelty), at any time before submitting the application and in any way.

The other group is composed of technical solutions contained within national applications but also the ones contained within international applications (according to The Patent Cooperation Treaty concluded in 1970² at the diplomatic conference in Washington) in which Serbia is marked (if they are in the national phase). This also applies to European patent applications that are expanded because of Serbia, that have an earlier date of submission compared to an application for a subject and that are published on that date or later. This group of applications is characterised by spatial limitation (limited to the territory of Serbia) and temporal limitation (applications submitted in the period of 18 months before submitting an application for a subject). In accordance with The European Patent Convention (EPK)³, article 10 of The Patent Law prescribes that the findings of a substance or composition are considered novel even though they are contained within state of the art, conditioned that they are applied for the first time in one of the surgical, diagnostic procedures or treatment procedure - all of which are applied directly onto living human or animal bodies and are excluded from patent protection (Article 52, paragraph 2 EPK).

Via this so-called "pharmaceutical regulation" a retreat from the basic principle of absolute novelty is made. Therefore, in case of finding the first application for a certain matter (which is already contained within state of the art) in surgery, treatment or diagnostics, it is considered that the matter (pharmaceutical product) is new and therefore suitable for protection as an invention of pharmaceutical product. In this case, the demanded novelty is derived from new pharmaceutical application, The first application of a known matter as a medicine creates a fiction of novelty for the matter so that it could be patented as a medicine (and not as an application procedure) (Markovic, 1997:116).

Examination of novelty at an authorised organ (in Serbia its Intellectual Property Office) is done by an authorised person by firstly determining the subject of an invention based on content of patent demands. Then the person determines state of the art by gathering relevant patent documentation and finally, compares the subject of the invention with the existing state of the art.

There is an invention level if solution of a technical problem does not derive from the existing state of the art in an obvious way, which is related with an expert in a certain area.

Third condition that an invention must fulfil in order to accomplish protection in the form of a patent is industrial applicability. Article 13 of The Patent Protection Law points out that an invention is industrially applicable if the subject of the invention can be made or used in any branch of industry or agriculture. Applicability should be noted in accordance with directives of The Paris Convention, adopted in 1883 (article 1, paragraph 3) which assumes that industrial applicability, besides industry, encompasses commerce, agriculture, refining industry as well as all manufactured and natural products (Besarovic, 2005: 76). Article 57 of European Patent Convention says that an invention is industrially applicable if its subject can be manufactured in any area of industry, including agriculture.

The fact is that our country is (still) not a member of the EU so there is no formal obligation of adjusting our regulations with the ones of the EU. However, it is necessary because European rules con-

2 Our country is a member of the Agreement on Cooperation in the Field of Patents of February 1, 1997, Official Gazette of the FRY-International Treaties and Agreements, No/96.

3 The EPK was concluded on October 5, 1973 in Munich, entered into force on October 7, 1997, our country (then Yugoslavia) ratified the Convention on August 29, 1996, and finally the Law on Ratification of the KEP was passed, with amendments to Article 63 of 17 December 1991 and amendments of 29 November 2000, Official Gazette of RS-International Agreements No. 5/2010.



tain solutions that are result of a long-term successful application and because of conversion towards EU member states. This is dictated by development of new technologies and economy globalisation. Changes in technological development affect patent diversity because new discoveries are being made in the field of medicine, biotechnology and genomics.

PHARMACEUTICAL PRODUCTS PATENT PROTECTION

Medications are specific with regard to their purpose and their production is a serious work that requires large investments in research and development but in production and marketing as well. Large profit is expected of them. The costs of introducing a new medicine are enormous, which is the key reason for joining pharmaceutical companies in order to reduce costs of research and development. Mighty pharmaceutical companies wanted to secure monopoly over their products so the protection of pharmaceutical products was introduced.

The reasons why medications were not the subject of patent rights until the 70s of the last century in European countries (until the 90s in our county) were basically the same in all countries. It was considered that you cannot monopolize the matters that serve to maintaining human health and that the protection in the form of a patent would significantly increase the price of medicines joined by their substantially more difficult accessibility for a community (Vlaskovic, 1989: 124).

Article 3, paragraph 1 and article 7 of the 1995 Patent Law introduced patent protection for medicines. By that time, a medicine was excluded from patent protection in different ways via appropriate directives that referred to exceptions. Examples include the term “medicines” and article 13, paragraph 3 directives of the 1960 Law as well as the term “pharmaceutical products for people and animals” and article 4, paragraph 5 of the 1981 Law. Article 77a of The Law on Amendments and Modifications of the Law and article 77a of The 1990 Law on Protection of Inventions, Technical Advancements and Differentiation Signs state that the inventions that refer to applying matters in treating people and animals will not be patented until 31 December 1992, while the article 77b prescribes that using a matter as a medicine for people and animals does not represent patent harm for an invention of the matter if application for the invention was submitted until 31 December 1992. This is the exact date of changing regime of patent protection of pharmaceutical products but it was unclear whether a medicine was excluded from patent protection or not. Distribution and Marketing of Drugs Law of that time contained a definition of a medicine which describes it as a product and not an application as it was defined by The Patent Law.

Since 1990, a new substance has had protection status, while the 1995 Patent Law enabled protection of new application too.

Inventions of medicines are specifically significant group of inventions because they are used for preventing or treating diseases, i.e. health preservation. Without reliable monopoly such as a patent, there is no goad regarding investments in research and development of new medicines. Although economists sometimes debate on whether the general patent system is useful, they never seriously disputed patent protection of medicines as the investments in this area are risky (Jacobs, 2011).

Clinical trials last for several years in order to gather data on a medicine efficiency and safety. Authorised organ makes a decision whether the medicine should be distributed. This is based on the aforementioned data.



For these reasons, a person holding the rights title doesn't have the possibility to use an invention during the whole period of protection so he could primarily regain financial means invested in examination and development of the product and then make enough money to undertake new research that would eventually lead to new products. Medicine patents are required at a very early stage of their development (before clinical trials begin). Early patenting is required because of the competition from rivaling companies. Why invest up to several tens of millions of dollars if someone could copy and commercialize the medicine after it was licenced for distribution? This is the reason why a period of patent protection goes by without usage before the medicine gets distributed. Pharmaceutical company must prove that the medicine is safe and efficient and must enable that an authorised organ gains insight into the results of preclinical and clinical trials.

Preclinical trials provide initial indications related to the medicine safety while clinical trials are performed on volunteers. They last long, represent the most expensive phase of drug development and cannot be done without approval of an authorised organ. In our country it is Medicines and Medical Devices Agency of Serbia. It was first established in 2004 by The Law on Medicines and Medical Devices. The Agency is a legal entity that decides on issuing permissions for distributing medicines. This is done based on documentation that must contain administrative, pharmacological, toxicological, pharmaceutical, chemical, biological and clinical data. In accordance with EU Directives (2001/83, 2001/82, 2002/98 and 2003/63) a medicine is tested in accordance with guidelines of Good manufacturing practice, Good laboratory practice and Good clinical practice. They are all issued by Ministry of Health. Permission holder for distribution of medicines can be a medicine manufacturer with headquarters in Serbia, i.e. an agent or representative of a foreign legal entity that is not medicine manufacturer but is permission holder for the medicine within EU countries. It can also be legal entity with headquarters in the Republic of Serbia that holds permission for the medicine that was transferred onto it by the manufacturer, i.e. that was given the right for acquiring the property of licence holder from the manufacturers' program. The Agency makes decision on issuing the permission after receiving request for gaining permission to distribute the medicine. It is issued for the period of 5 years.

Permission for a medicine is no longer valid with its expiry date, if the licence holder demands so and if The Agency confirms that the medicine is harmful, that it has no therapeutic efficiency, that therapeutic results cannot be achieved during the treatment, that quantitative and qualitative composition of the medicine does not match the one on declaration or if the licence holder for the medicine no longer fulfils prescribed conditions.

COMPULSORY LICENCE WITHIN TRIPS⁴

By signing The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), developing countries had to introduce patent protection for medicines. Many countries found themselves in unequal position because this lead to an increase in medicine prices and these countries are burdened by serious health problems, especially diseases such as AIDS, tuberculosis and malaria.

The Agreement prescribes that member states can include necessary measures when formulating national laws. The goal of such action is protection of public health and diet (Article 8, paragraph 1).

4 The World Trade Organization, abbreviated: WTO, is an international multilateral organization designed to monitor and liberalize international trade. The organization was established on January 1, 1995 under the Marrakesh Treaty, which was signed by 123 states¹⁵ April 1994.



One part of The Agreement addresses patent holder limitations. It prescribes that member countries can establish exclusive rights limitations, conditioned that such exceptions do not clash with the usual patent exploitation and do no harm to legitimate interests of rights titleholder while being considerate about legitimate interests of third parties (article 30).

The use implies economic exploitation. Therefore, all the measures that do not penetrate significantly or do not penetrate at all into economic interests of patent holder are allowed (Zivkovic, 2008:32).

Article 31 prescribes other cases of usage without permission by titleholder. The article points out that if The Law of a member state allows different use of a patent (the different use is the one that is different from the use prescribed by article 30) without permission of the titleholder (which includes usage by Government or third parties authorised by the Government) the following rules must be respected: firstly, issuing permission for usage is considered for each case. Then, usage can be allowed only if presumed user tried to get usage permission from titleperson under reasonable commercial conditions and deadlines and if that effort has not been fruitful in a reasonable time period. A member state can give up this request in case of a national plight, in other cases of extreme necessity or in case of non-commercial public use.

This directive represents a result of a compromise because it cites negotiations with the rights holder, which is of titleperson's interest. On the other hand, there are appropriate means that a country can use to prevent irrational behaviour of patent holder and react in case of interest jeopardy.

The Agreement gives much attention to the need to find balance between interests of a holder and users. Therefore, possibility of approving compulsory licences exists only in the cases of non-commercial public usage and in cases of state of emergency in a country that can be caused by large-epidemics and most recently – pandemics.

Thanks to Compulsory Licence Institute, Taiwan avoided Roche patent for Tamiflu medicine that is used for treating bird flu. Thanks to The Institute, patent holders with no conscience were disabled from misusing their rights. This refers to charging too much for a medicine in a period of serious health emergency state.

A new round of TRIPS negotiations was held in Doha and was followed by 2001 Declaration that confirmed the right of member states to protect public health and issue compulsory licences (Zivkovic, 2008:43).

Article 31 enables that member countries of The Agreement can enable production of their own medicines via compulsory licences in case of big epidemics. However, problem emerges when a developing country does not have production capacities for medicine manufacturing and import of generic medicines that were made in accordance with compulsory licence is not possible. It is prescribed that compulsory licences are non-transferable which disables compulsory licence to be transferred onto a business entity that has production capacities.

The decision on implementation was adopted at 2003 Cancun meeting. It enables granting a compulsory licence for exporting to a country that doesn't have its own production capacities. TRIPS Council must be informed (not in the case of the least developed countries – they are devoid of this obligation) and all manufactured contingents must be exported. The importing country must prove that it really does not have production capacities.⁵

5 WTO- Intellectual property, TRIPS and public health, <http://www.wto.org/english/trips /pharmpatent-e.htm>, 11.12.2010.



After the 2003 Decision was changed, member states were proposed in Hong Kong with adopting TRIPS amendment by adding Article 31 bis, which would enable pharmaceutical products to be exported to the countries that don't have their own production capacities. This would be done based on mandatory licence. The General Council adopted The Protocol Amending the Agreements in accordance with the 2003 Decision. Regulation number 816/2006 of The European Community, The European Parliament and Council, introduced on 17 May 2006 refers to mandatory licencing for the patents concerning pharmaceutical products production. These products are exported to countries with public health problems. The Regulation gives a legal basis for EU member states to give mandatory licences for exporting patent medications.⁶

Example of a state of emergency as listed in the Article 31 is certainly the lack of vaccines against COVID-19. According to the British NGO Oxfam, rich countries that make 13% of the world population have now bought more than half of so far planned vaccine production. Considering that research meant for development of the vaccine against COVID-19 was financed with the money of taxpayers, results should be accessible to the public. The right of pharmaceutical companies to profit cannot be above the health right!⁷

In October 2020, India and South Africa suggested (within TRIPS) limiting certain authorisations of COVID-19 vaccine patent titleholders with the aim of preventing, combatting or treating COVID-19. Aforementioned countries proposed that limitations on authorisation last as long as the pandemic goes on. The proposal was supported by many countries (firstly by developing states). However, the USA, the UK, Switzerland, Japan, Brazil, Canada, Australia and some EU states were against it.

India, South African Republic and 60 other (mainly the least developed countries) submitted revised proposal to TRIPS regarding the time period. To be exact, the period of limitations of titleholder rights was reduced to 3 years and referred to health products and technologies, including diagnostics, therapy, vaccines, medical devices, personal protective equipment, their materials or components together with their methods and means of production that are meant for prevention, treating or combating COVID-19. However, a scope of potential limitation remains the key question. The EU has submitted alternative suggestion to TRIPS concerning equal approach to vaccines and treatments against COVID-19. It implies reduction of export limitations that will expand vaccine production and make it easier.⁸

CONCLUSION

TRIPS member states have not yet succeeded in accomplishing an agreement that would temporarily give up an intellectual property rights for COVID -19 related vaccines and treatments while the pandemic goes on all over the world.

Mandatory licencing is a powerful means of protecting public health which can be essential for alleviating insufficient supplies of vaccines against COVID-19.

Vaccines are complex biological medicines that are harder to replicate than the small-molecule medicines. Therefore, a new manufacturer who would like to create his own version of Pfizer-BioNTech

6 WTO- Intellectual property, TRIPS and public health, <http://www.wto.org/english/trips /pharmpatent-e-htm>, 11.12.2010

7 <https://www.dw.com/sr/treba-li-vesti-prisilne-licence-za-vakcine/a-5649848>, 23.08.2021.

8 Potential WTO TRIPS Waiver and COVID-19. Updated September 13, 2021 <https://crsreports.congress.gov/product/pdf/IF/IF11858>, 18.09.2021



vaccine would have to start his own clinical trials to prove efficiency and safety of the vaccine. Key obstacle in expanding production involves not only patent issues but business secrets, knowledge and poor physical supplies needed to run a new manufacturing facility. For example, Moderna has already given up its patent right in October but other manufacturers still cannot use its technology without an active cooperation with Moderna. This is the key question that creators of politics should focus on – to think of a way to goad an active transfer of knowledge on vaccine technology and then to ensure more righteous global vaccine distribution (Larrimore, 2021).

Expansion of global approach to vaccines against COVID-19 is a moral imperative. Record-breaking development of these vaccines is a triumph but the existing distribution reflects differences between countries.

Majority of doses that come from production lines of big pharmaceutical companies are distributed to the USA, European countries and several other rich countries. It is not expected that most parts of Africa, South America and Asia will accomplish mass vaccination until 2023. The USA has bought far more doses than it needs so it can share the extra ones from its supplies. The Irish Times gives an insight into export for the vaccines that the EU has gathered starting from February of the last year in the following order: 10.9 for UK, 6.6 for Canada, 5.4 to Japan, 4.4 for Mexico, 1.5 million doses for Saudi Arabia and the same number for Singapore. Vaccine ingredients and production capacities are limited, leaving the world to fight using the available doses (Larrimore, 2021).

In order to produce enough doses for global vaccination there needs to be a global increase of the existing production too. As it has already been mentioned, the key is goading or behesting knowledge transfer from the existing manufacturers together with efficient compulsory licence application. Building a stronger infrastructure network for vaccine production would not only help in ending this pandemic but would also leave the world better prepared for the next one.

REFERENCES

1. BESAROVIĆ, V., 2005, *Intelektualna prava, industrijska svojina i autorsko pravo*, četvrto, izmenjeno i dopunsko izdanje, Centar za publikacije, Beograd.
2. CARER D., 2011, "Drug Production, Public Interest vs. Intellectual property rights", *Yale Journal of Medicine and Law*, 18.02.2010., Vol. VI, issue 2, www.yalemed.law.com/2010/02-drug-production-public-interest-w-i.p.r.
3. IDRIS K., 2003, *Intelektualna svojina, mocno sredstvo ekonomskog rasta*, Beograd.
4. LARRIMORE O., Stanford's Lisa Ouellette on Waiving COVID-19 Vaccine Patents, <https://law.stanford.edu/2021/05/04/>.
5. MARKOVIĆ S., 1997, *Patentno pravo*, Beograd.
6. MARKOVIĆ S., 2007, O nedopustenoj retroaktivnosti zakona na primeru patentibilnosti pronalaska lekova u pravu Republike Srbije, *Pravo i privreda* 5-8, 595-608.
7. Pravo farmaceutskih kompanija na dobit ne može biti iznad prava na zdravlje! <https://www.dw.com/sr/treba-li-uvesti-prisilne-licence-za-vaccine/a-56498483>
8. Potential WTO TRIPS Waiver and COVID-19 Updated September 13, 2021 <https://crsreports.congress.gov/product/pdf/IF/IF11858>.

9. ROBIN J. 2011, Patents and pharmaceuticals - a paper given on 29th November at the Presentation of the Directorate General of Competitions preliminary report of the pharma sector inquiry, www.europa.eu/.../pharmaceuticals/jacobs.pdf.
10. SARABOH, TESANKIC, 2009, Uslovi za sticanje, kriterijumi patentibilnosti.
11. VLASKOVIĆ, B., 1989, Patentna zaštita pronalazaka iz oblasti hemije, Pronalazastvo, Beograd.
12. WTO-Intellectual property, TRIPS and public health, <http://www.wto.org/english/trips /pharm-patent-e-htm>.
13. ŽIVKOVIC V., 2008, Patenti i investicije, Beograd.



MUTUAL DEPENDENCY BETWEEN SOCIAL FACTORS AND CRIME

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Abstract: The issues of crime, its causes and effects, are perpetually current issues. Although legislators are investing efforts to act preventively and reduce the scope and types of criminal activities, crime is present in all countries of modern society. The occurrence of crime is conditioned by social, economic, and cultural factors, but also by the behaviour of individuals, their biological and psychological characteristics. There are conflicting views in literature and the professional public about the dependency between social factors and crime. The subject of the analysis in the paper is the impact of economic and social factors, primarily the poverty and unemployment, on the level of crime, but also the impact of crime on the economic development. Resources engaged in police, judiciary, and crime itself have opportunity costs, and their application in other fields can affect the economic development and social well-being. We used economic tools and methods in the analysis.

Keywords: *crime, social factors, unemployment, poverty.*

INTRODUCTION

The connection and mutual dependency of social phenomena often makes differentiating between the cause and the effect impossible. Whether social conditions, primarily unemployment and poverty, are the cause and crime is the effect, or whether crime has conditioned social development, poverty and unemployment, are issues that occupy the attention of a large number of scientists and practitioners, but are also the subject of analysis of a significant body of research in this connection.

The most significant number of studies on the association between social conditions, primarily unemployment and crime, was carried out in the USA. However, in Europe, empirical research is modest, so this critical and current topic analysis is yet to come.

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Analysing the economic causes of crime has been especially popular following the publication of Gary S. Becker's *Crime and Punishment: an Economic Approach* in 1968, which emphasizes the cost-benefit ratio of crime, and the work of Ehrlich, *Participation in illegitimate activities: A theoretical and empirical investigation* from 1973, which expands Becker's model and includes the opportunity costs of illegal and legal work in the analysis.

The occurrence of a criminal offense and the causes that preceded or conditioned it are viewed as a whole. Social circumstances create an opportunity for individuals who are likely to commit a crime. On the one side, the increase in personal wealth and, on the other, the impoverishment of a part of population is stimulating enough for the unemployed and the margins of society to resort to crime. In addition, the increase in and higher fluctuation of the population in cities allowed the potential criminals to get closer to a more significant number of people and multiplied the likelihood of an increase in crime. Although many factors influence the level of crime and its occurrence, this paper's analysis is limited to the relationship between poverty, unemployment and crime.

SUBJECT DETERMINATIONS

The issue of poverty is one of the issues faced by the largest number of modern economies. Accelerated progress and development of technology have created conditions for increased comfort and rising standards of the population. However, despite the significant improvement in living and working conditions, a significant part of humanity still lives in poverty. The concept of poverty implies a comprehensive observation of both the material standard related to income, consumption, and property, and health, education, and social conditions.

Unemployment implies a situation when a person who is actively searching for employment is unable to find work. If an individual is able to work, but does not look for a job and does not do anything to find it, they are not considered unemployed. Many modern economies face high unemployment rates, which leaves room for an increase in crime. This certainly does not mean that the unemployed or the poor are potential criminals, but the inability to make a living in legal flows can influence an individual's decision to enter the grey zone and crime.

Regardless of the form and intensity of its manifestation, crime is a negative phenomenon that accompanies society development from its establishment until today. Crime has been more or less pronounced depending on social conditions, but it has always absorbed social resources and affected social wellbeing. Therefore, one gets the impression that crime is getting out of control in modern living and working conditions, i.e. that the increasing investments in crime prevention and suppression do not give the expected results and that it is challenging to outwit criminals, i.e. their creativity.

POVERTY, MATERIAL WEALTH AND CRIME

Until recently, poverty referred to insufficient income to purchase a minimum basket of goods, while today poverty is considered to be the absence of conditions for a dignified life. The UN defined poverty in the Copenhagen Declaration as "the lack of income and productive resources to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited or the lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments and social discrimination and exclusion. It is also characterised by the lack of



participation in decision making and in civil, social and cultural life.” Absolute poverty, on the other hand, is defined as “a condition characterised by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to services” (UN, 1995: 57).

According to the definition adopted by the European Union in 1975, “people are said to be living in poverty if their income and resources are so inadequate as to preclude them from having a standard of living considered acceptable in the society in which they live. Because of their poverty they may experience multiple disadvantages through unemployment, low income, poor housing, inadequate health care and barriers to lifelong learning, culture, sport and recreation. They are often excluded and marginalised from participating in activities (economic, social and cultural) that are the norm for other people and their access to fundamental rights may be restricted” (Council of the European Union, 2004: 8).

The impact of poverty on crime levels can be manifold. Material insecurity and poverty can affect children’s development from the earliest childhood. Poverty is often the reason for dropping out of school, leading to development without work habits, later without employment opportunities and the like. Dropping out of school, poor school performance and low level of education have been recognized as an important factor and condition for delinquency (Nikolić-Ristanović, Konstantinović-Vilić, 2018: 357-358).

In addition, poverty and the inability to live independently force a large number of teenagers to stay in a family in which they often face domestic violence. Young people who live in conditions of poverty and who do not receive the necessary conditions and support in the family very often become the prey of various vices, ending up in the sphere of life on the other side of the law. The poor should not be labelled as potential criminals, but the inability to meet basic needs can be one of the key reasons for engaging in criminal activities. Adolescents are a group particularly prone to engaging in crime due to material poverty.

The modern age is characterized by a system of values in which the amount of material goods and wealth are the basic criteria for evaluating people. Their success and importance are determined by the amount of money they have at their disposal. Being poor is a shame, and getting money in any way, even unlawful, is not. From such a system arises the aspiration of the vast majority, especially young people, to get money as quickly and easily as possible.

Aspiring for a certain level of wealth, i.e. the possibility of satisfying needs should not be viewed negatively. Creating conditions for a decent life is stimulating for every individual. The problem arises when the desire and need for the amount of money and wealth are not limited and go beyond the borders of rationality. Almost daily, we come across the news that the director of a company committed embezzlement, that the rich caused damage to the budget by tax evasion, etc. In the case of the poor, we find the causes of crime in the scarcity and impossibility of satisfying the basic needs, so the question arises as to what is the cause leading the rich to commit crimes and what the limits are of enough money and goods that are not essential for life.

The root cause of the pursuit of increasing wealth can be recognized in the increased need for sensual satisfaction. The level of satisfaction is largely set by the media which daily place information about the wealth of a small part of society. As a significant part of society does not even have an average amount of money and goods, it makes many people feel less valuable so they resort to crime to afford a higher level of comfort.

The fact that they have more money or wealth at their disposal does not make rich people untouchable by crime. On the contrary, they are often the target of criminals, and they, or members of their families,



often get involved in criminal activities. The possession of material wealth is very often accompanied by psychological poverty and dissatisfaction. According to the research conducted in the USA in the late 20th and early 21st century, the increase in wealth of Americans was accompanied by an increase in murders among teenagers, the number of divorces, and drug users among rich children (Myers, 2000: 61). From personal experience, but also based on monitoring the social trends, each individual can conclude that the growth of material wealth does not guarantee happiness and satisfaction. The many benefits in terms of security that material wealth provides are important for a life worthy of a 21st-century man, but not crucial for personal happiness and wellbeing. In that sense, the essence of the new society organization concept is a state of wellbeing that will stimulate the creation of a society in which man as an individual is important regardless of the level of wealth at their disposal.

(UN)EMPLOYMENT AND CRIME

Unemployment and inequality are challenges the world economy and every national economy faces. The labour market is characterized by excess supply, resulting in a certain unemployment rate. Unemployment implies a situation when a person who is actively searching for employment is unable to find work. If an individual is able to work, but does not look for a job and does not do anything to find it, they are not considered unemployed.

Depending on the manner and conditions in which unemployment manifests, it can occur as frictional, structural or cyclical.

Frictional unemployment is temporary short-term unemployment resulting from changing jobs, looking for a new, better paid job, the changes in residence, temporary inability to work, breaks due to illness and the like.

Structural unemployment is a more severe problem for the economy in which it occurs. It refers to the unemployment resulting from changes in the economy and does not refer to an individual but to a larger number of people who cannot get a job for a long time due to economic flows and the lack of need for their engagement.

Cyclical unemployment is inherent in a decline in economic activity, recession, or depression. It results from a drop in aggregate demand and reduction in the number of workers needed.

The fact that the unemployed are able to work and that regardless of whether the reasons why they do not work are personal or there is no need to engage them, indicates that they remain unable to make a living by doing legal jobs. The inability to meet basic needs can influence the decision to ensure sustainable livelihoods by engaging in illegal activities.

By behaving as rational individuals, the unemployed compare the benefits they can get from a legal job and the likelihood of being employed and the benefits they would get from engaging in crime, and the likelihood of being caught and punished for it.

According to the model presented by Becker in the above paper, the expected usefulness of engaging in legal activities is determined by the expression:

$$EU_i = p_i U(Y_i) + (1 - p_i) U(Y_i) = U(Y_i) \quad i \neq j \quad (1)$$

According to the above model, the expected value from engaging in crime is obtained by the expression



$$EU_j = p_j U(Y_j - f_j) + (1 - p_j) U(Y_j) \quad (2)$$

where E is the expected value, U is the function of utility for the potential criminal, Y_j is the yield from committing the crime, f_j is to be interpreted as the monetary equivalent of the threatened punishment, p_j is the probability that the offender will be discovered, i.e. the probability of pronouncing the final verdict for the crime.

If $EU_j > EU_i$, $j \neq i$, (the utility of engaging in crime is greater than the utility of engaging in legal activities), the condition of committing a crime is met.

A particularly important issue is the duration of unemployment. In the conditions of longer unemployment, there is a devaluation of human capital and increased willingness to take risks and engage in criminal activities. The situation in the economy is also important at the moment when an individual loses his job. If it is a developing economy, individuals will be focused on looking for a job, because there is a real possibility for employment. However, when it comes to an economy in recession, the employment opportunities are weak, and the unemployed resort to alternative earning opportunities. Although the cause-and-effect relationship between unemployment and crime levels is still insufficiently explored, and the existing research does not provide reliable evidence of its existence, its non-existence cannot be ruled out because of the inability to find employment and work legally and the fact that needs must be satisfied can affect individuals and their decision to choose crime as a source of income.

There are different views but also different study results on the impact and relationship between crime and unemployment.

Cantor and Land developed a structural approach to analysing the relationship between unemployment and crime that synthesized the opposing effects of motivation and opportunity into one working model, finding that opportunity dominates motivation. They argue that doubts in this area stem from a failure to distinguish between two separate cause-and-effect relationships: a positive motivational relationship (unemployment increases the attractiveness of certain forms of crime) and a negative effect of opportunity (unemployment keeps people at home and reduces the availability of goods through reduced consumption) (1985: 317-322). Consequently, they argue that the relationship between the unemployment rate and crime levels can be positive, negative or null depending on the type of crime under consideration. Hale and Sabbagh found a significant positive link between poverty and burglary, theft, and robbery (1991: 400-417).

Agell and Nilsson (2003: 5), as well as Papps and Winkelmann (1999: 1-16) believe that there is a positive relationship between these categories, while according to Choe (2008: 31-33) the results of studies on the cause-and-effect relationship between these categories are contradictory and insufficiently reliable. Box (1987) points to 35 reliable studies on the subject, 20 of which find a positive relationship between unemployment and crime, while the rest could not find such a relationship.

The occurrence of crime can be influenced by both unemployment and employment, i.e. the amount of earnings and the conditions in which an individual works. The social status and position of individuals (but also their families) are most often determined by the workplace, the jobs they perform and their earnings (Petrović, 2020: 240-241). The individuals who earn a higher level of income, i.e. have a larger amount of money at their disposal, become the subject of potential robberies and burglaries. Dissatisfaction of employees with the conditions in which they work, but also the fact that many are not paid enough and do not have the conditions to ensure a decent life for their families affects the status of the whole family and family members resorting to crime.



In addition, the level of crime can be affected by working conditions in which an individual or more of them are not sufficiently controlled in performing the tasks entrusted and may abuse the position and authority given to them. We often witness scandals in which individuals or groups of employees put personal interest before the interests of the entities employing them. The abuse of opportunities provided by the workplace constitutes serious crimes, destroying the reputation of employers and the institutions in which they are employed.

The relationship between crime and macroeconomic variables has caused the great interest of policymakers in defining the measures that would reduce the level of crime and increase the economic results. The fact that crime causes high social costs indicates the need to create such an economic environment in which able-bodied people can work and live from their work, that is, the increased job availability is insisted on. In order to reduce the level of crime, it is necessary to make crime more costly and less accessible.

EMPIRICAL RESEARCH ON THE RELATIONSHIP BETWEEN CRIME AND UNEMPLOYMENT

The analysis of the mutual dependency of unemployment and crime has a long history. Most of the research and studies that have examined the correlation between crime and unemployment were carried out in the 1980s and 1990s. There is little research analysing this relationship in modern conditions.

One of the more comprehensive analyses on the association between crime and unemployment is done by Chiricos. The analysis included 63 studies in which 288 assessments of relationships were made, namely, 125 for property crimes, 138 for violent crimes, 25 for other crimes. The analysis pointed to the positive and negative impact of unemployment on the level of crime and determined the impact unemployment has on different types of crimes. The results of the analysis are presented in Table 1.

Table 1. Summary of Direction and Statistical Significance
for Unemployment and Crime Rate Relationships by Type of Crime

| | (N) | % positive/negative | % positive/negative |
|-----------------------|-----|------------------------|------------------------|
| All Crimes | 288 | 75/25 | 31/02 |
| Property Crimes | 125 | 85/15 | 40/03 |
| Violent Crimes | 138 | 64/36 | 22/02 |
| General Crime Bur- | 25 | 84/16 | 32/02 |
| glary | 42 | 86/14 | 52/02 |
| Larceny | 32 | 84/16 | 47/03 |
| Auto Theft | 28 | 79/21 | 21/07 |
| General Property Oth- | 18 | 89/11 | 33/00 |
| er Property Murder | 05 | 100/00 | 20/00 |
| Robbery | 38 | 66/34 | 16/00 |
| Rape | 41 | 66/34 | 22/02 |
| Assault | 17 | 71/29 | 35/00 |
| General Violent | 25 | 52/48 | 12/00 |
| | 17 | 76/24 | 41/00 |



Source: Chircos G. T., (1987), Rates of Crime and Unemployment: An Analysis of Aggregate Research Evidence, Social Problems, Vol. 34, No. 2 p. 193.

Table 1 describes the essentially positive relationship between unemployment and crime. The relative frequency of positive findings is the highest for property crimes, especially burglaries and thefts.

In addition to numerous studies indicating the correlation between crime and unemployment, a significant number of scholars who have analysed the association indicate that it does not exist and that unemployment is a “mediator” in the much broader relationship between economic activity and crime (Begović, 2009: 120). There is a negative correlation between the level of economic activity and unemployment, which can also be determined between economic activity and crime, so based on these correlations, crime and unemployment can be associated (Begović, 2009: 117).

The differing views on the relationship between unemployment and crime may be due to errors in the specification of the econometric regression model and the omission of the relevant variable. Given that the level of crime, but also the unemployment rate, is affected by a large number of variables, different results can be obtained and thus different conclusions about the mutual dependency of these phenomena by including or excluding the relevant variable.

The regression model which determines the level of crime against the unemployment rate is represented by the following expression:

$$Crime_{it} = \alpha_t + \sigma_i + \gamma Unemployed_{it} + \beta X_{it} + \mu_{it} \quad (3)$$

where the dependent variable $Crime_{it}$ is the number of crimes committed, $Unemployed_{it}$ is the explanatory variable denoting the unemployment rate, X_{it} is the vector of standard controls, such as annual household income, education and sex, α_t is the year fixed effect, δ_i is the area fixed effect, γ is the elasticity of the unemployment rate in relation to the crime rate, β is the parameter vector for the control variables in X_{it} and η_{it} is the residual (Raphael and Winter-Ember 2001, 265). The condition for the existence of a cause-and-effect relationship between unemployment and crime is that the residual η_{it} should not be correlated with the unemployment rate. This expression indicates that a large number of factors determine the level of crime, that it is partly determined by the unemployment rate, and that both variables are conditioned by economic activity, education, the characteristics of the territory under analysis, etc.

CONCLUSION

The issue of the relationship of social factors, especially employment and crime, has occupied the attention of the scientific and professional public for the last 30 years. Despite numerous studies, the economists have not reached a consensus on the mutual dependency of these phenomena, which does not mean that further analysis should be abandoned. On the contrary, further research is necessary to correct methodological errors and determine to what extent these phenomena are mutually conditioned. Previous research indicates that crime is conditioned by the unemployment rate, but as a consequence of the decline in economic activity. The research results indicate that the correlation is notable in property crimes, while it is insignificant in violent crimes. Final and complete evidence of the relationship between social conditions and crime can be sought in inequality, status, but also in the potential offenders' perception that the risk of being caught is low.



REFERENCES

1. Agell, J. and Nilsson, A. (2003). Crime, Unemployment and labor market programs in turbulent times, Institute for Labour Market Policy Evaluation, p. 5
2. Begović, B. (2009). Nezaposlenost i kriminal: pregled teorijskih i empirijskih nalaza, Stanje kriminaliteta u Srbiji, str. 101-123
3. Box S., (1987). Recession, Crime and Punishment, London, Macmillan
4. Cantor D. and Land K., C. (1985). Unemployment and Crime Rates in the Post-World War II United States: A Theoretical and Empire Analysis, American Sociological Review 50, pp. 317-322
5. Chiricos, T. (1987). rates of crime and unemployment: An analysis of aggregate research evidence Journal of social Problems 34, pp. 187-211
6. Choe, J. (2008). Income inequality and crime in the United States. Economic Letters 101, pp. 31-33
7. Council of European Union. (2004). Joint report by the Commission and the Council on social inclusion, Brussels
8. Chris H., Sabbagh D. (1991). Testing the Relationship between Unemployment and Crime: A Methodological Comment and Empirical Analysis Using Time Series Data from England and Wales, Journal of Research in Crime and Delinquency, Vol. 28, pp. 400-417
9. Ehrlich I. (1973). Participation in illegitimate activities: A theoretical and empirical investigation. Journal of Political Economy 38(3), pp. 521-565
10. Myers D. G. (2000). The American paradox: Spiritual hunger in an age of plenty. New Haven, CT: Yale University Press
11. Nikolić-Ristanović V., Konstantinović-Vilić S. (2018). Kriminologija, Beograd, str. 357-358
12. Papps, K. L., Winkelmann R. (1999). Unemployment and crime: New evidence for an old question, IZA and Centre for Economic Policy Research, pp. 1-16
13. Петровић Д. (2020). Економска анализа накнаде нематеријалне штете у парничном поступку, докторска дисертација, Ниш, стр. 240-241
14. Raphael S., Winter-Ebmer R. (2001). Identifying the Effect of Unemployment on Crime, The Journal of Law & Economics, Vol. 44, No. 1, pp. 259-283
15. UN (1995). The Copenhagen Declaration and Programme of Action: World Summit for Social Development, New York

LIABILITY OF MEMBERS FOR COMPANY OBLIGATIONS IN CASE ABUSES OF THE PRIVILEGE OF LIMITED LIABILITY

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Abstract: The principle of limited liability - limited liability for the company's obligations represents the fundamentals of the operations of modern capital companies. Nevertheless, in circumstances where globalization of the market of goods and services gets more and more important, there is room for the circumvention of the law, especially in the area of abuse of the principle of limited liability for company's obligations. The issue of piercing the corporate veil is an exception to the principle that the members of the company are not liable to the company's obligations, i.e. to respond only to the amount of the amount entered into the company. The purpose and goal of establishing this institute is primarily to prevent various forms of abuse in the business of companies. Piercing the corporate veil exists in all those cases when the limited partner, a member of a limited liability company and a shareholder, as well as the legal representative of that person if they are a legally incapable natural person, abuses the rule on limited liability for the company's obligations. The misuse of the right exists when the following persons: 1) use the company to achieve a goal that is otherwise prohibited to them; 2) use the company's property or dispose of it as if it were their personal property; 3) use the company or its property in order to harm the company's creditors and 4) in order to gain benefits for themselves or third parties reduce the company's property, even though they knew or had to know that the company will not be able to perform its obligations. The author will investigate the extent to which the institution of piercing the corporate veil and criminal liability of individual persons is normatively regulated within the national framework and the scope of case law.

Keywords: *piercing the corporate veil, company, responsibility of members, shareholder, misuse of the right, criminal liability of individual persons*

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INTRODUCTION

The expansive development of the capital market in the former SFRY, which was closed until the beginning of the 1990s (it was not familiar with modern business mechanisms), created conditions for performing a series of speculative transactions that were often on the verge of being illegitimate. The economy, which for the past twenty years has tried to some extent to present itself as transparent in terms of the rules of business, in practice has very often been contrary to the proclaimed principles of good business. Non-transparency of business, the need for quick earnings, underdeveloped control institutions, insufficiently developed legal regulations and case law created conditions for business malpractice. Having recognized the weaknesses of the legal system, the liable persons in a legal entity would undertake a range of frauds that would lead to abuse of rights. One of the common fraudulent behaviors is the abuse of the principle of limited liability of a company member – shareholders (liable only to the extent of capital that they invested in the company) for the company's liabilities. This type of fraudulent behavior is most present in a corporation, especially in a single form of business (single-member corporation), which is the most suitable form of disturbing the balance of gaining benefits.

DEVELOPMENT, ETYMOLOGY AND NOTION OF THE TERM PIERCING THE CORPORATE VEIL

Like most institutes of modern business, the institute of piercing the corporate veil originates from case law. The desire and need of the court to prevent: a) *fraud*, b) injustice, c) evasion of just responsibility, d) distortion or hiding of the truth or d) unjust raising of a defense, as actions in the company business, inevitably influenced the development of the institute of piercing the corporate veil (Barbić, 2008:292). Piercing the corporate veil evolution is experienced through case law in relation to the liability for obligations of a legal entity when its members abuse the fact that it is a company which is a separate legal entity (Barbić, 2008:292). The dominating understanding is that the origin of the institute of piercing the corporate veil is related to a precedent in the English law in the litigation *Salomon v Salomon & Co Ltd* [1896] UKHL 1 (16 November 1896), and one of the earliest cases of piercing the corporate veil in United States is *Booth v. Bunce* 33 N.Y. 139 (1865). Piercing the corporate veil refers to the judicially imposed exception to this principle by which courts disregard the separateness of the corporation and hold a shareholder responsible for the corporation's action as if it were the shareholder's own (Thompson, 1991:1036). The case law of the United States of America (*Berkey v. Third Avenue R. Co.*, 244 N.Y. 84, 155 N.E. 58 [1926], *Perpetual Real Estate Servs. Inc. v. Michaelson Props., Inc.* - 974 F.2d 545 [4th Cir. 1992] etc.) has gone the furthest in terms of elaborating the institute of piercing the corporate veil, for the reason of the relevant role that the corporate personality has played in the development of the infrastructure of the country (Micklethwait, & Wooldridge, 2003:57-78). In an empirical study about the piercing the corporate veil, Thompson, R., concluded that piercing of the corporate veil is one of the most litigated issues in Company law in the U.S. In his study, used a pool of 1,600 cases. He found that in 636 cases the veil had been pierced and that in 947 cases it had not. The 636 cases represent 40%, which can be considered a high figure if it is compared with other jurisdictions in which the veil is not frequently or never pierced (Thompson, 1991:1048-1050). Two decades after, Oh, P., refreshes this subject with a new study based on 2,908 cases and found that the veil had been pierced in 50% of the cases (Oh, 2010: 108). Dealing with the institute of piercing the corporate veil, the case law of the UK has greatly contributed to the development of: a) single economic unit theory;²

² Single economic unit theory is based on the decision *Salomon v. Salomon* (1897) when the principle of



b) piercing of the corporate veil under the fraud exception³ and c) reverse piercing.⁴ Of importance is judgement in 2013, *Prest v Petrodel (Prest v Petrodel Resources Ltd & Ors)* [2013] UKSC 34) the English Supreme Court clarified the law of piercing the corporate veil, and that for the reason that it is a growing number of cases, attempts were made to circumvent the separate personality and limited liability of companies. The Supreme Court even went so far as to call the existence of the doctrine into question altogether in *VTB Capital (VTB Capital Plc v Nutritek International Corp and others)* [2013] UKSC 5). (Schall, 2016:549-550). After *VTB Capital* case, however, *Prest* apparently confirmed the existence of the doctrine, and the court made an effort to deliver the long missing rationale for piercing the veil by spelling out the “evasion principle” as opposed to the “concealment principle”. (Schall, 2016:550).

The etymology of the term piercing the corporate veil has its source in the American legal and court terminology. The term “piercing the veil” was first coined by Wormser I. M. (Wormser, 1912:497). Term “piercing the corporate veil” (Thompson, 1991:1036) is most often used, while the terms “disregard the corporate entity” (Clark, 1986:37) and “misuse of corporate form” are used less frequently (Hackney & Benson, 1982:850). Unlike the American terminology, the term “lifting the corporate veil” is dominant in English legal terminology, while the term “looking behind the company” is used to a lesser extent. Although considered synonymous, in legal theory there are opinions that there is the essential difference between the terms piercing the corporate veil and lifting the corporate veil. Piercing the corporate veil is focused exclusively on the member’s liability for the company’s obligations in case of abuse of the limited liability concept, while lifting the corporate veil should be viewed in a much broader context, because it can explain any situation in which it is necessary to, for the purpose of determination of the member’s legal liability for company’s liabilities, look behind the corporate entity (Ramsay & Noakes, 2001:253-255). In the Serbian legal literature, for the reason of ignorance institute piercing the corporate veil, the terms were used “illusion of economic identity” (Law on Amendment to Company Law, Official Gazette of SFRY, 40/89) and “abuse of legal subjectivity” (Company Law, Official Gazette of RS, 125/04). Underdeveloped case law and business ethics, which started from the position that there is no separation of obligations (company = member), influenced the development of the view that the company is the only entity that should be responsible for the obligations to creditors. Only with the development of the company law, and especially when a more comprehensive view was of the way of operation of the company obtained and the possible abuse of the principle of limited liability of company members for the company’s liabilities, did the modern Serbian legal and regulatory terminology start using the term piercing the corporate veil (Васиљевић, 2011:68).

In legal theory, there is no single position on the notion of the institute of piercing the corporate veil, but its consideration in both broad and narrow sense comes to the fore. In a broader sense, piercing the corporate veil includes all cases in which the legal relationship between the company’s creditors and its members is caused by the liability of the company, regardless of the legal nature of that relationship (Brnabić, 2010:14). Based on the stated position, the institute of piercing the corporate veil could include any type of liability of a member of the company that arose in connection with the obligations of the company. Unlike the term in a broader sense, piercing the corporate veil in a narrow sense does not represent anything other than the individual and unlimited liability of a member of the company due to abuse of the rule on limited liability for the obligations of the company. By applying the stated attitude, a member of a corporation is unlimitedly liable with its personal assets for the liabilities that the company has assumed in its own name. In this case, a member of a corporation is compared to

separation of legal personality and its members was established.

3 Fraud exception is a theory that considers the piercing the corporate veil a situation when the existence of certain companies is a already a fraudulent business.

4 Reverse piercing is characterized by a reverse conception, company liability for the obligations that, by nature of things, a member of the company should be liable for on the individual basis.



a member of a proprietorship and partnership that is liable for the company's liabilities with its entire assets, i.e. the creditor may collect receivables from a member of the company arising from the company. Following modern trends, maturing in the field of corporate law, the Serbian legislation has implemented the theory of piercing the corporate veil in a narrow sense (Company Law - CL, Official Gazette of RS, nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015 and 44/2018).

BUSINESS PRINCIPLES OF CORPORATION AFFECTING IMPLEMENTATION OF THE INSTITUTE OF PIERCING THE CORPORATE VEIL

A company can be defined as a technique (legal form) of organizing a company by the founder (one or several) in order to make a profit (regularly) or achieve certain non-economic goals (exception), with some legal independence from the founders and subsequent members and shareholders and with some openness to the subsequent accession of other members and shareholders (Васиљевић, 2004:30). The common denominator, regardless of the form in which the company appears as a legal entity, is the existence of legal separation from the members of the company. Legal separation can have property and non-property effects (Васиљевић, 2011:67). Property effects of the legal personality of a legal entity are reflected primarily in the separation of the assets of the legal entity from its members (Armour & Hansmann & Kraakman, 2009:7-11). The company's liabilities are not liabilities of the members of the company as well (Васиљевић, 2004:30).

Companies can be classified into two large groups: a) proprietorship and partnership and b) corporation. Proprietorship and partnership are characterized by the dominant presence of a personal element - *intuiti personae* members of the company, which influences the fact that the company is founded on the basis of trust and acquaintance, and the members are liable with unlimited personal assets (unlimited liability) for the company's liabilities. Unlike proprietorship and partnership, corporation (company) is characterized by domination of interest of the capital (Васиљевић, 2004:30), rather than elements *intuiti personae* and therefore the company is liable for its commitments with its assets. The ability to form the personal substrate of the company (members of the company form the personal substrate), to make decisions in the name and on behalf of the company, the limited economic risk of members in the company's operations and the independence of the company, is one of the most important grounds for emergence of corporation (Bakst, 1996:323). The fact that the company members are not liable for the company's liabilities is counterbalanced by share capital as a guarantee that the company shall settle its liabilities to its creditors on its own. Creditors of corporation may request settlement of its receivables only from the company as its debtor (Davies, 2008:37-40).

The effect of dominance of capital interests is that operation of a corporation is based on two fundamental principles: a) legal independence and b) limited liability of company members. The principle of limited liability of company members is set out in the text below and also is important for this paper.



PRINCIPLE OF LIMITED LIABILITY OF COMPANY MEMBERS

The principle of non-liability or concept of limited liability of the company members originates from business practice and case law. Certain authors are of the opinion that the concept of limited liability of the company members first appeared in England, dating back to the 15th century, (Kempin, 1960:13) and being affirmed during the 17th century (Kessler, 1967:239). It became generally accepted only with the enactment of the Limited Liability Act (Limited Liability Act 1855 (18 & 19 Vict c 133). Unlike the English legal system, in continental Europe, the adoption of the *commercial code* established and proclaimed the concept of limited liability of members in the companies organized in the form of: French *Société Anonyme* (S.A),⁵ the German *Gesellschaft mit beschränkter Haftung* (GMBH)⁶ and the Spanish *Sociedad Anónima* (S.A)⁷ (Navarro, 2013:25). Unlike Europe, the concept of limited liability of company members in the American law started developing as late as in the 19th century through the institute of double-liability (Macey & Miller:31).

However, it should be emphasized that the source of the concept of limited liability should not be sought primarily in law, but also in economics (Mendelson, 2002:1217-1219). The meaning of limited liability of members of a corporation is based on enabling the development of economic activities and economic growth, in order to legally encourage investors to participate in the market without being afraid for personal assets (Lattin, 1971:11-12).

The principle of separation of subjectivity, emphasized in the corporation, originates from the fact that the company as a legal entity is separated from its members (Barbić, 2008:291). The importance of the corporation being legally independent and the non-liability of the members of the company for the obligations of the company, represents one, if not the most important feature and advantage of the corporation over other forms of business. Unlike a proprietorship and partnership where the members are liable for the obligations of the company independently or jointly and severally with their personal assets, the principle of non-liability of the members of the company for the obligations of the corporation comes to the fore. The limit function enables the members of the company to have limited liability, i.e. to bear business risk only up to the amount of the subscribed or paid or unpaid contribution in the company (Easterbrook & Fischel, 1985:90). This principle disables creditors of the company to collect their receivables from the company also from the company members, i.e. company creditors are not and cannot be creditors of the company members.

The basic characteristic of the concept of limited liability of company members is manifested in the form of creating a legal veil of the company in relation to its creditors. Although the members of the company have a privilege of non-liability, it should be pointed out that they are obliged to behave in a certain way. In accordance with the fiduciary liabilities they have to the company, the company members must not abuse the principle of non-liability. Limited liability is a suitable ground for numerous abuses aimed at achieving the personal benefit of a company member, to the detriment of the interests of creditors. The concept of non-liability of a company member for the company's obligations, i.e. liability for business risk only, affects the creation of a sense of security of personal assets. Security that

⁵ The French *Société Anonyme* was introduced in the French *Code of Commerce* enacted in 1807. However, the attributes of legal personality and limited liability in addition to capital requirements were established in the *loi de mai* of 1863 and the reforms in 1867.

⁶ The German *Gesellschaft mit beschränkter Haftung* or limited liability company was introduced in Germany in 1892.

⁷ The concept of corporate personality and limited liability became subject of interest in 1869 and 1885 when reforms to the *Spanish code* of commerce were made.



personal assets cannot serve as assets for settling the company's creditors, i.e. that it is exempt from the potential claim of the company's creditors, can create a feeling in the members of the corporation that the company uses it for personal purposes (it is hidden behind the legal individuality of the company). The security of personal assets and the use of the company for personal purposes, where the members of the company hide behind the legal independence of the company, creates a feeling of absence of fear and apprehension of personal responsibility for relations with third parties (Barbić, 2008:291).

However, it should be pointed out that though members of the company can be relaxed due to the illusion of being non-labile for the company's liabilities with their personal assets, the protection of the personal assets is not absolute. The company's creditors may direct their claim also against the company members, thus settling their receivables from the personal assets of the company members (Јовановић, 1997:865-890). Then and in such circumstances we are talking about piercing the corporate veil or lifting the corporate veil. Piercing the corporate veil should be considered an exception from the privilege of the company members not being liable for the company's liabilities. If the privilege of limited liability is abused, or the company uses it in order to achieve goals that are not adequate to the reasons and policy of its foundation (Wormser, 1927:8) it is legitimate to pierce the corporate veil. Based on the above, it can be concluded that implementation of the institute of piercing the corporate veil is justified in the situation when the limited liability rule is abused. The doctrine of the prohibition of abuse of rights in the Serbian law is the basic principle that justifies the existence of the institute of piercing the corporate veil (Company Law, Official Gazette of RS, nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015 and 44/2018). It can be concluded that the purpose of the establishment of the institute of piercing the corporate veil primarily refers to the: a) prevention of various forms of fraudulent behavior of members of the company and b) security for the company's creditors.

LEGAL NORMS OF THE REPUBLIC OF SERBIA COMPANY LAW

Following the trends of modern legislation in the field of corporate law of the Republic of Serbia, and in order to unify the legal framework, legal transplants are created and transplanted (Вотсон, 2000:58). The Republic of Serbia is no exception to the rule of non-implementation of legal transplants in its legal system, in this case Company Law. The institute of piercing the corporate veil as a legal transplant is implemented in the Company Law (CL, Official Gazette of RS, nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015 and 44/2018).

Pursuant to the provisions of the Company Law, a limited partner, a member of a limited liability company and a shareholder, as well as the legal representative of that person if it is a legally incapable natural person,⁸ is liable for the company's liabilities with its assets if it abuses the limited liability rule (CL, Official Gazette of RS, nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015 and 44/2018). Definition the abuse of the limited liability rule for the company's liabilities is defined as a general basis for the implementation of the institute of piercing the corporate veil. It should be noted from the above definition that only those persons whose liabilities towards the company are limited to the amount of their contributions to the company are liable, i.e. responsible for business risk.

Exempli causa the legislator itemizes the cases of abuse of the limited liability rule by the company members, specifically when they: 1) use the company to achieve a goal that is otherwise prohibited; 2)

⁸ It should be noted that it is not considered that every legal representative is liable, but only the one who represents a legally incapable natural person who appears in the role of some of the mentioned persons.



use the company's assets or dispose of it as if it were their personal assets; 3) use the company or its assets in order to damage the company's creditors and 4) in order to gain benefits for themselves or third parties reduce the company's assets, even though they knew or had to know that the company will not be able to settle its liabilities (CL, Official Gazette of RS, nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015 and 44/2018). In order to protect the interests of the creditor, and for the sake of legal certainty, the legislator stipulates a subjective and objective deadline within which the company's creditor can file a lawsuit to the competent court for piercing and abuse by the responsible person (persons liable for the company's liabilities to the amount of their contribution). Stipulation of the subjective deadline determines the creditor's interest in their receivables and their intention to collect them, i.e. the company's creditor may file a lawsuit against the responsible persons within six months from the moment of learning about the abuse (CL, Official Gazette of RS, nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015 and 44/2018). It is important for the protection of the creditors' rights that they are given the opportunity to protect their interests also in the circumstances the claim against the company is not due. If the claim is not due at the moment of learning of the abuse, the creditor has the right to file a lawsuit for piercing the corporate veil and to prevent abuse, provided that the period of six months begins to run from the date of maturity of the claim (CL, Official Gazette of the RS, nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015 and 44/2018). However, it should be emphasized that the possibility to protect the interests, although the claim is not due, is provided only under the condition that at the time of the abuse of the limited liability rule, the plaintiff had the status of a creditor to the company (Decision of the Commercial Appellate Court 5753/12 dated 03 April 2013). In addition to stipulating the subjective deadline, the legislator also stipulates the objective deadline in which the creditor exercises its rights. By stipulating the objective deadline, the creditors of the company are protected, may file a lawsuit no later than five years from the date of the abuse (CL, Official Gazette of the RS, nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015 and 44/2018). Finally, by specifying the subject matter jurisdiction of commercial courts only conditions have been created for better implementation of the law in case of abuse of rights limited liability.

CRIMINAL LIABILITY

In addition to the liability of a company member with its personal assets in connection with piercing the corporate veil pursuant to the provisions of the Company Law, we can point out that the liability of a member for abuse of limited liability right may be criminal. Until the adoption of the Law on the Liability of Legal Entities for Criminal Offences - LLLECO (Law on the Liability of Legal Entities for Criminal Offences, Official Gazette of the RS, 97/2008), the criminal law regulations on the liability of legal entities (primarily companies) did not exist in the Republic of Serbia, and the only liability of a legal entity that existed primarily related to misdemeanors (Law on Misdemeanours, Official Gazette of the RS, nos. 65/2013 and 13/2016)⁹ and economic offences that are a legal entity or the responsi-

⁹ A legal person shall be liable for a misdemeanour committed by an action or omission of due supervision of the management body or a responsible person or by an action of another person that, at the time when the misdemeanour was committed, was authorized to act in the name of the legal person. A legal person shall additionally be liable for a misdemeanour when: 1) the management body passes an unlawful decision or an order whereby committing misdemeanour is enabled or when the responsible person orders a person to commit a misdemeanour; 2) a natural person shall commit a misdemeanour due to an omission by the responsible person to supervise or control him/her. Under conditions referred to in paragraph 2 of this Article, a legal person may additionally be liable for a misdemeanour when: 1) the misdemeanour proceeding against the responsible person has been discontinued or when such person has been relieved from liability in compliance with the provisions of Article 250 of this Law; 2) there are legal or actual obstacles for determining liability of the responsible person with the legal person or where it cannot be determined who the responsible person is. LAW



ble person of a legal entity may be liable for an economic offence (Economic Offences Act, Official Gazette of SFRY nos. 4/77, 36/77 - cor., 14/85, 10/86 (edited text), 74/87, 57/89 and 3/90 and Official Gazette of FRY, nos. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96 and 64/2001 and Official Gazette of RS, 101/2005 – other law). The economic offence as one of the more complete and stricter types of liability in relation to misdemeanors committed by a legal entity is to sanction a violation of the legality of business in the field of economic and financial business. The legal regulation of the liability of legal entities for committed criminal offenses has made a significant step forward to more complete, thorough and comprehensive legal regulations. Although the adoption of the LLLECO can be seen as a success of the domestic legislator, it should be noted that the adoption of this law is not a voluntary legal regulation, but the result of obligations undertaken by concluding and ratifying international conventions (Recommendation No. R (88) 18, of the Committee of Ministers to Member States, Concerning Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their Activities) by the Republic of Serbia. The importance of LLLECO lies in the fact that it stipulates that a liable person (natural person) legally or de facto entrusted with a certain circle of tasks within a legal entity is considered liable, i.e. person that can be considered authorized to act on behalf of the legal entity (LLLECO, Official Gazette of the RS, 97/2008). Although the provisions of the law emphasize the liability of a legal entity, as a person having business ability and therefore a criminal offence can be attribute to it, natural persons who are the personal substrate of the company and who are in the category of authorized persons by law or internal documents (directors, management, proxy, legal representative...) whose decisions affect the creation of business policy may be subject to criminal liability for abuse. When determining which natural persons are to be considered liable, it is proclaimed that the liable person is considered to be a natural person legally or de facto entrusted with a certain circle of tasks in a legal entity, as well as a person who is authorized or can be considered authorized to act on behalf of the legal entity (LLLECO, Official Gazette of the RS, no. 97/2008). Any natural person in a legal entity who is de facto or legally assigned to perform certain tasks can be considered responsible. It should be noted that this is a *question facti* that is assessed in each case, whereby the internal regulations of the legal entity must be taken into account, and especially the fact that the liable persons authorized to act on behalf of the legal entity have entrusted them with certain tasks (Ilić, 2010:249). However, a special type of liability which has made a significant step forward in the field of liability of a natural person is: a) when a person within a legal entity (employee) without a legal basis is entrusted with performance of a certain task that he/she is not competent for, or b) when a person who does not have the status of an employed person is entrusted with the performance of certain tasks without a contractual relationship (Stojanović). Finally, it should be noted that the regulation of this type of liability of natural persons by the legislator has significantly expanded the basis of liability of legal entities for criminal offenses (Đurđević, 2005:45).

CONCLUSION

Striving to regulate the capital market, which was characterized by non-transparency of operations, the need for quick earnings, underdeveloped control institutions, insufficiently developed legal regulations and case law, the Republic of Serbia adopts and implements modern institutes in its legislation. One of the institutes that represents the *acquis* of modern corporate law and which regulates the liability of a member of the company in case of abuse of the rules on limited liability is piercing the

ON MISDEMEANOURS 9 The liability of a natural or responsible person with a legal person for a misdemeanour committed, for a criminal offence or for an economic offence shall not preclude the liability for misdemeanour of the legal person. – Art. 27, Law on Misdemeanours.



corporate veil. The institute piercing the corporate veil a legal transplant is implemented in the Companies Law, and the legislator exemplifies the cases when there is an abuse of the limited liability rules by a member of the company. In addition to the liability of a member of the company with personal property in connection with the breach of legal personality based on the provisions of the Companies Law, we can point out that the liability of a member for abuse of limited liability may be criminal. The significance of the criminal liability regulation is that it stipulates that the responsible person (natural person) who is legally or de facto entrusted with a certain range of activities in the legal entity, as well as the person who is authorized, or who can be considered authorized to acts on behalf of the legal entity, and has abused the tasks entrusted to it concerning the business of the company. It can be concluded that regardless of the fact that there was a good will to place and regulate the abuse of the rights of a member of company in order to meet modern standards of corporate business, in business and court practice it remained only at the level of good wishes of the legislator.

REFERENCES

1. Armour, J. & Hansmann, H. & Kraakman, R. (2009). The Essential Elements of Corporate Law: What is Corporate Law?, *Harvard Law and Economics Research Paper No. 643*.
2. Bakst S. D. (1996). Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive, *Boston College International & Comparative Law Review*, Vol.19. Iss.2, Art. 4, 323-351.
3. Barbić, J. (2008). *Pravo društava*, knjiga prva- opći dio, Zagreb.
4. Brnabić, R. (2010). *Proboj pravne osobnosti i odgovornost za obveze*, doktorska disertacija, Zagreb.
5. Company Law (CL), Art. 18, Para., 1, Para. 2, Para. 3, Para. 4, *Official Gazette of RS*, nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015 and 44/2018.
6. Company Law, Art.15, *Official Gazette of RS*, 125/04.
7. Council of Europe Committee of Ministers, Recommendation no. (88) 18, of the Committee of Ministers to member states, Concerning Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their activities (Adopted by the Committee of Ministers on 20 October 1988 at the 420th meeting of the Ministers' Deputies).
8. Davies, L. P. (2012). *Principles of Modern Company Law*, Sweet, ed. 9, London.
9. Dodd, M. E. (1948). The Evolution of Limited Liability in American Industry: Massachusetts, *Harvard Law Review*, Vol. 61, No. 8, 1351-1379.
10. Easterbrook, F. H. & Fischel, D. R. (1985). Limited Liability and the Corporation, *University of Chicago Law Review*: Vol. 52: Iss.1, Article 3, 89-117.
11. Economic Offences Act (EOA), Art. 6, Para.1, *Official Gazette of SFRY* nos. 4/77, 36/77 - cor., 14/85, 10/86 (edited text), 74/87, 57/89 and 3/90 and *Official Gazette of FRY*, nos. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96 and 64/2001 and *Official Gazette of RS*, 101/2005 – other law.
12. Hackney, P. W. & Benson, G. T. (1982). Shareholder Liability for Inadequate Capital, *University of Pittsburgh Law Review*, Vol. 43, Iss. 4, 837-902.
13. Ilić, G. (2010). Marginalije uz Zakon o odgovornosti pravnih lica za krivična dela, *CRIMEN* (I) 2, 246–256.



14. Јовановић, Н. (1997). Побијање правног субјективитета компанија, *Правни живот*, бр. 10, 865-890.
15. Kempin, G. F. (1960). Limited Liability in Historical Perspective, *American Business Law Association Bulletin*, Vol. 4, No. 1, 11-34.
16. Kessler, A. R., (1967). With Limited Liability For All: Why Not a Partnership Corporation?, *Fordham Law Review*, Vol. 36, 235-306.
17. Lattin, N. (1971). *The Law of Corporations*, 2ed, N.Y.
18. Law on Amendment to Company Law (LACL), Art. 140a, *Official Gazette of SFRY*, 40/89.
19. Law on Misdemeanours (LM), Art. 27, *Official Gazette of the RS*, nos. 65/2013 and 13/2016.
20. Law on the Liability of Legal Entities for Criminal Offences (LLLECO), Art. 5, Para. 2, *Official Gazette of the RS*, 97/2008.
21. Macey, J. R. & Miller, G. P. (1992). Double Liability of Bank Shareholders: History and Implications, *Wake Forest Law Review*, Vol. 27, Iss. 1, 31-62.
22. Mendelson, N. (2002). A Control-Based Approach to Shareholder Liability for Corporate Torts, *Columbia Law Review*, Vol. 102, 1203-1303.
23. Micklethwait, J. & Wooldridge, A. (2003). *The Company: A Short History of a Revolutionary Idea*, U.S.A: Modern Library.
24. Navarro, L. M. J. (2013). *The piercing of the corporate veil in Latin American jurisprudence; with specific emphasis on Panama*, City, University of London.
25. Oh, B. P. (2010). Veil-Piercing, *Texas Law Review*, Vol. 89, 81-145.
26. Ramsey M. I. & Noakes B. D. (2001). Piercing the Corporate Veil in Australia, *Company and Securities Law Journal*, 250-271.
27. Clark, R. (1986). *Corporate Law*, Aspen.
28. Schall, A. (2016). The New Law of Piercing the Corporate Veil in the UK, *ECFR*, 549-574.
29. Thompson, B. R. (1991). Piercing the Corporate Veil: An Empirical Study, *Cornell Law Review*, Vol. 76, Iss. 5, 1036-1074
30. Васиљевић, М. (2011). *Компанијско право – право привредних друштава*, Београд.
31. Васиљевић, М. (2004). *Пословно право*, Београд.
32. Вотсон, А. (2000). *Правни транспланти*, Београд.
33. Wormser, I. M. (1912). Piercing the Veil of Corporate Entity, *Columbia Law Review*, Vol. 12, No. 6, 496-518.
34. Wormser, I. M. (1927). *The Disregard of the Corporate Fiction and Allied Corporate Problems*, N. Y.
35. Đurđević, Z. (2005). *Komentar Zakona o odgovornosti pravnih osoba za kaznena djela*, Narodne novine, Zagreb.

CASE LAW

1. *Prest v Petrodel Resources Ltd & Ors* [2013] UKSC 34 - <https://www.supremecourt.uk/cases/docs/uksc-2013-0004-judgment.pdf>
2. *VTB Capital Plc v Nutritek International Corp and others* [2013] UKSC 5 - <https://www.supremecourt.uk/cases/uksc-2012-0167.html>
3. *Perpetual Real Estate Servs. Inc. v. Michaelson Props., Inc.* - 974 F.2d 545 (4th Cir. 1992) - <https://www.lexisnexis.com/community/casebrief/p/casebrief-perpetual-real-estate-servs-inc-v-michaelson-props-inc>
4. *Berkey v. Third Avenue R. Co.*, 244 N.Y. 84, 155 N.E. 58 (1926) - <https://www.courtlistener.com/opinion/3625415/berkey-v-third-avenue-railway-co/authorities/>
5. *Salomon v Salomon & Co Ltd* [1896] UKHL 1 (16 November 1896) - <https://www.bailii.org/uk/cases/UKHL/1896/1.html>
6. *Booth v. Bunce*, 33 N.Y. 139 (1865) - <https://cite.case.law/ny/33/139/>





TOPIC V

FORENSIC LINGUISTICS AND LANGUAGE FOR SPECIFIC PURPOSES





THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS IMPACT ON THE DEFINITION OF THE LANGUAGE ASSISTANCE AS A FUNDAMENTAL RIGHT OF THE THIRD-COUNTRY NATIONALS¹

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Abstract: The paper focuses on the specific aspects of the provision of the language assistance to the third-country nationals arriving into the territory of the European Union. Being defined as one of the fundamental human rights, particularly within the criminal proceedings, the language mediation is provided across the EU Member States in various ways. Different approaches are presented from the perspective of the European Court of Human Rights Judgments related to the violation of Article 5§2 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Based on the European Court of Human Rights Case-Law, the author presents possible solutions to the remaining challenges faced by the EU Member States when providing the language assistance to third-country nationals arriving into the territory of the EU.

Keywords: fundamental human rights, third-country nationals, language assistance, procedural safeguards, detention, intercultural communication.

INTRODUCTION

Even though the COVID-19 pandemics reduced the numbers of people migrating across the European Union (EU) borders, migration remains one of the most topical issues at the European level even in 2021. “The COVID-19 pandemic has affected migration and human mobility in the European re-

¹ The present contribution is the output of the project of the Academy of the Police Force in Bratislava registered under the title: Intercultural Communication with the Third-Country Nationals in Detention Centres for Aliens (VYSK 241).

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gion as countries have restricted international, transborder and internal movements to minimize the spread and impact of the pandemic. As of mid-June 2020, 6 per cent of airports, 25 per cent of land border crossing points and 9 per cent of “blue border” (sea, river or lake) crossing points were closed for their entry and exits in the European Economic Area (EEA)” (IOM, 2020). However, illegal migration of third-country nationals arriving into the territory of the EU Member States remains an issue that still needs to be addressed as, according to the International Organization for Migration (IOM), the total number of illegal migrants and asylum seekers who arrived in Europe in 2020 was 128,536, respectively. With such number of foreigners, the national governments of the individual Member States face the challenges in terms of providing funding to address migration and tackle the need to provide adequate housing, health care, education, legal aid, and also *language assistance*³ to the arriving migrants, even they are entering the territory of the EU illegally and consequently are detained in the detention facilities. *“The provision of the language assistance along with the cultural mediation for the third-country nationals detained in detention facilities is an area that has received increasing attention in recent years, as it is an issue that directly reflects the level of respect for fundamental human rights in the individual EU Member States towards the third-country nationals”* (Nikolajová Kupferschmidtová, 2020).

The main aim of the present contribution is to present the legal framework and current situation regarding the provision of language assistance to the third-country nationals detained in detention facilities within the individual Member States and point out at the European Court of Human Rights Case-Law related to the violation of the right to communicate in the language a detainee understands which is at the same time procedural safeguard guaranteed by the respective authorities at the national, European and international level.

PROVISION OF LANGUAGE ASSISTANCE AS A PROCEDURAL SAFEGUARD

The EU efforts to establish a unified approach in the field of immigration and asylum resulted in adoption of Directive 2008/115/EC on an effective removal and repatriation policy based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity. Consequently, Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) and Regulation (EU) No 439/2010 establishing a European Asylum Support Office were adopted as the core documents in the field of migration. The above-mentioned documents set the common framework that was transposed into the national legislation of the Member States with the protection of the human rights in mind.

However, even the Member States are prohibited from detaining an asylum seeker for the sole reason that he/she has applied for asylum and detention can be ordered only if necessary and on the basis of an individual assessment of each case, detention remains one of the key tools in the response to migration and asylum flows in most of the countries. The grounds for detention are explicitly defined in Article 8(3) of the recast Reception Conditions Directive and in compliance with the Body of Principles for the Protection of All Persons (adopted by the United Nations General Assembly in 1988) and it is explicitly stated (Principle 11) that a person shall not be kept in

3 For the purposes of this study, the term *language assistance* means an interpretation service which must be provided by the Member State not only for basic communication in official communication with the competent authorities, but also for daily communication between members of the Police Force and foreigners placed in detention facilities across the Member States.



detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by a counsel as prescribed by law and shall also receive prompt and full communication of any order of detention, together with the reasons therefor (UN Body of Principles for the Protection of All Persons, 1988). Thus, the right to communicate is set as one of the fundamental human rights. Further, the right to communicate in a language a person detained can understand is set also in Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights (ECHR)) as stated in Article 5 § 2 of the ECHR: “*Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him*” (ECHR, 1950). The need to provide the language assistance to a person who does not understand the information also forms an integral part of Principle 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the assistance of an interpreter is supposed to be provided promptly **in a language which a person understands the information (...)** and the language assistance is provided **free of charge**, if related to the **legal proceedings subsequent to person’s arrest** (UN Body of Principles for the Protection of All Persons, 1988). Further, a detained person is entitled to have the assistance of a legal counsel, to be informed of that right and to be provided with facilities for exercising it (UN Body of Principles for the Protection of All Persons, 1988). All of the cited principles were successfully transposed into the secondary legislation of the EU in the form of above-mentioned Directives and these principles also form an integral part of the European Convention on Human Rights. Thus, as part of the secondary legislation and the European Convention on Human Rights, the principles are legally binding for all EU Member States. In addition, the legal basis for the language assistance for the third-country nationals is also set within the Return Directive, in particular Article 13(3) and (4); Articles 20 and 21 of recast Asylum Procedures Directive 2013/32/EU (replacing Article 15(3) to (6) of Asylum Procedures Directive 2005/85/EC). In accordance with the listed documents the third-country national⁴ concerned shall have the possibility to obtain not only legal advice and representation but also the language assistance.⁵

The language assistance covers not only a translation of a decision (this is already covered by Article 12(2)), but also an obligation to make available assistance by interpreters in order to allow the third-country national to exercise the procedural safeguards afforded to him/her under Article 13 (Return Handbook, 2017). However, for the purposes of the European Court of Human Rights Judgments and the purposes of the present contribution, the distinction between translation and interpretation should be noted. When the reference to ‘interpretation’ is made, it is understood as an oral interpretation of oral communication. When the reference to ‘translation’ is made, it is understood as a written translation of written documents. The distinction between translating and interpreting forms also part of Directive 2010/64/EU on the Right to Interpretation and Translation in Criminal Proceedings which was transposed into the national legislations of the EU Member States and governs the detainee’s right to interpretation in police interviews, hearings and in meetings with detainee’s lawyer and the right to translation of essential documents. The question of language of the detainee is

4 For the purposes of the present contribution, a third-country national is any person who is not a citizen of the European Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the right of free movement under European Union law, as defined in Article 2(5) of the Schengen Borders Code.

5 For the purposes of the present contribution, expression *language assistance* will be used and it is understood as covering both translation, as well as interpreting services provided to someone who does not speak or understand the language of the country he/she is detained in. The distinction between interpretation and translation is not insignificant given that, in the case-law of the European Court on Human Rights the two are largely conflated as Article 6(3) (e) of the ECHR refers only to ‘interpretation’.



explained in para 22 of the Directive 2010/64/EU as follows: *“Interpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or in any other language that they speak or understand in order to allow them fully to exercise their right of defence, and in order to safeguard the fairness of the proceedings”*.

Therefore, the EU Member States are required to provide an interpreter in order to ensure a standard procedure, i.e. the third-country national can understand and communicate in the interpreted language in all procedural proceedings with the competent authorities. The legal regulation concerning standards and procedures in the field of communication in the framework of official contact with third-country nationals in all EU member states, including Slovakia, is similar, as they are governed by the following common European legislation:

- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection;
- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals;
- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings;
- Regulation (EU) No 182/2011 of the European Parliament and of the Council 439/2010 of 19 May 2010 establishing a European Asylum Support Office;
- Regulation (EU) No 182/2011 of the European Parliament and of the Council Regulation (EC) No 640/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person;
- Commission Recommendation (EU) 2017/432 of 7 March 2017 on ensuring more effective returns in the implementation of Directive 2008/115/EC;
- Commission Recommendation of 1 October 2015 establishing a common “Handbook on Return” to be used by the competent authorities of the Member States in carrying out return tasks (C (2015) 6250 final).

In practice, however, the legislation in question is implemented with regard to specific conditions in individual countries.

EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS SHAPING THE LANGUAGE PROVISION TO THIRD-COUNTRY NATIONALS

The protection of the fundamental human rights guaranteed under the ECHR in relation to the language assistance is in practice interpreted on the basis of Member States needs and possibilities. The language-related provisions are drafted in a broader sense, thus giving the way to broader interpretation, e. g. *being ‘promptly’ informed* can cover the time period from 10 minutes to 24 hours, also the very use of an interpreter is also a subject to different approaches as it is not clear if the interpreter should assist the authorities from the moment of arrest or through the next stages of detention (Nikolajová Kupferschmidtová, 2020). And even the common framework of the language assistance is



grounded in the ECHR and the EU Directives, the European Court of Human Rights (EctHR) may help to narrow down various interpretations from the Member States and adopt more unified way through the language provision as the EctHR judgments function as a reference to the future court decision-making also at the national level of the respective Member States.

Challenges related to the language issues have been raised in a number of cases – till the beginning of the year 2021 there were 189 apparent violation of Article 5 §2. However, there were only 45 cases marked as the key cases. For the purposes of the present contribution, the violations of Article 5 §2 related particularly to the following issues were analyzed:

- a) information in language understood (30);⁶
- b) information on charge (13);
- c) information on reasons for arrest (106);
- d) prompt information (86).

As the number of the judgments was significant, the further selection was performed not only on the basis of violation of Article 5 §2 criterion but further the current Member States of the EU being the parties involved in the cases criterion was also implemented. Furthermore, only the judgments that appear to be crucial in shaping the provision of language assistance were taken into account based on the thorough analysis of all 189 cases. The selected judgments also reappear in the Court's Assessment section in the latter judgments as the respective judgments of key cases were cited as Principles laid down in the Court's case-law. The following cases/judgments⁷ were considered as the core ones having impact on the language provision in terms of fundamental rights and freedoms entitled to third-country nationals arriving into the territory of the EU. The following key cases are given along with the reasons of their importance being underlined and subsequently commented on:

- **the case of Čonka v. Belgium, Judgment of 5 February 2002, No. 51564/99**, the Grand Chamber ruled as follows: *"Given that the applicants were not given information on available remedies in their language, there was only one interpreter available for many people and no form of legal assistance at the detention centre, there was no realistic possibility of accessing a remedy"*. The Court confirmed that one interpreter being available for many people is not sufficient. The case also stipulates that a group of people cannot be taken into account as an entity, therefore, the individual approach is obligatory not only for the purposes of legal assistance, but consequently even in regard to language assistance. Thus, granting the language assistance equal status as legal assistance.

- **the case of Rusu v. Austria, Judgment of 2 October 2008, No. 34082/02** as the Court reiterated that paragraph 2 of Article 5 contains the elementary safeguard that: *"(...) by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whilst this information must be conveyed 'promptly' (in French: 'dans le plus court délai'), it need not be related in its entirety by the arresting officer at the very moment of the arrest"*. As mentioned in connection with the time framework for the provision of information and consequently also for the language assistance required in this matter, it is obvious that the obligation to provide information 'promptly' is understood as being provided as soon as possible and additionally by the arresting officer. This judgment, however, does not take into account the language competence of the arresting officer.

⁶ The numbers in the brackets indicate the number of the judgments of the EctHR directly related to the violation of the Article 5 §2.

⁷ The judgments are publicly available through the website of the ECtHR and are part of Case-law section.



- **the case of Husain v. Italy, Judgment of 24 February 2005, No. 18913/03** the Court notes that the right to the free assistance of an interpreter signifies that an accused has the right to “(...) *the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him that it is necessary for him to understand in order to have the benefit of a fair trial* (...)” However, paragraph 3 (e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. In that connection, it should be noted that the text of the relevant provisions refers to an “interpreter”, not a “translator”. This suggests that oral linguistic assistance may satisfy the requirements of the Convention.
- **the case of Diallo v. Sweden, Judgment of 5 January 2010, No. 13205/07** - in the third section of the ECtHR judgment, the right to language assistance is built on the level of legal aid and must therefore be granted at the investigation stage, i.e. immediately upon arrest at the police station.
- **the case of Vizgirda v. Slovenia, Judgment of 28 August 2018, No. 59868/08** – the Court denied the claim of the applicant that he was not provided with the language assistance in his mother tongue as the proceedings were held in Russian language of which the applicant has a good spoken command even he was not able to write in Russian. The person’s own language would in principle be his or her mother tongue but, if the person had a command of another language, the use of the latter could suffice for oral communication in the proceedings. Thus, the right to language assistance does not solely imply that the language assistance has to be provided in the mother tongue of the third-country national.

The rights concerned are obviously intended to represent minimum standards. The language-related assistance is in practice a subject of interpretation from the perspective of the individual countries. Through the case-law of the ECtHR it is shown how the provisions on language assistance can be developed to some extent. Frequently, the language issues are raised together with complaints under Article 5 and 6 and occasionally in conjunction with Article 14 (prohibition of discrimination). Even though the Court has rarely found a violation solely on account of language issues, the above-mentioned cases have given it the opportunity to lay down the basic principles in passages that represent a consolidation of the applicable case-law (Brannan, 2010).

CONCLUSION

Since the language assistance provided to third-country nationals arriving into the territory of the EU Member States is firmly grounded not only within the secondary legislation of the EU (within respective Directives), but also forms an integral part of the European Convention on Human Rights, it is legally binding for all Member States, even though it is defined in the listed legislation too broadly and as such gives rise to various interpretations within the national legislations of the EU Member States. To prevent further disparities and discrepancies between the EU Member States implementations of the right to language assistance, the presented European Court of Human Rights case-law can help to clarify provisions regarding the language provision in more detail. As providing the information promptly, accurately and in the language a detained third-country national understands is a procedural safeguard guaranteed not only at the national level of the individual EU Member States and the European level, but also forms an integral part of the international law.

The given case-law can shed more light on the language issues related to the assistance of interpreter/translator, time span reflecting the requirement of providing information promptly, helps to understand the status of the language assistance in the processes related to the asylum procedure (fortu-



nately it is equally important as the legal assistance provided to detained third-country nationals), and also points out at the possible solutions available for the EU Member States that are struggling with the number of interpreters, especially in relation to less-spread or minority languages, and the EctHR case-law allows them to provide the language assistance not solely in the mother tongue of the detained third-country national, but also in the language a detainee understands which may also be one of the widely-spread language as English, Russian, German, etc.

To sum up, the language assistance is listed as one of the procedural safeguards firmly rooted not only in the European Convention on Human Rights as the crucial document, but also within the respective Directives at the European level that are legally binding for all EU Member States. Thus, it is of high importance to unify the way the language assistance is provided to arriving third-country nationals as the unification would help to prevent the exploitation of such right from the third-country perspective and would allow the competent authorities at the national levels to rely on one interpretation and therefore, contribute to more effective tackling of at least one of the burdens related to the migration.

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REFERENCES

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December 1988 available online at: <https://www.un.org/ruleoflaw/files/Body%20of%20Principles%20Detention.%20pdf.pdf>
2. BRANNAN, J. (2010) ECHR case-law on the right to language assistance in criminal proceedings and the EU response available online at: [e-justice.europa.eu/4_BrannanECHRcaselaw_EU_en%20\(1\).pdf](http://e-justice.europa.eu/4_BrannanECHRcaselaw_EU_en%20(1).pdf)
3. Case of Abdolkhani and Karimnia v. Turkey, Judgment of 22 September 2008, No. 30471/08 available online at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-94127%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-94127%22]})
4. Case of Conka v. Belgium, Judgment of 5 February 2002, No. 51564/99 available online at: <https://www.asylumlawdatabase.eu/en/content/ecthr-%C4%8Donka-v-belgium-application-no-5156499-5-february-2002>
5. Case of Hermi v. Italy, Judgment No. 18114/02 available online at: <https://www.echr.coe.int/echr/en/hudoc>
6. Case of Husain v. Italy, Judgment No. 18913/03 available online at: <https://www.echr.coe.int/echr/en/hudoc>
7. Case of Kaboulov v. Ukraine, Judgment of 19 November 2009, No. 41015/04 available online at: <http://echr.ketse.com/doc/41015.04-en-20091119/view/>
8. Case of Ladent v. Poland, Judgment No. 11036/03 available online at: <https://www.echr.coe.int/echr/en/hudoc>
9. Case of Lazoroski v. the Former Yugoslav Republic of Macedonia, Judgment No. 4922/04 available online at: <https://www.echr.coe.int/echr/en/hudoc>



10. Case of Leva v. Moldova, Judgment No. 12444/05 available online at: <https://www.echr.coe.int/echr/en/hudoc>
11. Case of Nechiporuk and Yonkalo v. Ukraine, Judgment No. 42310/04 available online at: <https://www.echr.coe.int/echr/en/hudoc>
12. Case of Nowak v. Ukraine, Judgment No. 60846/10 available online at: <https://www.echr.coe.int/echr/en/hudoc>
13. Case of Rusu v. Austria, Judgment of 2 October 2008, No. 34082/02 available online at: <https://www.echr.coe.int/echr/en/hudoc>
14. Case of Saadi v the United Kingdom decided by the Grand Chamber in Strasbourg, Judgment of 29 January 2008 available online at: <http://echr.ketse.com/doc/13229.03-en-20080129/view/>
15. Case of Shamayer and others v. Georgia and Russia, Judgment No. 36378/02 available online at: <https://www.echr.coe.int/echr/en/hudoc>
16. Directive 2010/64/EU on the Right to Interpretation and Translation in Criminal Proceedings available online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010L0064>
17. European Court of Human Rights Judgments
18. ICCPR General Comment No. 08: Right to liberty and security of persons. UN OHCHR. 30 June 1982. Retrieved 1 January 2020.
19. NIKOLAJOVÁ KUPFERSCHMIDTOVÁ, E. (2020) *The Case-Law Shaping the Right of the Third-Country Nationals for the Language Assistance*. In: Kosice Security Review, Vol. 10, No. 1/2020. ISSN1338-6956.
20. NORSTRÖM, E. (2010) Community Interpreting in Sweden and its significance to guaranteeing legal and medical security. Available online at: <http://sens-public.org/articles/781/>
21. NOVÁKOVÁ, I. et al. (2018) *Interkultúrna komunikácia so štátnymi príslušníkmi tretích krajín v útvaroch policajného zaistenia pre cudzincov*: Projekt. /Rieš. výsk. úl. Iveta Nováková, spolurieš. Martina Binderová, spolurieš. Petra Ferencíková, spolurieš. Emil Semjan, spolurieš. Patrik Ambrus, spolurieš. Jelena Ondrejkočiová, spolurieš. Klaudia Marczyová. [a i.]. 1. vyd. – Bratislava: Akadémia PZ – K jazykov, 2018. – 39 l.: dokumentácia 11 l. Vto
22. Return Handbook available online at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf
23. The European Convention on Human Rights available online at: https://www.echr.coe.int/Documents/Convention_ENG.pdf

ADJECTIVE + NOUN COLLOCATIONS WITH THE ADJECTIVE “CRIMINAL” IN ENGLISH AND THEIR TRANSLATIONAL EQUIVALENTS IN MACEDONIAN

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Abstract: The paper deals with the analysis of English adjective + noun collocations and their corresponding equivalents in Macedonian. More specifically, it focuses on the English adjective “criminal” and several nouns it collocates with in an authentic formal text. The analyzed corpus is extracted from an official document in English issued by the European Commission and its Macedonian translation. The aim of the paper is to determine the equivalence level between the original English collocations and their Macedonian translational equivalents with reference to their form as well as the meaning they convey.

Keywords: criminal, collocation, translation, Macedonian, English

INTRODUCTION

The ability to combine lexical units in a meaningful way is an important aspect of the acquisition of lexical knowledge in any language. This equally applies to “ordinary” speakers of the language as well as to translators of texts containing terminology that pertains to a specific field, where accurate transfer of the semantic notion behind a certain lexical unit or combination of two or more lexical units from the source language into the target language, by choosing the corresponding translational equivalents, is crucial for producing a correctly translated text. Let us take, for instance, the very basic English noun *law* which occurs in combination with various parts of speech conveying different meanings. If a person does something illegal, we would say that s/he *breaks the law*, *violates the law*, *flouts the law*, etc. Conversely, if a person behaves in compliance with the law, we would say that s/he *abides by the law*, *obeys the law*, *observes the law*, etc. If, for instance, we talk about the duty of police

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officers, we may say that they *enforce the laws, uphold the laws*, etc. If we are interested in the specific divisions of law, we may talk about *Administrative Law, Constitutional Law, Criminal Law*, etc. If some act was carried out contrary to what the law permits, we would say that it was done *against the law*, if we talk about pieces of legislation addressing specific issues, we would say, for instance, *Law on Criminal Procedure, Law on Abortion, Law on Police*, etc. These examples show that for expressing certain actions related to laws in English, specific verbs are used that usually co-occur in combination with the noun *law*. When translating these combinations into another language, they should be adapted to the target language and replaced by adequate word combinations that would sound natural to the target language speakers. Thus, for instance, the adequate word combination for *Constitutional Law* in Macedonian would be *Управно право (Upravno pravo)*, *enforce the law* would be translated as *спроведува закон (sproveduva zakon)*, *Law on Police* would become *Закон за полиција (Zakon za policija)*, etc. All these word combinations can accurately be translated only if the translators possess high level of lexical knowledge of both languages, which includes the lexical combinations within the respective lexical corpora.

The examples presented above are all examples of collocations. The term *collocation* was introduced by J. R. Firth. His notion of collocation focuses on “lexical cooccurrence” (Heid, 2011:284) and is associated with his statement that “you shall know a word by the company it keeps” (Firth, 1957:11 quoted in Heid, 2011:284) referring to the meaning of words inferred from the lexical combinations they form. In the *Longman Dictionary of Language Teaching and Applied Linguistics*, the term *collocation* refers to “the way in which words are used together regularly” (Richards & Schmidt, 2010:95). More specifically, it “refers to the restrictions on how words can be used together, for example which prepositions are used with particular verbs, or which verbs and nouns are used together” (ibid). Depending on the parts of speech that constitute this type of lexical combinations, in *The BBI Combinatory Dictionary of English* a distinction is made between lexical collocations, on the one hand, and grammatical collocations, on the other. According to this classification, “typical lexical collocations consist of nouns, adjectives, verbs, and adverbs” (Benson et al. 2010: xxxi), as opposed to grammatical collocations which are comprised of “a dominant word (noun, adjective, verb) and a preposition or grammatical structure such as an infinitive or clause.” (ibid: xix).

Translation is a complex process that requires high proficiency level of both the source language and the target language. What adds to the complexity of translating legal vocabulary is the fact that translators often translate not only between languages, but between legal systems as well. This is specifically true for languages – “parties” to a translation process that lexically shape concepts derived from different legal traditions, where the legal terminology based on the different legal systems, inter alia, affect the lexical relationships within the specific languages in question. This is the case with the process of translating from English into Macedonian and vice versa, representing concepts from the Anglo-Saxon and the Continental legal tradition, respectively.

Bearing this in mind, in the sections that follow, we will discuss the challenges faced by translators when translating collocations consisting of the adjective *criminal* as a collocate of a limited number of nouns, as found in an authentic text composed in English and then translated into Macedonian. The subject of our analysis will be lexical collocations of the *adjective + noun* type consisting of the fixed adjective *criminal* in collocation with different nouns. Taking into account the wide collocational range of this adjective, it will be interesting to draw conclusions on how it “behaves” when translators attempt to translate the lexical combinations it enters into during the process of their translation from English into Macedonian.



ETYMOLOGY AND MEANING OF CRIMINAL

According to the *Online Etymology Dictionary* the existence of the word *criminal* in English could be traced back to the 14th century, when it was used to refer to the quality of being “sinful, wicked”². In mid-15th century its meaning covered “of or pertaining to a legally punishable offense, of the nature of a crime”, while in late 15th century it was used to denote “guilty of crime”. It is rooted in the Old French word *criminal* meaning “criminal, despicable, wicked” from the 11th century and directly taken from Late Latin *criminalis* meaning “pertaining to crime”, derived from the Latin word *crimen* (genitive *criminis*).³

In general English language dictionaries, the word *criminal* is usually found in two forms – nominal and adjectival. To illustrate this, we will refer to the online edition of the *Oxford Learner's Dictionaries*. The word *criminal* is defined as a noun denoting “a person who commits a crime”⁴. It is also listed as an adjective with three meanings. The first meaning of *criminal* is rather formal and refers to something that is “connected with or involving crime”. Its second meaning refers to something that is “connected to the laws that deal with crime”. The third meaning is referred to the quality of being “morally wrong”⁵.

In Macedonian, the nominal variant of *criminal* is translated as *криминалец* (*kriminallec*) and covers the same notion of its English counterpart. As far as the adjectival variant is concerned, *criminal* is usually translated as *криминален/-на/-но/-ни* (*kriminalen/-na/-no/-ni*), with the Macedonian root noun *криминал* (*criminal*) – the equivalent of the English noun *crime*. The *Interpretative Dictionary of the Macedonian Language* defines the adjective *криминален/-на/-но/-ни* (*kriminalen/-na/-no/-ni*) as something “that is related to, or has a characteristic of a crime”⁶. Colloquially, *криминален/-на/-но/-ни* (*kriminalen/-na/-no/-ni*) is also used to refer to something a) “that has criminalistic content; criminalistic”⁷, or b) “that has no quality, very bad”⁸. On the other hand, *criminal* can also be translated as *кривичен/-на/-но/-ни* (*krivičen/-na/-no/-ni*), derived from the adjective *крив* (*kriv*) meaning *guilty*, and the noun *кривица* (*krivica*) meaning *guilt*⁹. In the Dictionary quoted before, *кривичен/-на/-но/-ни* (*krivičen/-na/-no/-ni*) is defined as something “that is related to acts committed against persons and property”¹⁰. More specifically, in a legal context, the adjective *кривичен/-на/-но/-ни* (*krivičen/-na/-no/-ni*) is used to modify nouns when denoting concepts within the context of criminal law.

RESEARCH METHODOLOGY

The research was carried out with the goal to evaluate the equivalence level between “*criminal* + noun” collocations in an authentic formal text in English and in its translated Macedonian version. To

2 <https://www.etymonline.com/search?q=criminal>

3 *ibid*

4 [Oxfordlearnersdictionaries.com/definition/english/criminal_1?q=criminal](https://www.oxfordlearnersdictionaries.com/definition/english/criminal_1?q=criminal)

5 https://www.oxfordlearnersdictionaries.com/definition/english/criminal_2

6 <https://makedonski.gov.mk/corpus/l/kriminalen-prid>

7 *ibid*

8 *ibid*

9 Although the term *кривичен/-на/-но/-ни* (*krivičen/-na/-no/-ni*) is most frequently used by most authors, and is officially accepted in Macedonian legal texts, such as *Кривичен законик/ Krivičen zakonik* (*Criminal Code*), *Закон за кривична постапка/ Zakon za krivična postapka* (*The Law on Criminal Procedure*) etc., some legal experts favor the use of the adjective *казнен/-а/-о/-и* (*kaznen/-a/-o/-i*) used individually or in various collocations. See Камбовски, В. (2004). *Казнено право (општ дел)*. Скопје: Култура, сс. 6-8

10 <https://makedonski.gov.mk/corpus/l/krivichen-prid>



achieve this goal, we chose the *European Commission's North Macedonia 2020 Report*¹¹ and its translation in Macedonian available at the website of the Sector for European Affairs of the Macedonian Government¹². These texts were chosen because, inter alia, they cover terminology in the fields of law and security, including lexical combinations that contain the adjective *criminal* followed by various nouns. These lexical combinations were extracted from the English text and their Macedonian lexical equivalents in the translated text and with the help of the method of content analysis they were analyzed both in terms of their form and meaning.

RESEARCH RESULTS

The analysis of the original English text of the North Macedonia 2020 Report issued by the European Commission revealed that the word *criminal* in its adjectival form occurred 40 times, in combination with a total of 18 different nouns. In its nominal form, it was encountered only once, in the collocation *cyber criminal*, translated into Macedonian as *сајбер-криминалец* (*sajber-kriminallec*).

The table below illustrates the distribution of *criminal* + noun collocations¹³ extracted from the original text of the Report in English:

Table 1: Distribution of *criminal* + noun collocations

| Collocation | Number of occurrences |
|-------------------------|-----------------------|
| criminal act | 2 |
| criminal area | 1 |
| criminal asset | 5 |
| criminal case | 4 |
| criminal charge | 4 |
| criminal code | 3 |
| criminal court | 3 |
| criminal group | 2 |
| criminal infiltration | 1 |
| criminal investigation | 3 |
| criminal law | 1 |
| criminal liability | 1 |
| criminal matter | 1 |
| criminal network | 2 |
| criminal offence | 4 |
| criminal police | 1 |
| criminal procedure | 1 |
| criminal responsibility | 1 |

11 The original English text of the European Commission's Report can be accessed on the following link: https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/north_macedonia_report_2020.pdf

12 The Macedonian translation of the Report can be accessed on the following link: <https://www.sep.gov.mk/page/?id=1117#.YTbF550zbIU>

13 The collocations extracted from the text were used both in singular and plural forms, but for the purpose of the paper we presented all collocations in their singular form. In some cases, in the discussion of their translation when quoting the excerpts in which they occurred, we used their plural form. Postpositive definite article was also omitted.

STRUCTURAL EQUIVALENCE OF THE TRANSLATED COLLOCATIONS

The research results showed that in most cases the English form of the collocation *adjective + noun* was replicated in the translated Macedonian text.

However, in one case we noticed a translational equivalent where the source *adjective + noun* collocation was translated with a noun followed by a prepositional phrase (*noun + prepositional phrase*). In that particular instance, the collocation *criminal assets* (used in the plural form) was translated as *средства од криминални дејства* (*sredstva od kriminalni dejstva*). Although the original English form was not replicated in the Macedonian translation, we can agree that the form of the Macedonian equivalent does not sound strange to Macedonian speakers and can be used as a translational alternative of *adjective + noun* English collocations. The back translation into English would be *assets from criminal activities*.

The same collocation also occurred in a translational equivalent consisting of an adverb followed by an adjective and a noun (*adverb + adjective + noun*). Thus, in one place in the text, *criminal assets* was translated as *криминално стекнат имот* (*kriminalno steknat imot*). In this case, the back translation of the collocation into English would be *criminally obtained property*, and we can draw the same conclusion that this choice and order of the parts of speech within the translated collocation in Macedonian can be considered acceptable.

Table 2: The structure of the English *criminal + noun* collocations and their Macedonian equivalents

| Structure of the English collocation (<i>criminal + noun</i>) | Number of occurrences | Structure of the translated collocation in Macedonian | Number of occurrences |
|---|-----------------------|---|-----------------------|
| <i>adjective + noun</i> | 40 | <i>adjective + noun</i> | 38 |
| | | <i>noun + prepositional phrase</i> | 1 |
| | | <i>adverb + adjective + noun</i> | 1 |

SEMANTIC EQUIVALENCE OF THE TRANSLATED COLLOCATIONS

As we have previously noted, the English adjective *criminal* is mainly translated into Macedonian either as *криминален/-на/-но/-ни* (*kriminalen/-na/-no/-ni*) or *кривичен/-на/-но/-ни* (*krivičen/-na/-no/-ni*).

The following table illustrates the distribution of *криминален/-на/-но/-ни* (*kriminalen/-na/-no/-ni*) as a Macedonian translational equivalent of the adjective *criminal* within the *criminal + noun* lexical combination¹⁴:

14 The labels “acceptable, partially acceptable and unacceptable translational equivalent” in the second column in Table 3 refer to the translation of the English adjective *criminal* as an adjective within the *adjective + noun* Macedonian translational equivalent. In the third column they refer to the translation of the English adjective *criminal* as a prepositional phrase within the *noun + prepositional phrase* Macedonian translational equivalent. The same labels in the fourth column refer to the translation of the English adjective *criminal* in the



Table 3: Distribution of the Macedonian translational equivalents of the English adjective in *criminal* + noun collocations

| English: CRIMINAL (adj.) | Macedonian: КРИМИНАЛЕН/-НА/- НО/-НИ (KRIMINAL- LEN/-NA/-NO/-NI) (adj.) | Macedonian: PREPOSITIONAL PHRASE | Macedonian: ADVERB + ADJEC- TIVE |
|---------------------------------------|--|--|--|
| a) | Acceptable translational equivalent | Acceptable translational equivalent | Acceptable translational equivalent |
| <i>criminal asset</i> | криминално средство | средство од криминално дејство | криминално стекнат имот |
| <i>criminal asset</i> | криминален имот | - | - |
| <i>criminal group</i> | криминална група (x 2) | - | - |
| <i>criminal infiltration</i> | криминална инфилтрација | - | - |
| <i>criminal network</i> | криминална мрежа (x 2) | - | - |
| b) | Partially acceptable translational equivalent | Partially acceptable translational equivalent | Partially acceptable translational equivalent |
| - | - | - | - |
| c) | Unacceptable translational equivalent | Unacceptable translational equivalent | Unacceptable translational equivalent |
| <i>criminal police</i> | криминална полиција | - | - |

According to the data in Table 3, a conclusion can be drawn that *criminal* is adequately translated in the adjectival form *криминален/-на/-но/-ни* (*kriminalen/-na/-no/-ni*) in 8 out of the 9 detected occurrences. This includes the example where *криминален/-на/-но/-ни* (*kriminalen/-na/-no/-ni*) was used as an adjective within the prepositional phrase that was the equivalent of the English noun *criminal*, presented in the third column.

However, in one instance *criminal* was not translated with a corresponding Macedonian counterpart. This remark refers to the collocation *criminal police*, which was translated as *криминална полиција* (*kriminalna policija*).

In the original English paragraph, the collocation *criminal police* was used as follows:

“In the coming year, the country should, in particular:

→ ensure that institutional reforms of the security sector (*criminal police, financial units, intelligence services, National Coordination Centre for the Fight against Organised Crime*) are translated into a proactive policy of implementing the strategic documents and achieving further tangible results;” (European Commission, 2020:36).

adverb + adjective form within the *adverb + adjective + noun* Macedonian translational equivalent.



As we can see from the excerpt, *criminal police* was used within the context of institutional reforms of the security sector, i.e. at the level of an institution within the security sector, besides the other institutions/services mentioned in the paragraph. This means that the translation should match the name of the corresponding institution within the Macedonian Ministry of Interior. If we look at the structure of the Ministry of Interior, we can see that the corresponding sector is named *Сектор за криминалистичка полиција*¹⁵ (*Sektor za kriminalistička policija*), within the Public Security Bureau. Consequently, the adequate translation of *criminal police* in this case would be *криминалистичка полиција* (*kriminalistička policija*). The collocation *criminal police* can also be found in the full name of INTERPOL, originally named "*The International Criminal Police Organization – INTERPOL*"¹⁶ which is officially translated into Macedonian as "*Меѓународна организација за криминалистичка полиција – ИНТЕРПОЛ*" (*Međunarodna organizacija za kriminalistička policija – INTERPOL*)"¹⁷.

Another interesting example is the collocation *criminal asset*, which was used in the original English text in the plural form, i.e. *criminal assets*. In this collocation, the adjective *criminal* was correctly translated as *криминален* (*kriminalen*), but we came across two different translational equivalents for the noun *asset* it collocated with. *Criminal assets* was translated as *криминални средства* (*kriminalni sredstva*) and *криминален имот* (*kriminalen imot*). However, not both are accurate translations of the original English term. *Криминални средства* (*kriminalni sredstva*) is the literal translation of *criminal assets*, while the equivalent of *криминален имот* (*kriminalen imot*) is *criminal property*. The analysis of the use of *asset* in its plural form, i.e. *assets* in the entire English text that is the subject of our paper shows that *asset* is used as a hypernym of the noun *property*. This can be illustrated with the following sentence:

"In addition to the positive trend of adopting temporary measures for freezing bank accounts and property, the seizure and confiscation of criminal assets need to be increased." (European Commission, 2020:23)

In another section, the following sentence was found:

"The strategy for strengthening capacities to conduct financial investigations and to confiscate property for asset recovery is being implemented including through institutional and operational reforms within the Ministry of the Interior." (ibid:37).

Although in both examples *property* is used without the adjective *criminal*, the context makes it clear that the authors referred to criminal property. In both cases *property* was used with relation to *assets* as one of its components, i.e. the actions of freezing and confiscating property are considered as part of the wider actions of seizure and confiscation of criminal assets, and asset recovery, respectively. Bearing in mind the specific contexts in which these two words were used throughout the text, as well as the existence of two separate translational equivalents in Macedonian, it can be concluded that *криминални средства* (*kriminalni sredstva*) would be a more adequate and accurate counterpart of the English collocation *criminal assets*, wherever it is encountered in the original English text. This also applies to *средства од криминални дејства* (*sredstva od kriminalni dejstva*) as a more accurate equivalent of *criminal assets* compared to *криминално стекнат имот* (*kriminalno steknat imot*), which is a more specific term and does not fully correspond to the original notion in English.

As far as the choice of *кривичен/-на/-но/-ни* (*krivičen/-na/-no/-ni*) as the Macedonian equivalent of *criminal* is concerned, our analysis revealed the results presented in the table below:

15 <https://mvr.gov.mk/page/biro-za-javna-bezbednost>

16 <https://www.interpol.int/en/Who-we-are/Legal-framework/Name-and-logo>

17 <https://mvr.gov.mk/page/interpol>



Table 4: Distribution of the Macedonian collocations with the adjective *кривичен/-на/-но/-ни* (*krivičen/-na/-no/-ni*) as the translational equivalent of the English adjective in **criminal** + noun collocations

| English: CRIMINAL (adj.) | Macedonian: КРИВИЧЕН/-НА/-НО/-НИ (KRIVIČEN/-NA/-NO/-NI) |
|---|--|
| | Acceptable translational equivalent |
| <i>criminal act</i> | кривично дело (x 2) |
| <i>criminal area</i> | кривична област |
| <i>criminal case</i> | кривичен предмет (x 3) |
| <i>criminal charges</i> | кривична пријава (x 4) |
| <i>Criminal Code</i> | Кривичен законик (x 3) |
| [Basic] ¹⁸ <i>Criminal Court</i> | [Основен] Кривичен суд |
| [International] <i>Criminal Court</i> | [Меѓународен] Кривичен суд |
| [Skopje] <i>Criminal Court</i> | Кривичен суд [во Скопје] |
| <i>criminal investigation</i> | кривична истрага (x 3) |
| <i>criminal law</i> | кривично право |
| <i>criminal liability</i> | кривична одговорност |
| <i>criminal offence</i> | кривично дело (x 4) |
| <i>criminal procedure</i> | кривична постапка |
| <i>criminal responsibility</i> | кривична одговорност |
| | Partially acceptable translational equivalent |
| <i>criminal case</i> | кривичен случај |
| <i>criminal matter</i> | кривичен предмет |
| | Unacceptable translational equivalent |

The semantic analysis of the source collocations and their Macedonian equivalents showed that in all 29 collocations the term *criminal* was correctly translated as *кривичен/-на/-но/-ни* (*krivičen/-na/-no/-ni*) in the Macedonian text. However, we noticed two cases in which the translators did not use the most adequate translational equivalent that would correspond to the original English collocate of *criminal* in the collocations in question.

The first example of inaccurate translation of the collocate of *criminal* into Macedonian was noticed in the collocation *criminal matter*. Originally, it was used in the plural form within the subtitle “Judi-

¹⁸ In the English version of the text of the Report, the collocation *Criminal Court* was encountered three times. In one example it was preceded by *Skopje* (*Skopje Criminal Court*), while in two other examples it was preceded by the adjectives *Basic* (*Basic Criminal Court*) and *International* (*International Criminal Court*). Taking into consideration that the paper specifically focused on two-part collocations consisting of the adjective *criminal* + a noun, as well as the fact that the other words preceding it did not affect the meaning of the collocation *Criminal Court*, we decided to exclude these words from our analysis, but to keep them in brackets in the text of the paper to show the entire lexical combinations *Criminal Court* was extracted from.

cial cooperation in civil and criminal matters” (European Commission, 2020:46), which was translated into Macedonian as “Судска соработка во граѓански и кривични предмети” (“*Sudska sorabotka vo graѓanski i krivični predmeti*”). However, in choosing the most appropriate translational equivalent in Macedonian, the best approach would be to refer to a Macedonian law that regulates this matter, at least partially. Namely, the international judicial cooperation in criminal matters is regulated by the *Law on International Cooperation in Criminal Matters*, with the original Macedonian title *Закон за меѓународна соработка во кривичната материја*¹⁹ (*Zakon za meѓunarodna sorabotka vo krivična-ta materija*). Considering the already existing official counterpart in Macedonian in a legal text, one may agree that *criminal matters* should be translated as *кривична материја* (*krivična materija*). In Macedonian, *кривична материја* (*krivična materija*) is a wider term compared to *кривичен предмет* (*krivičen predmet*), and can also be viewed as its hypernym, and can best transfer the semantic notion behind the wider term *criminal matters* used in the original English text.

The second example of inadequately translated collocate of *criminal* in the Macedonian text leads us to the collocation *criminal case*, which was encountered in the original English text three times. In the Macedonian version, the translators used two lexical equivalents – *кривичен предмет* (*krivičen predmet*) in two instances and *кривичен случај* (*krivičen slučaj*) in one of its occurrences. In a general context, the first meaning of the English noun *case* in Macedonian is *случај* (*slučaj*) (Мурроски, 2001:183). The Macedonian noun *случај* (*slučaj*) is defined as “something that has happened, an event”²⁰, and can be used to refer to events of any kind, including ones that might have some component that is contrary to what the laws prescribe²¹. However, in the context of the Macedonian criminal law, cases that end up with official indictment by the prosecution and are dealt by the corresponding court are referred to as *criminal cases* and are officially named *кривични предмети* (*krivični predmeti*). Therefore, it is our opinion that it would be more accurate to use the narrower term *кривичен предмет* (*krivičen predmet*) in the Macedonian version of the text.

In the corpus included in our research we noticed an interesting example of a single Macedonian translation of two English collocations. Namely, the Macedonian equivalent *кривична одговорност* (*krivična odgovornost*) was used for the translation of the English collocations *criminal liability* and *criminal responsibility*. The analysis of the original text in which these collocations were used showed that they appeared in two identical contexts, as part of a longer stock phrase commonly used in legal language. In the English text, the phrase was encountered in two variants. The first variant was “...under moral, material and criminal liability...” (European Commission, 2020:71), while the second one was “...under moral, material and criminal responsibility...” (ibid:29). For both variants the Macedonian translators used the equivalent phrase “...под морална, материјална и кривична одговорност...” (“...pod moral-na, materijalna i krivična odgovornost...”), which was the only acceptable solution in this case.

19 Source: Закон за меѓународна соработка во кривичната материја (Службен весник на РМ, бр. 124 од 20.09.2010 година)

20 <https://makedonski.gov.mk/corpus/l/slučaj-m>

21 The Macedonian term *случај* (*slučaj*) as a translational equivalent of the English term *case* is also used in legal texts in international law. Examples of this kind can be found in judgments by the European Court of Human Rights in Strasbourg, where our country is one of the parties to the cases brought in front of the mentioned Court. For illustration, see *Case of Oluri v. North Macedonia* (*Случај Олури против Република Северна Македонија*), where the noun *case* is translated as *случај* (*slučaj*) in the title and throughout the text. However, the translational equivalent *предмет* (*predmet*) is also used in the text, when referring to the legal procedure before the Macedonian courts in appropriate context. The texts of the judgments can be accessed at the website of the Macedonian Ministry of Justice, on the following link: <https://biroescp.gov.mk/>, and the text of the judgment taken as an example here can be accessed on: <http://biroescp.gov.mk/wp-content/uploads/2020/01/Prevod-OLURI-v.-RSM-1.pdf>

The practice of using a single Macedonian equivalent was also noticed in the collocations *criminal act* and *criminal offence*. Both of them were correctly translated as *кривично дело* (*krivično delo*). What makes the collocation *criminal offence* interesting for analysis is the fact that the English noun *offence* is usually translated into Macedonian as *прекршок* (*prekršok*) or *престан* (*prestop*) (Мурџоски, 2001: 920). According to the Interpretative Dictionary of the Macedonian Language, *прекршок* (*prekršok*) denotes “act that is contrary to a given regulation, law, order etc.”²² As such, *прекршок* (*prekršok*) is not subject to criminal charges and does not result in criminal liability. It is also used as the equivalent of the English term *misdemeanor*. The term *престан* (*prestop*), on the other hand, can be considered as a wider term, and may refer to minor wrongdoings or more serious criminal acts. Therefore, the translation of the English term *offence* would depend on the context in which it was used and the words it collocated with. In this specific example, the adjective *criminal* implies actions that are punishable under the Criminal Code, and consequently the translation of *criminal offence* as *кривично дело* (*krivično delo*) is an example of adequate and accurate Macedonian translational equivalent and transfer of the semantic notion behind the original English term.

CONCLUSION

The presentation and the analysis of the extracted examples in the sections above show that the English adjective *criminal* can form collocations with different nouns.

From the analysis of the selected collocations, a conclusion can be drawn that the collocations from the English text that was the subject of the research were, to a considerable extent, adequately translated into Macedonian. The form of the original collocations was adequately translated into Macedonian. The semantic analysis also showed high level of equivalence between the collocations in English and Macedonian in the analyzed texts.

Although the translators obviously adopted the appropriate approach for transferring the semantic notions covered by the original collocations, the examples of inadequate or inaccurate translators elaborated in the paper indicate that in some cases a deeper analysis is required before deciding on the appropriate translational equivalent. The findings of the research may help translators when translating this type of collocations and may also help learners of English in the fields of security and law when dealing with semantic specificities of the adjective *criminal* and the nouns it interacts with, in forming lexical collocations commonly found in texts addressing issues within the mentioned fields.

REFERENCES

1. Benson, M., Benson, E. & Ilson, R. (2010). *The BBI Combinatory Dictionary of English. Your Guide to Collocations and Grammar, third edition revised by Robert Ilson*. Amsterdam/Philadelphia: John Benjamins Publishing Company
2. European Commission, *Commission Staff Working Document North Macedonia 2020 Report Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Communication on EU Enlargement Policy*, (SWD(2020) 351 final), Brussels, 6. 10. 2020,

²² <https://makedonski.gov.mk/corpus/l/prekrshok-m>



3. available at: https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/north_macedonia_report_2020.pdf (Accessed: 14.9.2021)
4. Закон за меѓународна соработка во кривичната материја (Службен весник на РМ, бр. 124 од 20.09.2010 година)
5. Европска Комисија, Работен документ на службите на Комисијата, Извештај за Северна Македонија за 2020 година во прилог на Комуникацијата на Комисијата до Европскиот парламент, Советот, Европскиот економско-социјален комитет и Комитетот на регионите, Комуникација за Политиката за проширување на ЕУ за 2020 година, (СВД(2020) 351 конечна верзија), Брисел, 6.10.2020, available at: <https://www.sep.gov.mk/page/?id=1117#.YTbF550zbiU> (Accessed: 14.9.2021)
6. Камбовски, В. (2004). *Казнено право (општ дел)*. Скопје: Култура
7. Мургоски, З. (2001). *Голем англиско-македонски речник (второ проширено и преработено издание)*. Скопје: автор
8. Richards, J.C. & Schmidt, R. (2010). *Longman Dictionary of Language Teaching and Applied Linguistics (fourth edition)*. London/New York: Routledge
9. Heid, U. (2011). German noun + verb collocations in the sentence context: morphosyntactic properties contributing to idiomaticity. In: Herbst, T., Faulhaber, P. & Uhrig, P. (eds.) *The Phraseological View of Language. A Tribute to John Sinclair*, (pp.283-311), Berlin/Boston: De Gruyter Mouton
10. <https://biroescp.gov.mk/> (Accessed: 14.9.2021)
11. <http://biroescp.gov.mk/wp-content/uploads/2020/01/Prevod-OLURI-v.-RSM-1.pdf> (Accessed: 14.9.2021)
12. <https://makedonski.gov.mk/corpus/l/kriminalen-brid> (Accessed: 14.9.2021)
13. <https://makedonski.gov.mk/corpus/l/krivichen-brid> (Accessed: 14.9.2021)
14. <https://makedonski.gov.mk/corpus/l/prekrshok-m> (Accessed: 14.9.2021)
15. <https://makedonski.gov.mk/corpus/l/sluchaj-m> (Accessed: 14.9.2021)
16. <https://mvr.gov.mk/page/biro-za-javna-bezbednost> (Accessed: 14.9.2021)
17. <https://mvr.gov.mk/page/interpol> (Accessed: 14.9.2021)
18. <https://www.etymonline.com/search?q=criminal> (Accessed: 14.9.2021)
19. <https://www.interpol.int/en/Who-we-are/Legal-framework/Name-and-logo> (Accessed: 14.9.2021)
20. https://www.oxfordlearnersdictionaries.com/definition/english/criminal_2 (Accessed: 14.9.2021)
21. [Oxfordlearnersdictionaries.com/definition/english/criminal_1?q=criminal](https://www.oxfordlearnersdictionaries.com/definition/english/criminal_1?q=criminal) (Accessed: 14.9.2021)



TOPIC VI

INFORMATICS AND APPLIED MATHEMATICS IN FORENSIC, CYBERCRIME AND SECURITY SCIENCES





CHALLENGES OF CONTEMPORARY PREDICTIVE POLICING

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Abstract: Big data algorithms developed for predictive policing are increasingly present in the everyday work of law enforcement. There are various applications of such technologies to predict crimes, potential crime scenes, profiles of perpetrators, and more. In this way, police officers are provided with appropriate assistance in their work, increasing their efficiency or entirely replacing them in specific tasks. Although technologically advanced, police use force and arrest, so prediction algorithms can have significantly different, more drastic consequences as compared to those that similar technologies would produce in agriculture, industry, or health. For further development of predictive policing, it is necessary to have a clear picture of the problems it can cause. This paper discusses modern predictive policing from the perspective of challenges that negatively affect its application.

Keywords: predictive policing, crime forecasting, ethics, biases, artificial intelligence.

INTRODUCTION

The pressure on law enforcement agencies (LEA) to reduce crime rates is constantly growing. Social networks give particular impetus by providing unlimited resources for the exchange and distribution of information generated by crowdsourcing, mostly for criticizing the work of the police and demon-

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strating their omissions. Also, given the police powers, one could interpret police surveillance as “incredible discretion” (Selbst, 2017), is especially interesting for the non-governmental sector, various organizations, and the media.

Under such pressure, law enforcement is turning to modern technologies to improve police resource management, increase efficiency in crime prevention and reduce unnecessary contact with citizens. One such technology is predictive policing.

Meijer and Wessels defined predictive policing as “the collection and analysis of data on previous crimes for identification and statistical prediction of individuals or geospatial areas with an increased likelihood of criminal activity to help to develop policing intervention and prevention strategies and tactics” (Meijer, 2019). Predictive policing combines information technology, criminology, and predictive algorithms and represents a logical extension of existing methods due to the new reality that brings significantly more data and processing power (Selbst, 2017).

In addition to the optimal use of resources for prevention, the purpose of predictive policing is also deterring crime (Vogiatzoglou, 2019), i.e. pre-emptive policing, which essentially represents the reaction of the police before the criminal activity occurs (Meijer & Wessels, 2019).

Predictive policing does not replace conventional methods such as problem-oriented policing, intelligence-led policing, or hotspot policing but improves them by applying advanced statistical models and algorithms (Meijer & Wessels, 2019). Moreover, the “intelligence-led policing” paradigm has empowered the police to introduce more invasive, secret-service type technologies, which have become more sophisticated than ever before, and which include predictive policing (Vogiatzoglou, 2019). Predictive policing processes a large amount of data, just as conventional methods, yet it does not rely only on criminal data, as for this method, all data are relevant (Meijer & Wessels, 2019).

LEA uses predictive policing tools because their application achieves better results from the perspective of public safety, legal, and cost/resources (Oswald, Grace, Urwin & Barnes, 2018). However, the relationship between claims and proven benefits of crime reduction when it comes to spatial-temporal predictions is that positive and negative results are mixed, while for profiling, they are ambiguous (Meijer & Wessels, 2019). Despite this, more and more tools are being developed and used for this purpose, but there are also a growing number of challenges that predictive policing technologies face.

Crime prevention by applying predictive policing is opposed by the controversy of prejudice and “pre-crime”², which are further strengthened by more general concerns over the implicit biases contained in the historical data set and apparent implications for racial, gendered, ethnic, religious, class, age, disability, and other forms of discriminatory policing (Asaro, 2019).

LEA uses increasingly more and more data to prevent crime and it is not surprising given the nature of information-oriented policing (Gstrein, Bunnik, & Zwitter, 2019). However, this is where most of the problems lie, in the historical crime data used for forecasting in predictive policing technologies. In addition, there are problems of fairness of algorithm, transparency of technologies, various legal and ethical issues, and the perception of the usefulness of predictive policing systems. Also, turning to artificial intelligence that significantly expands the potential pool of people and activities under police surveillance raises different concerns (Joh, 2020).

2 Precrime is a science fiction concept that first appeared in the writings of Philip K. Dick in the novel *The Minority Report*, 1956. The term represents interventions undertaken to punish, disrupt, incapacitate or restrict those deemed to embody future crime threats.



In this paper, we have reviewed current research and its focus on various technology issues and identified what challenges modern predictive policing solutions must overcome during their development and implementation. We emphasize that although one of the main problems of predictive policing is transferring racial prejudice inherent to LEA's data to prediction, as demonstrated in many different studies (Brantingham, Valasik & Mohler, 2018), it will not be in the focus of this paper. Instead, we wanted to show that predictive policing technologies have challenges that need to be overcome beyond the current discourse on the struggle for racial equality.

In the first part, we explain the concept of predictive policing and give examples of practical applications. In the second part, we discuss the problems in developing and applying predictive policing in detail. Finally, in the third part of the paper, we discuss the severity of the challenges based on the relationship between the problem and current solutions.

PREDICTIVE POLICING

Ultimately, the goal of predictive policing is to prevent crimes before they occur, which would eliminate the need for other vital elements of criminal justice - retribution and reformation (Asaro, 2019). Predictive policing is an umbrella term that encompasses the application of analytical techniques to identify the most likely targets for police intervention and prevent crime or solve a past crime based on statistical prediction (Griffard, 2019). Prediction in the use of the police is not a new concept. Crime mapping determines hot spots that have been present for many years, whereas offender profiling is used to predict criminal behavior based on psychological and environmental factors. The new thing that predictive policing brings as a concept is incorporating data mining (Selbst, 2017).

Predictive policing refers to a three-part process consisting of entering one or more types of data, processing data by an appropriate algorithm where the result is the prediction of crime in some domain of interest, and applying prediction results when making strategic and tactical decisions in the field (Kutnowski, 2017). Currently, there are three broad categories of data-driven technologies: predictive technologies, surveillance, and data mining technologies (Ferguson, 2018). Although data mining technologies are also used for predictive policing purposes, we have singled them out to highlight their other broad application in forensic recognition by DNA, faces, or fingerprints biometrics.

The use of predictive technologies by law enforcement is part of a longer historical transition from reactive to proactive policing enabled by the temporal density of big data (Karppi, 2018). Big Data analytics involves working with large and complex data sets whose processing become possible by a recent significant increase in available computing resources and trend forecasting (Kutnowski, 2017). Data sets in predictive policing solutions primarily represent historical crime data over which different algorithms are applied. The task of the algorithms is to identify individuals or geographical areas with elevated risks for future crimes based on which one could better allocate valuable resources towards fulfilling a police mission or goal (Karppi, 2018; Asaro, 2019).

In previous predictive policing solutions, the application of algorithms relied on a "blended theory" according to which both criminals and victims follow common life patterns, while overlaps in these patterns indicate an increased likelihood of crime (Vogiatzoglou, 2019). Using patterns extracted from historical data of previously registered criminal offenses allows predicting time slots and places for certain crimes to be precise (Vogiatzoglou, 2019).



The phenomenon is referred to as the “near repeat effect”, as in “repeat victimization” where houses or similar properties in the neighborhood that have already been burgled could become the target of attack again in a short period of time.

We can divide predictive policing technology into three generations, one that predicted locations of property crimes, one that evolved to predict the locations of violent crimes, and the latest that predicts the participation of certain persons in the commission of crimes, whether they are perpetrators or victims (Griffard, 2019). Place-based predictions are focused on hot-spot detection and are used primarily for resource management. Person-based predictive policing, but not investigation-driven, and suspect-based predictive policing, which is a continuation of offender profiling, is related to the latest predictive policing solutions (Selbst, 2017).

The use of data analysis and statistical methods to predict the probability of crime has quickly become popular with LEAs in the US and then across Europe (Gstrein et al., 2019). The reason is in the advantages of big data policing: more innovative policing, faster investigation, predictive deterrence, and the ability to visualize various crime problems (Ferguson, 2018). What additionally contributed to this were initial successes such as those by Richmond police department, which adjusted its surveillance routes based on a forecast of where gun firing would occur on New Year's Eve in 2003, resulting in a 47% reduction in gunfire, and 246% more weapons that were seized (Meijer & Wessels, 2019).

Currently, there are many predictive policing solutions based on different concepts of application of algorithms that process a large number of diverse data.

PREDICTIVE POLICING APPLICATION

The Harm Assessment Risk Tool (HART) was developed by University of Cambridge statistical experts in collaboration with the Durham Constabulary to assist decision-making by custody officers when assessing the risk of future offending (Oswald et al., 2018). HART divides offenders into three different groups: those who are likely to commit a more serious crime in the next two years (murder, attempted murder, grievous bodily harm, robbery, sexual crimes, and firearm offenses), i.e. those who represent a high-risk group; those who will commit non-serious crimes in the same period are designated by the system as a moderate-risk group; those who are unlikely to commit crimes in the next two years, a low-risk group. HART uses a random decision tree algorithm during the classification, an ensemble learning method for classification, regression, and other tasks. The model was built on 104,000 custody events between 2008 and 2012 using 34 predictor variables, of which 29 were directly from the suspect's offending history.

New York Police Department uses the Patternizr system (Griffard, 2019). The purpose of Patternizr is to assist investigators in identifying crime patterns of robberies, burglaries, and grand larcenies that may have been committed by the same individuals or groups of people based on past crime data. During the development of the system, 39 distinct attributes were identified (date and time of the event, whether weapons were used, how many suspects there were), based on which three models were trained, one for each type of crime, using data collected in the period from 2006 to 2015 and complex decision-tree based classification algorithm.

The Illinois Institute of Technology develops the Strategic Subject List (SSL) algorithm used by the Chicago Police Department. The system considers 48 factors, such as the number of arrests, convic-



tions, drug arrests, gang affiliations, and uses them in determining an individual's social network - which is arrested together with an individual (Asaro, 2019).

The Dutch Crime Anticipation System (CAS) was internally developed in 2013. The tool made predictions about locations, and in some cases it also sought to identify individuals at risk of victimization (Gstrein et al., 2019). CAS uses a "heat-map" for prediction visualization where a specific territory is divided into networks of 125 x 125 m regions. If the chance of crime is high, then regions are highlighted. Furthermore, it uses a near-repeat concept, such as "repeat victimization" (Strikwerda, 2020). The input used by the system includes data such as crime rates and less obvious information such as the distance of the highway from the crime scene, assuming that the features of the urban environment affecting the accessibility of places shape patterns of offending. The intensive application of the CAS tool for predicting crime locations makes the Netherlands the first country in the world to deploy predictive policing on a national scale (Strikwerda, 2020).

The Hunchlab solution developed by Azavea applies the near-repeat concept and other approaches such as Risk Terrain Modeling that considers only exogenous factors, such as specific landmarks' position to improve the results (Degeling & Berendt, 2018). HunchLab system is theoretically agnostic and starts without a hypothesis than applied machine learning technique combines variables that most accurately predict the locations and times of the crime (Shapiro, 2017). HunchLab uses public crime reports, requests for police assistance, weather patterns and Moon phases, geographical features such as bars or transports hubs, and schedules of significant events and school cycles as inputs.

The Lower Saxony project "PreMap" 2016 is a system intended for predictions related to domestic burglary based on "repeat victimization theory" (Gstrein et al., 2019).

CHALLENGES OF PREDICTIVE POLICING SOLUTIONS

There have been conflicting views on predictive policing. It helps police units with limited resources to achieve better results and drastically increase public security, but also provides deceptive and undeserved legitimacy of impartiality to law enforcement (Griffard, 2019). Thus predictive policing is praised for its effectiveness, while being criticized for its unethical behavior (Karppi, 2018).

There are examples in practice due to which the problems of development and application of predictive policing solutions must be paid special attention. The most extreme example is the SyRI (System Risk Indication) system, which is no longer in use due to the decision of the Dutch Court. The system used employment data, civic integration data, debt data, health insurance data, and personal data (name, address, date of birth) as input, without taking into account the previously used indicators or the model. The court ruled that because of all the above, it was not possible to determine whether or not interference with the right to privacy was necessary in relation to achieving the legitimate aim (Strikwerda, 2020).

However, there are examples where further implementation has been abandoned due to system inefficiencies. For example, authorities of the German city of Nuremberg did not continue to use their near-repeat Precobs system for burglaries because, after six months, there were many burglaries that the system did not anticipate, although some were committed by serial offenders (Degeling & Berendt, 2018).

We divided the problems of predictive policing technology into groups related to input data, prediction errors and biases, ethical and legal issues, and transparency. Problems within one group affect



problems within other groups, often in a causal relationship, so the classification is made based on the problem's key feature.

INPUT DATA

Input data has been highlighted in most studies as the cause of the problems that technology has. Although there are different technical solutions for predictive policing systems, one thing is for sure - historical police data is the primary data source. Different categories of specific data can be used, such as information on past crimes (type of crime, time, and location), arrests, and calls for service (Richardson, Schultz & Crawford, 2019). The problem with input data, which is limited to reports by victims and police observations, is that there are a large number of unreported and unseen crimes, especially in the area of domestic violence, which is why the system will not have enough data to predict (Strikwerda, 2020). If there is not enough data, if irrelevant, inaccurate, and outdated data are used, it will directly reflect on the accuracy of the prediction (Gstrein et al., 2019).

The prediction is also affected by the erroneous assumption that historical crime data are objective. Those data are deeply related to the practice and priorities of police organizations (embedded with political, social, and other biases). They can hardly be treated as data resulting from consistent scientific measurements because there are no standardized procedures for their collection and evaluation (Richardson et al., 2019). The result is that arbitrarily selected data is entered into the reports at the police officers' discretion.

The problem with data related to machine learning is the use of training algorithms for data essentially labeled by the police close to their contact with criminals, most often after arrest, and which are not updated later during criminal proceedings and evidence. This is also one of the reasons why most crime labels may be incorrect, whether they describe the type of crime or the existence of one, which will reflect in a model training and prediction ability (Selbst, 2017). For example, suppose crime is downgraded or not reported at all. In that case, the level of risk that can be assigned to the place and time must be downgraded, as in the situations when hate crimes are wrongly downgraded from constituting criminal offenses to incidents (Kutnowski, 2017). The consequences of downgraded or upgraded crime are under-policing or over-policing, respectively. The example of the Los Angeles Police Department (LAPD) shows the seriousness of the problem. They misrecorded 14,000 serious assaults as minor offenses from 2005 to 2012, which was discovered only in 2015 when LAPD already started using predictive policing solution company PredPol (Richardson, 2019).

There is also the minimum amount of data needed for prediction when it comes to model training, making it harder for smaller cities to spot the system's positive effects (Degeling & Berendt, 2018).

Problems with the data used to train the model and the prediction itself reduce the process of crime prognosis, that is, the positive effect of the system on pure dice rolling. This was confirmed by the Memphis Police which, after three years of using the IBM Blue CRUSH (Criminal Reduction Utilizing Statistical History) system, had a thirty percent reduction in crime rate in the metropolitan area. However, later, the audit analysis determined that a large amount of data was not entered into the system, making a precise prediction of where the crime would take place impossible (Bakke, 2018).

No matter how precise and no matter how more objective than the police they may be, classifying algorithms depends on previous data. The problem of making decisions based on historical offender data can be influenced by past arrest history, force targeting decisions, social trends, and prioritization



of certain offenses, such as child sexual abuse offenses, domestic violence, and hate crime (Oswald, 2018; Gstrein, 2019).

In addition to the data itself, the choice of features used during training is crucial, which is a particularly demanding job for person-based prediction (Selbst, 2017). It is impossible to collect all the attributes about the subject or consider all the environmental factors with a model. Features that inadequately capture the relevant distinction between people or locations will make the prediction less accurate (Selbst, 2017).

When the use-value of the input data is in question, it is linked to the specific subject of the investigation. So the probability of near-repeat events of armed robberies increases in the first seven days but does not exist after that (Meijer & Wessels, 2019). If robberies do not occur in a certain period, historical data lose their significance, and the system based on them will not be able to make predictions for specific crimes.

Most errors in police data occur in everyday work, and the more complex the data, the greater the chance for bias to be embedded in subtle and difficult-to-detect ways (Kutnowski, 2017).

BIASES AND THE INFLUENCE OF ERRORS IN CLASSIFICATION

Training data must represent a sample of the entire population concerning the ultimate goal of the algorithms, which is pattern matching and generalization, otherwise, sampling bias occurs. For example, police data can be biased because it reflects police practices and policies that can lead to a specific group of people or regions being overrepresented in the police data used for training and model work. In addition, important information such as white-collar crime data can be omitted from the input data because priority is traditionally given to violent, street, and quality of life crimes (Richardson et al., 2019). One of the problems is also unbalanced data sets like, for example, the police have significantly more information about people who are injured than about those who are not (Selbst, 2017).

Unbalanced gatherings lead to an increased presence of the police in low-income and minority neighborhoods, which citizens do not perceive as a form of protection, prevention but a source of harm (Shapiro, 2019). So instead of one of the goals of predictive policing, which is to reduce contact with citizens, i.e. to minimize the optimal organization of resources, it achieves the opposite prediction based on crime history data that direct the police to such regions where most of the data is collected. Data mining techniques can reproduce existing patterns of discrimination, inherited prejudices of previous decision-makers, or reflect the widespread biases in society (Selbst, 2017; Bakke, 2018). Thus technological solutions have been criticized for focusing on low-level “nuisance” crime or areas with high crime levels and therefore poor neighborhoods (Oswald & Babuta, 2019). In the same context, the appearance of the feedback loop caused by the bias of crime statistics is also interesting. The police pay attention to the neighborhood with many immigrants. Although the area has an average crime rate, the number of detected crimes in that area becomes greater than in other areas, which in turn causes even more police to be sent to such locations (Zuiderveen, 2020).

The problem with generalization is that each learning algorithm has an inductive bias to favor simpler hypotheses and conditional independence and the assumption that factors work independently to contribute to their effect (Degeling & Berendt, 2018). Examples include placing a campus zone on an increased risk map for the crime of rape, which is supported by the fact that many females have op-



portunities to interact frequently with members of the opposite sex, like within fraternities. However, in this case, the risk is more of a social feature than a geographical one.

In research related to predictive policing, automation biases have also been identified, representing a tendency to over-rely on automated outputs while ignoring other correct and relevant information (Oswald & Babuta, 2019). Similarly, confirmation bias is present, where the algorithm's decision is not checked, but more efforts are made to prove the accuracy of the prediction (Griffard, 2019).

The impact of false positives and false negatives varies with the purpose of the prediction system. For example, when it comes to prediction errors related to terrorism, false negatives can be more expensive as they can lead to attacks and casualties that could have been avoided as compared to false positives, which may lead to the search of an innocent person (Degeling & Berendt, 2018). However, the stakes in false positives certainly increase if the system helps decide on incarceration or intense psychotherapy.

TRANSPARENCY

One of the problems of predictive policing is opaque, lacking transparency because everything happens due to the “black box” of proprietary solutions and mathematically complex algorithms (Ferguson, 2018). It is not acceptable for predictive policing systems to be a black box. A combination of approaches to combat opacity, such as end-user-facing components, independent audits, a context-specific regulatory framework, and the use of open-source code is needed (Oswald et al., 2018). When it comes to transparency of predictive policing, LEAs have institutions in charge of supervising this kind of work. However, there are also problems such as a code of silence, conflict of interests, and a perceived lack of objectivity (Bakke, 2018).

The European Union GDPR and Directive 2016/680 for automated data processing in the LEA context contain a right to human review of automated individual decisions and an obligation for states to adopt appropriate protection of the rights and freedoms of a data subject (Gstrein et al., 2019). Therefore, in addition to data privacy issues, Lower Saxony gave up cooperation with IBM to avoid the situation that due to proprietary solutions, it cannot explain decisions made based on the suggestion of an externally developed system (Gstrein et al., 2019). Furthermore, due to the lack of transparency and the limited ability to explain predictions, it is difficult to measure the severity of crime risks to be prevented and the risks of proper crime prevention, which can lead to disproportionate invasion of privacy, but also discrimination, stereotypes, and stigmatization (Strikwerda, 2020).

The non-transparency of predictive policing systems also leads to incorrect use of their forecasts and making wrong decisions. For example, many officers reported that they were not fully informed of how the SSL list was compiled, so they assumed or were led to believe that all were perpetrators of violent crimes and would most likely use even more violence. In contrast, the SSL list combined potential victims and perpetrators in a single metric of “being involved in violence” (Asaro, 2019). It is interesting for SSL that one-third of the individuals on the list are individuals who have never been arrested or victims of crime, and seventy percent of that group received a high-risk score, which is a result that certainly requires explanation (Richardson et al., 2019).

Some of the arguments for insisting on transparency are (Bakke, 2018): transparency aids accountability, preventing police misconduct, transparency helps provide a remedy to the aggrieved party, allows



a more significant number of parties, with a greater variety of interests, to review predictive policing, and transparency also builds community trust.

On the other hand, there is a need for restrictions on access to data that the police work with due to the secrecy of the data and the interest of ongoing investigation.

There is an interest in the data used in decision-making and the mechanisms by which those decisions are made regarding transparency. For the former, personal data protection laws support transparency. Nevertheless, even in such laws there are frequently some exceptions that restrict access to data or to general information that someone's data is being processed. In addition, there are intellectual properties, which protect the manufacturer from disclosing how the systems work or what algorithms they use, based on which amounts of data they make decisions. Thus, while complete transparency may not be feasible, complete darkness is not in the interest of either side.

ETHICAL AND LEGAL ISSUES

Police organizations suffer tremendous pressure to produce annual crime reductions, leading to manipulation of criminal statistics and provoking other inappropriate behaviors to artificially reduce serious crime statistics (Richardson et al., 2019). Therefore, one cannot look at people, and therefore police officers, as perfect decision-makers, and compare the system's predictions with the mystical perfect human decision-maker (Oswald et al., 2018). Given that predictive policing has become a profitable industry today, manufacturers are trying to emphasize the efficiency and fairness of their products as a tactic in the fight for contracts with police organizations (Griffard, 2019). Thus, the goal of predictive policing technologies is not only to identify hidden patterns but also to create a "neutral" data-driven tool by preventing unconscious biases from being involved in the operation of the algorithm (Selbst, 2017). However, there are examples where the tools have not reached the required standards of neutrality. For example, the UK Information Commissioner's Office has found that the manner of operation of a Gangs Matrix predictive policing tool by the Metropolitan Police in London was a breach of UK data protection law and possibly the Equality Act 2010, which is why the Mayor's Office for Police and Crime conducted a review (Grace, 2019). Among other things, the review found that 82.3% of people on the Matrix were racial or ethnic minorities, and 55.6% of them were under 18 years of age.

If we look at current data analysis techniques in predictive policing from a position of effectivity, we can accept that we are in a situation where computers are becoming increasingly necessary, and humans are becoming increasingly random (Karppi, 2018). So one of the ethical issues with predictive policing is whether we are moving to a time when we might do something just because the computer said so. For example, when a predictive policing system generates a chart in different colors to visualize the threat level without explaining how the threat is conceived, are the police then under the control of technique from the perspective of epistemology (Karppi, 2018)? A different but also ethical problem that builds on the previous one is "judgmental atrophy" where, consciously or not, police officers distance themselves from risky decisions and leave them to the system. On the other hand, police officers may resist applying the artificial tool. Although big data crime prediction can eliminate humans' inclination to utilizing stereotypes regarding class or race when they encounter incomplete information about suspects, algorithms have the same problem because crime data is often incomplete (Karppi, 2018). This issue further raises ethical concerns because predictive policing tools become part of a chain for which inclusive evidence leads to unjustified actions (Oswald et al., 2018).



Predictive policing techniques that determine the profile of individuals use a wide range of personal information in addition to historical data from crime records (Vogiatzoglou, 2019). The data that individuals produce through social media play a significant role in determining the potential future of the individual, that is, in increasing accuracy in the prediction of crime (Karppi, 2018). The wide range of private data used in prediction poses a potential risk of excessive privacy breaches, which do not significantly benefit. The Dutch government has stopped using SyRI, a solution intended to predict fraudsters, due to a court decision indicating a breach of privacy concerning Article 8 of the European Convention on Human Rights (Strikwerda, 2020). In addition, there is the problem of sharing private data with manufacturers. Lower Saxony started the “PreMap” project in 2016 after previously collaborating with IBM and abandoned that collaboration for fear of sharing data with a private company (Gstrein et al., 2019).

Specific solutions such as CAS had an ethical and legal problem due to the development of the system in providing support to the multi-agency approach, i.e. shared information between intelligence agencies and the police (Gstrein et al., 2019). Moreover, this information exchange was further influenced by the rise of new threats to national and public security, mainly terrorism, and its spread beyond national borders, leading to overlapping law enforcement and intelligence services (Vogiatzoglou, 2019).

The epistemological and ontological problem is related to drawing boundaries between different areas and those living in them, for example, division into areas in which the law prevails and those in which it does not (Karppi, 2018). However, if the border is drawn, a new ethical question arises: whether the citizens of the zones marked as high-risk should be informed by the police about their endangerment, even if there are chances of false positives. What the algorithm certainly does not do is that when anticipating possible criminal activities in a particular area, it cannot inform the police about the underlying conditions that contribute to crime in that area, aggravating the preventive role of predictive policing (Karppi, 2018). The reason for this can be found in the fact that social variables are codependent and are in constant flux (Kutnowski, 2017).

PERCEPTION OF USEFULNESS

The question for LEA is also a measure of the usefulness of such systems from the perspective of citizens. Do citizens see that such systems are profitable? For example, murder is severe in impact but does not happen frequently, so it is difficult to predict, unlike vehicle theft and robbery, which have a moderate impact but are more predictable and readily addressed (Shapiro, 2017). Efforts to thwart more easily predictable crimes, such as burglary or larceny, may have higher success rates, but the “payoff” of deterring less predictable and more harmful crimes such as murder and assault may be more significant in citizens’ perceptions (Shapiro, 2019).

DISCUSSION

When data is used for model training and prediction, the problems are related to wrongly qualified crimes and thus erroneously labeled, then to irrelevant, inaccurate, and outdated data. In addition, the input data used, primarily historical crime data, convey the subjectivity of police officers, primarily their prejudices, and specific aspects of the moments in which they arose, such as LEA priorities or community and media focus on a particular type of crime or event. Thus, when developing the appro-



prate tools, the problem is also choosing the appropriate features that affect the accuracy of the crime forecast.

PredPol, a company that develops solutions based on place-based predictive policing, collects and analyzes the time, place of crime, and type of crime from reports. Drug-related offenses data are excluded (as well-documented for racial disparities), and also traffic citation data (often subject of corruption), from its prediction to remove police officer bias (Richardson et al., 2019). However, it cannot be said that such a choice solves all potential problems, i.e. that reports related to other crimes do not contain officer discretion which should be excluded as a prediction factor. In addition, a call for service that is perceived as objective enough may contain irregularities if something is reported that is not essentially a criminal activity but is based on the suspicion or discomfort of those who report (Richardson et al., 2019).

Also, when it comes to input data, it is necessary for analysts to at least try to eliminate errors from existing data sets before models are trained on them or prediction is performed (Oswald et al., 2018). Eliminating errors from a large amount of historical crime data is a particular challenge. It requires significant human resources, with potentially all the problems that initially led to the data problems.

During the application of predictive policing solutions, it was noticed that historical data transmit widespread biases that exist in society. In addition, there are also sampling biases, feedback loop, inductive bias, automation bias, and confirmation bias. The solution applied by Patternizr when it comes to minimizing bias is based on depriving the model of sensitive information related to suspects such as gender and race, while other information used, such as location, is taken very roughly (Griffard, 2019). The example of the Patternization solution shows an attempt to find a compromise. However, the problem of choosing the appropriate indicators for prediction remains whether there is enough left to profile the perpetrator and determine whether it is the same or different group of perpetrators.

Continuous empirical control with careful policy development is needed to prevent biases in prediction using algorithms and ensure the fairness of their outputs. An experiment conducted in three divisions of the Los Angeles Police Department, in which they randomly changed the use of the results of place-based prediction performed by the algorithm and based on the best practice of analysts from the divisions for about 200 days, showed twice the drop in crime at mean patrol dosage using algorithms (Brantingham et al., 2018). It should be noted that the algorithm used reported crime data for a limited range of offenses, burglary, car theft, plus crime location and time data and that the prediction was performed in 150x150 meter boxes. The experiment set up in this way did not show biased arrests.

One of the main classification problems involves unbalanced sets, but a particular challenge is related to classification errors (false negatives and false positives) because they may produce conflicting effects depending on the crime.

When it comes to transparency problems, which include technical barriers (police are not able to answer the question of how the system came to a particular prediction), technological (solutions are most often proprietary) and tactical barriers (police prefer not to reveal their proactive investigative strategies to perceived tactical advantage) must be overcome in order for predictive policing to be successful and to gain the trust of citizens (Ferguson, 2018). This condition in practice produces a large number of different challenges and the need for numerous compromises.

If at all possible, finding the right compromise is a challenge in itself, given the complexity of the problems accompanying predictive policing. Thus, for example, the goal of all algorithmic decision-making technology should be to augment human legal intelligence, not to replace it, and it is necessary to strive for artificial intelligence to rule the Law in a stable and contestable way (Oswald et al., 2018).



Therefore, the result of the Patternizr system is the expression of confidence in the prediction, which is determined in the range from 0 to 1, so the final decision is up to the user of the system. Similarly, SSL evaluates prediction results in the range from 1 to 500, leave the decision to humans. The initial version of the HART system required police officers to make their predictions of arrests of each offender whenever the algorithm was used. The results showed that: police officers were generally uneasy with forecasting both high and low-risk predictions, that the majority (63.5%) predicted moderate risk behavior, and that police officers and the model agreed only in 56.2% of the time (Oswald et al., 2018). The challenge remains how to avoid the importance of prediction in the decision-making process by police officers, or on the other hand, to avoid “judgmental atrophy.” Also, there was a problem with interpreting the prediction results on the example of SSL, i.e. understanding the way and meaning of visualizing predictions (Gstrein et al., 2019).

One of the positive examples of compromise is applying the randomization process in the HunchLab solution, where the police patrol is not always sent to the area marked as the riskiest but to those marked with a lower degree of risk. This randomization avoids over-policing specific communities while avoiding patrols being less predictable to potential offenders and avoiding crime displacement, noticing the focus of police criminals moving into new areas. (Shapiro, 2017, 2019).

In order to reach an ethically acceptable predictive policing solution from the aspect of human rights, it is necessary to perform detailed tests and checks such as a three-part test (Degeling & Berendt, 2018): a suitability test, whether the applied measure will achieve the goals, and a necessity test, whether there are less intrusive measures that can give the required results; and a proportionality test, where it is weighed whether the violation is more severe than the value of the goal to be achieved, and where the goal is crime prevention, the police must not go beyond the scope of their tasks. The lack of legal frameworks that would more precisely determine the area of operation of predictive policing tools, i.e. where the border with intelligence work is currently, hinders the development of tools that would enable wide application.

When it comes to ethical oversight of artificial intelligence, it is necessary to understand the computational techniques it deploys and essentially understands the data sets over which artificial intelligence operates, how data is collected and the biases that those datasets may represent (Asaro, 2019).

When it comes to algorithms for predictive policing, the idea is clear from an ethical point of view: the choice of the solution that least violates individual human rights, i.e. the adoption of the least intrusive means compared to other possibilities (Oswald et al., 2018). The challenge, with all these problems, even with all the extensive research in the field of predictive policing, is to find an appropriate solution that will not bring profit on the one hand and loss on the other. For example, one of the solutions that researchers are working on is the penalized likelihood approach, which seeks to include fairness into the Hawkes process³, but has been shown at the cost of the algorithm’s accuracy (Mohler, Raje, Carter, Valasik & Brantingham, 2018). In addition, the precision and fairness of artificial intelligence models do not guarantee that their use will provide fair, ethical, and socially desirable results; therefore, attention must be focused on the practice of those who use them (Asaro, 2019).

3 The Hawkes process is a mathematical model for these “self-exciting” processes, named after its creator Alan G. Hawkes, and It is a counting process that models a sequence of “arrivals” of some type of data over time, for example, gang violence. Each arrival excites the process in the sense that the chance of a subsequent arrival is increased for some time period after the initial arrival.

CONCLUSION

The choice of where to focus the work, when to arrest, where to use force is the right of the police only, with a particular role of the prosecution and the courts. Mistakes that occur in making these decisions have significant consequences for those to whom police measures are applied and can lead to stigmatization of entire communities. In addition, they negatively affect the sense of security and trust among the citizens of the community within which the police organization operates, due to the growing influence of various media, primarily social networks.

The challenges faced by developing and applying predictive policing systems make it unlikely to find a complete system that will perform all the necessary crime forecasts while meeting all technical, legal, and ethical requirements. Also, the problems that would subsequently arise, primarily legal and ethical, would nullify all the effort and resources invested in development and, in the first place, seemingly optimal resource management using predictive policing tools.

When developing a system for predictive policing, all challenges must be taken into account. It is important to create a system that can overcome these challenges rather than try to get ahead of the competition. First of all, LEAs must be aware of the challenges and strive to advance their work because they will suffer the most extensive consequences.

REFERENCES

1. Asaro, P. M. (2019). AI Ethics in Predictive Policing: From Models of Threat to an Ethics of Care. *IEEE Technology and Society Magazine*, 38(2), 40-53.
2. Bakke, E. (2018). Predictive Policing: The Argument for Public Transparency. *Annual Survey of American Law*, 74 (1), 131-171.
3. Brantingham, P. J., Valasik, M. & Mohler, G. O. (2018). Does Predictive Policing Lead to Biased Arrests? Results From a Randomized Controlled Trial, *Statistics and Public Policy*, 5(1), 1-6.
4. Degeling, M. & Berendt, B. (2018). What is wrong about Robocops as consultants? A technology-centric critique of predictive policing. *AI & Soc*, 33, 347-356.
5. Ferguson, A. G. (2018). Illuminating Black Data Policing. *Ohio State Journal of Criminal Law*, 15(2), 503-525.
6. Grace, J. (2019). 'Algorithmic impropriety' in UK policing? *Journal of Information Rights, Policy and Practice*.
7. Griffard, M. (2019). A Bias-Free Predictive Policing Tool?: An Evaluation of the NYPD's Patternizr. *Fordham Urban Law Journal*, 47(1), 44-83.
8. Gstrein, O. J., Bunnik, A. & Zwitter, A. (2019). Ethical, Legal and Social Challenges of Predictive Policing. *Católica Law Review*, 3(3), 77-98.
9. Joh, E. E. (2020). Increasing automation in policing. *Commun. ACM*, 63 (1), (January 2020), 20-22.
10. Karppi, T. (2018). "The Computer Said So": On the Ethics, Effectiveness, and Cultural Techniques of Predictive Policing. *Social Media + Society*, 1-9.
11. Kutnowski, M. (2017). The ethical dangers and merits of predictive policing. *Journal of CSWB*, 2(1), 13-17.



12. Meijer, A. & Wessels, M. (2019). Predictive Policing: Review of Benefits and Drawbacks. *International Journal of Public Administration*, 42(12), 1031-1039.
13. Mohler, G., Raje, R., Carter, J., Valasik, M., & Brantingham, J. (2018). A penalized likelihood method for balancing accuracy and fairness in predictive policing. In *2018 IEEE International Conference on Systems, Man, and Cybernetics (SMC)*, 2454-2459.
14. Nissan, A. (2017). Digital technologies and artificial intelligence's present and foreseeable impact on lawyering, judging, policing and law enforcement. *AI & Society*, 32, 441-464.
15. Oswald, M., Grace, J., Urwin, S. & Barnes, G. C. (2018). Algorithmic risk assessment policing models: lessons from the Durham HART model and Experimental proportionality. *Information & Communications Technology Law*, 27(2), 223-250.
16. Oswald, M. & Babuta, A. (2019). Data Analytics and Algorithmic Bias in Policing, Downloaded Jun 5, 2021 https://researchportal.northumbria.ac.uk/files/21729582/Babuta_Oswald_Data_Analytics_and_Algorithmic_Bias_in_Policing.pdf.
17. Richardson, R., Schultz, J. M. & Crawford, K. (2019). Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice. *New York University Law Review*, 94(Online 15), 15-55.
18. Selbst, A. D. (2017). Disparate Impact in Big Data Policing. *Georgia Law Review*, 52(1), 109-195.
19. Shapiro, A. (2017). Reform Predictive Policing. *Nature*, 541, 458-460.
20. Shapiro, A. (2019). Predictive Policing for Reform? Indeterminacy and Intervention in Big Data Policing. *Surveillance & Society*, 17(3/4), 456-472.
21. Strikwerda, L. (2020) Predictive policing: The risks associated with risk assessment. *The Police Journal: Theory, Practice and Principles*, Downloaded Jun 1, 2021 <https://journals.sagepub.com/doi/10.1177/0032258X20947749>, 1-15.
22. Vogiatzoglou, P. (2019). Mass Surveillance, Predictive Policing and the Implementation of the CJEU and ECtHR Requirement of Objectivity. *European Journal of Law and Technology*, 10(1), 1-18.
23. Zuiderveen Borgesius F, J.(2020) .Strengthening legal protection against discrimination by algorithms and artificial intelligence. *The International Journal of Human Rights*, 24(10), 1572-1593.

APPLICATION OF ARTIFICIAL INTELLIGENCE TO SUPPORT LAW ENFORCEMENT AGENCIES IN COMBATING FINANCIAL CRIME

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Abstract: The relentless technological development has far-reaching implications for almost every area of life. Fast and unlimited access to information, the remote establishment of interpersonal, business, and financial relations, including rapid money transfers, are only some developments. The development of new technologies, apart from many advantages, brings with it many risks. These threats include criminal activity on the Internet. It is aimed at obtaining financial gain. This type of criminal activity involves financial and cyber aspects, which causes many problems and challenges in law enforcement detection activities. Law enforcement activities must consider collecting and analysing vast amounts of data, which reach gigantic sizes and capacities. We describe an example of the application of artificial intelligence solutions in conducting financial investigations in this article. This work is a contribution to law enforcement agencies pragmatics. The publication shows the role and place and potential of artificial intelligence in combating financial crime.

Keywords: artificial intelligence, machine learning, economic crime, law enforcement agencies

INTRODUCTION

Rapid technological development characterises the social and economic development observed in Poland, Europe and worldwide. This is a sign of our times. Faster access to information, able to talk far a distance, the remote establishment of interpersonal, busi-

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ness and financial relations, including rapid money transfers, are just some manifestations of this development. Electronic devices designed to perform to our needs surround us, and (via the Internet) we can control these devices, even from the other side of the world. These solutions make life easier, but they also carry risks. We are operating on a virtual network, what means that other Internet users unknown to us may also have access to information about us. Their intentions will not always match ours, and they are often illegal. Criminals aim more often at obtaining financial gain. They often do this using the Internet. The preference of perpetrators for remote forms of relations with victims is not accidental and creates problems from the detection side.

From the point of view of law enforcement authorities, in this case, we are dealing with the combine of financial and cyber aspects of criminal activities. This has specific negative consequences for the effectiveness of the state in citizens and obliges to take measures aimed at solving the identified problematic situation.

This paper presents the possibility of using machine learning algorithms in automatic analysis of financial data sets, necessary from the point of view of combating economic crime. In this paper, we present an example of a financial dataset, which was subjected to preliminary analysis. The article presents the results of preliminary analytical activities and describes learning and evaluating the model together with optimisation. We will describe the results at the end of the article. The code used in the study is available on GitHub: <https://git.io/JCgCK>.

We first described the major challenges for law enforcement agencies in combating financial crime, highlighting the problem of analysing financial data sets. Then we described the sources and types of financial data, including bank data and sets of financial transactions. For this article, we have used a set of crafted data, which we have subjected to preliminary analysis. We then carried out supervised learning and evaluation of selected classifier models together with optimisation. Following the research part, we presented the results. We conclude the paper and discuss future research directions and existing limitations. The paper ends with conclusions.

MAJOR CHALLENGES FOR LAW ENFORCEMENT AGENCIES IN COMBATING FINANCIAL CRIME

Financial crime (committed in both the virtual and real worlds) mostly involves frauds, which accounts for the vast majority of economic crime (Ministry of Internal Affairs and Administration of the Republic of Poland, 2017). The manifestations of such activities are excessive, ranging from tax (treasury), financial, investment, para-banking, sales or access to service fraud, and their number and role are constantly increasing. Over 199,000 offences were recorded in Poland throughout 2020, up from 188,000 in 2019 and 181,000 in 2018, with a steady decline in the detection rate of offenders (Polish National Police, n.d.). It is not just the number of incidents that matter. Important is the increasing extent of organisation of the perpetrators. They use the latest technological solutions, as well as precise identification of the demand side (the most popular social needs), and thus the perfect adaptation of the used mechanisms to the victim (Nepelski & Struniawski, 2017). From the point of view of investigative institutions, this poses an increasing challenge, especially in establishing the mechanism of perpetration (*modus operandi*) and, above all, the identity



of the real beneficiaries of the crime (persons with significant control). Using modern technologies ensures anonymity of criminals and the rapid and remote transfer and hiding of funds. Thus, we are dealing with IT (technological) tools and with financial instruments. Law enforcement authorities intend to gather a full range of evidence in these types of proceedings. This has to aim at achieving the objectives of criminal proceedings: the detection of the perpetrator of a crime, the disclosure of the circumstances of the crime, and securing the interests of the injured party (Criminal Procedure Code of the Republic of Poland, 1997). In ongoing cases (operational and investigative) concerning financial crimes, law enforcements collect at least the following datasets:

- Call Data Records (telephone records, e-mail addresses, IP logs)
- financial data (bank accounts, information from payment service providers, information from telecommunications operators)
- open source data (from public databases and registers)
- closed data records (information and data got from entities and institutions within the framework of exercising rights to get information for conducted activities/proceedings).

Proceedings involving the activities of organised criminal groups (tax evasion, money laundering and larger-scale fraud, there are usually investigations related to organised crime groups), tax evasion, money laundering and fraud on a larger scale, proceedings usually last for several years and the amount of collected data sets and information (in paper and electronic form) reaches gigantic proportions and capacities (Leehealey & Chirgula, 2019). If we also consider the variety of formats of these data (telecommunications or financial operators are not obliged to make data available in a homogenous format), it is easy to conclude that the possibility for investigators to effectively analyse data in such cases, has long been exhausted. This may generate dangerous results, as the lack of support of law enforcement agencies with advanced technological tools may cause a further decrease in detection efficiency and ultimately a decrease in the level of public confidence in state structures and internal security (Ministry of Internal Affairs and Administration of the Republic of Poland, 2017).

SOURCES AND TYPES OF FINANCIAL DATA

Financial data is a rich set which contains information on specific transactions, the sender of the payment, the addressee, the amount, the title, the time of order and the execution of the transfer, the currency, the transaction identifier, the addresses and entities). In a broader sense, financial data also include personal and company data (so-called registration data) related to the account holder and online data (related to logging banking and remote ordering of payments). Banks and other payment institutions collect these data in an electronic format, and then in justified cases transferred to allow institutions for criminal prosecution. According to information established by the authors based on data from the records of the Polish Financial Supervision Authority, the number of institutions, entities and companies which conduct official and legal business involving the process of financial data is over 2,000 in Poland (Polish Financial Supervision Authority, 2021).



We can divide the sources of financial data by the category of entities that collect and process them. In this context, we distinguish between:

- bank data,
- non-bank data (payment service providers, investment entities, lending companies).

BANKING DATA

A major obstacle to rapid analysis of bank data is its diverse format and quantity. Collecting this material to a common denominator is time-consuming and requires involvement and work of many officers. Financial data derived solely from the banking system may be in paper form or in various electronic formats in unstructured form. Below is an example of such bank data in text format.

Account number: 44 462 125 690 000 000 000 000 000

Bank account summary

Account holder:

Invest Group LTD
UL. PRZEMYSŁOWA 11B
11-700 MRAGOWO,
Region: WARMINSKO-MAZURSKIE
Poland

Date from: 01/02/2017
Date to: 30/06/2018

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Account number: 44 462 125 690 000 000 000 000 000

Client number: 1280091447111

Currency: EUR

| DD/MM/YY | Contractor | Description | Amount |
|----------|--|--|--------------|
| 01/02/17 | 336125099990000000000000 | Contribution | 12580.000,00 |
| 02/02/17 | Invest Group LTD SIITE 507 ST JEMES CAIRT. MAURITIUS | title: transfer of funds transaction number: 1402 | |
| 02/02/17 | 0000000058585653 | Charge | -49980,00 |
| 02/02/17 | BOSS 19 SP. Z O.O. MRAGOWO 11-700 MRAGOWO | transfer of funds titel: Invoice | |
| 07/03/17 | 29 1030 1999 0001 0000 0177 0348 | Charge | -249.319,51 |
| 07/03/17 | ORLEN PetroCentrum Sp. z o.o. ul.Zglenickiego 44 09-411 Płock | titel: Invoice f/905008026 transaction number: 1406 | |
| 07/03/17 | 31 9999 0076 0000 1300 2565 2933 | Contribution | 125.000,00 |
| 07/03/17 | PIOTR MARKOWSKI 3 MAJA 85 23-400 OLSZTYN | title: transfer of funds transaction number: 1408 | |

Figure 1. Example of bank data in text format

There are examples of cases of financial fraud, connected with money laundering of cross-border nature. These cases concerned several dozen bank accounts (including foreign ones) and contains data on several hundred thousand payment operations. In such circumstances, it becomes necessary to provide technological support for investigating authorities with tools for quick and efficient data analysis. The purpose of these tools may be to identify and block suspicious financial transactions.

DATASET OF FINANCIAL TRANSACTIONS

Showing the potential of artificial intelligence solutions to support law enforcement agencies in combating economic crime requires an appropriate dataset. Open collections lack information on real financial transactions. Therefore, for this article, the authors of the publication used a set of prepared data available through the Kaggle service. In selecting an appropriate dataset, the usefulness and transparency of the information guided the authors. Many of the datasets reviewed contained anonymised information, which did not allow for comprehend of their nature and the links and relationships that existed. Thus, given the purpose of this article, the authors selected a well-described dataset: Ecommerce Fraud Data (Rastogi, 2021). This set comprises two files: Customer_DF (1).csv and cust_transaction_details (1).csv, containing information about commercial transactions on the Internet. The authors conducted further research activities related to the dataset in question in the following order:

- data analysis and preparation;
- learning and evaluation of models;
- optimisation.

DATA ANALYSIS AND PREPARATION

We carried out the data analysis and other stages of the research activities through the Google Colab tool, which allows writing and run Python code in a web browser. To process the dataset, we used the libraries Pandas and NumPy, with which we read the structure of the files:

```
<class 'pandas.core.frame.DataFrame'>
RangeIndex: 623 entries, 0 to 622
Data columns (total 11 columns):
#   Column                                     Non-Null Count  Dtype
---  -
0   Unnamed: 0                               623 non-null   int64
1   customerEmail                             623 non-null   object
2   transactionId                             623 non-null   object
3   orderId                                  623 non-null   object
4   paymentMethodId                          623 non-null   object
5   paymentMethodRegistrationFailure          623 non-null   int64
6   paymentMethodType                        623 non-null   object
7   paymentMethodProvider                    623 non-null   object
8   transactionAmount                        623 non-null   int64
9   transactionFailed                        623 non-null   int64
10  orderState                               623 non-null   object
dtypes: int64(4), object(7)
memory usage: 53.7+ KB
```

Figure 2. The structure of the file Customer_DF (1).csv



```

<class 'pandas.core.frame.DataFrame'>
RangeIndex: 168 entries, 0 to 167
Data columns (total 10 columns):
#   Column                                Non-Null Count  Dtype
---  -
0   Unnamed: 0                            168 non-null    int64
1   customerEmail                         168 non-null    object
2   customerPhone                         168 non-null    object
3   customerDevice                        168 non-null    object
4   customerIPAddress                     168 non-null    object
5   customerBillingAddress                168 non-null    object
6   No_Transactions                       168 non-null    int64
7   No_Orders                            168 non-null    int64
8   No_Payments                           168 non-null    int64
9   Fraud                                168 non-null    bool
dtypes: bool(1), int64(4), object(5)
memory usage: 12.1+ KB

```

Figure 3. The structure of the file *cust_transaction_details (1).csv*

In a further step of the research activity, we deleted from each file the columns: Unnamed: 0, which contained redundant indexes. Then we merged the files and create a single dataset with the following structure:

```

<class 'pandas.core.frame.DataFrame'>
Int64Index: 819 entries, 0 to 818
Data columns (total 18 columns):
#   Column                                Non-Null Count  Dtype
---  -
0   customerEmail                         819 non-null    object
1   transactionId                         819 non-null    object
2   orderId                              819 non-null    object
3   paymentMethodId                       819 non-null    object
4   paymentMethodRegistrationFailure       819 non-null    int64
5   paymentMethodType                     819 non-null    object
6   paymentMethodProvider                 819 non-null    object
7   transactionAmount                     819 non-null    int64
8   transactionFailed                     819 non-null    int64
9   orderState                           819 non-null    object
10  customerPhone                         819 non-null    object
11  customerDevice                        819 non-null    object
12  customerIPAddress                     819 non-null    object
13  customerBillingAddress                819 non-null    object
14  No_Transactions                       819 non-null    int64
15  No_Orders                            819 non-null    int64
16  No_Payments                           819 non-null    int64
17  Fraud                                819 non-null    bool
dtypes: bool(1), int64(6), object(11)
memory usage: 116.0+ KB

```

Figure 4. The final dataset



The following steps of the analysis included checking the dataset for missing values. We have found no blank cells in the dataset. The initial analysis of the data produced information that was subject to further in-depth analysis:

```
{'Average number of orders': 3.808302808302808,  
'Average number of payments': 2.1355311355311355,  
'Average number of transactions': 5.1953601953601956,  
'Average transaction value': 35.14774114774115,  
'Maximum number of orders': 8,  
'Maximum number of payments': 15,  
'Maximum number of transactions': 15,  
'Maximum transaction value': 353,  
'Minimum number of orders': 0,  
'Minimum number of payments': 0,  
'Minimum number of transactions': 0,  
'Minimum transaction amount': 10,  
'Number of transactions': 819,  
'Order state unique value': 3,  
'Unique billing addresses': 141,  
'Unique customer devices': 143,  
'Unique customer phone numbers': 143,  
'Unique device addresses': 140,  
'Unique e-mail addresses': 136,  
'Unique payment methods': 4,  
'Unique payment service': 10}
```

Figure 5. *Initial statistics*

The following steps included a more detailed analysis, which showed that the dataset contain 453 suspicious transactions, out of 819. A further step involved checking the data recorded in the various columns against suspicious transactions, including consumer email addresses, telephone numbers, payment methods and payment service providers. While performing the analysis, we developed a chart of transaction amounts concerning payment methods, including credit cards, bitcoin, Apple Pay and PayPal.

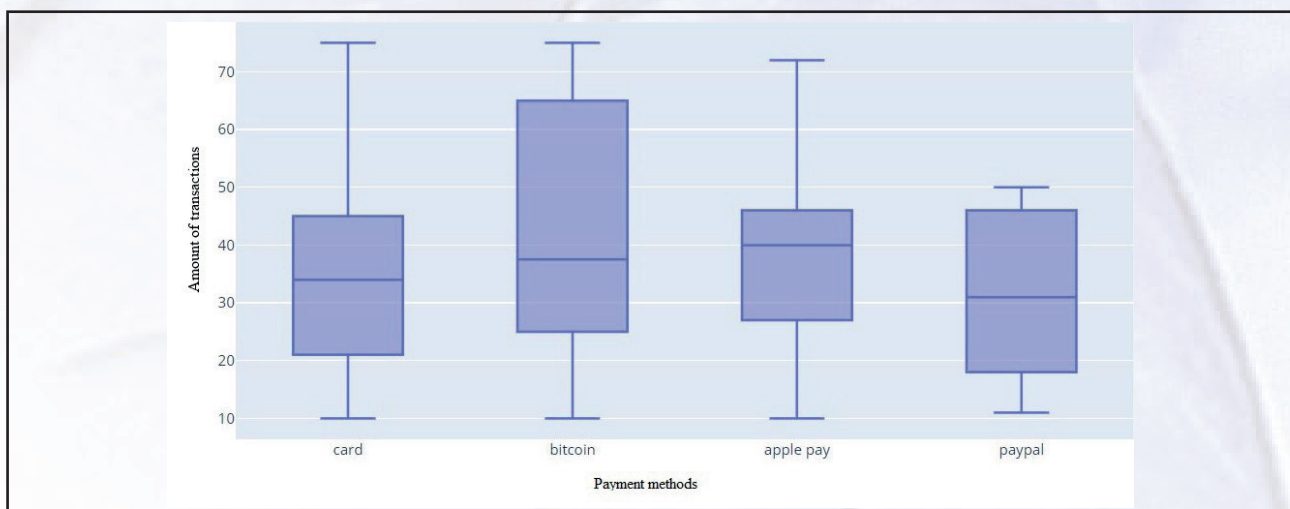


Figure 6. *Amount of transactions in relation to payment methods*



The box plot shows customers made payments in higher amounts with virtual currency. This graph shows that in this case the data are more scattered than in the other cases. On the other hand, customers carried the highest number of transactions with payment cards, as shown by the following figure No. 7. To understand the graph, we marked transactions carried out with payment cards by a circle.

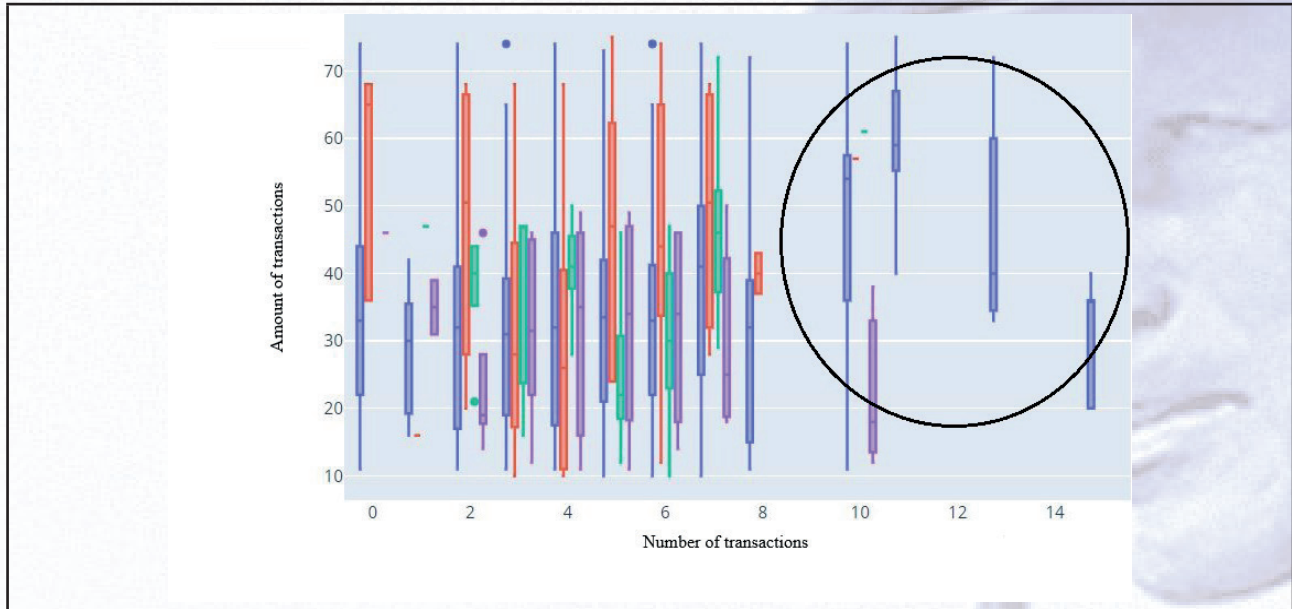


Figure 7. Number of transactions in relations to payment methods.

TRAINING AND EVALUATION OF SELECTED MODELS

To train the prepared models, we defined relevant features with which create dataset: `modelling_feature`. The structure of the created dataset is following:

```
<class 'pandas.core.frame.DataFrame'>
Int64Index: 818 entries, 0 to 818
Data columns (total 8 columns):
#   Column                Non-Null Count  Dtype
---  -
0   orderState             818 non-null   object
1   transactionFailed       818 non-null   int64
2   transactionAmount       818 non-null   int64
3   No_Transactions        818 non-null   int64
4   No_Payments            818 non-null   int64
5   paymentMethodType       818 non-null   object
6   paymentMethodProvider   818 non-null   object
7   Fraud                  818 non-null   bool
dtypes: bool(1), int64(4), object(3)
memory usage: 51.9+ KB
```

Figure 8. The set of modeling features.

We analysed the set containing the modelling characteristics to identify and remove outliers. Then, we applied coding categories and checked correlations between variables by removing the most correlated features. We further used the scikit-learn library and created a training set and a test set. We standardised the explanatory variables before learning and evaluating the model.

We should emphasise that with the described data set, we are dealing with supervised learning. In supervised learning, the data provided to the algorithm contains the attached solution to the problem, namely the so-called labels. The described in this article contains labels in the Fraud column. The values in this column allow the identification of suspicious transactions. The classical task of supervised learning is the so-called classification. Classification makes it possible to predict class labels in recent occurrences based on past observations. With the financial dataset, these will be new payment transactions.

To solve the problem of classifying electronic payment transactions, we used the following classifiers: SVC, Linear SVC and k-Nearest Neighbours. The accuracy, precision and sensitivity of the first two classifiers was 100%, which was confirmed by model validation. The k-Nearest Neighbours model got the following results:

- accuracy: 0.9329268292682927%,
- precision: 0.9529411764705882%,
- sensitivity: 0.9204545454545454%.

OPTIMISATION

To optimise the k-Nearest Neighbours model, we performed a model parameter search process using the GridSearchCV() method. The got grid of parameters allowed to increase all parameters of the k-Nearest Neighbours model to 100%.

CONCLUSIONS

In about growing globalisation and dissemination of technological solutions, one challenge is development and genuine support of state authorities in realizing effective investigative activities. Identification of perpetrators of economic crimes is painstaking work. This work requires recognition of the mechanism of the crime (modus operandi), disclosure of sources of evidence, and effective collection and proper interpretation of an enormous amount of various data sets. Financial data are among the most important evidential and detection data. It is necessary to provide law enforcement agencies with technological solutions, which will significantly accelerate and improve data analysis. Among the most promising are solutions from the area of artificial intelligence.

This publication is illustrative and shows that machine learning (as an area of artificial intelligence) applies in the automatic in automated analysis of financial data. However, this topic requires further detailed research based on real and good quality financial data sets. Certainly, the quality and quantity of data, alongside other important elements: the number of variables, model parameters and the type of problem, is an element that affects the effectiveness of models used in machine learning.



REFERENCES

1. Criminal Procedure Code of the Republic of Poland, Article 2 (1997). https://www.legislationline.org/download/id/4172/file/Polish%20CPC%201997_am%202003_en.pdf
2. Leehealey, A. & Chirgula A. (2019), Fighting Crime with Artificial Intelligence (AI). In H. R. Arabia, D. de la Fuente, E. B. Kozarenko & J. A. Olivas, F. G. Tinetti (Eds.) Proceedings of the 2019 International Conference on Artificial Intelligence (pp. 284-290). CSREA Press.
3. Ministry of Internal Affairs and Administration of the Republic of Poland. (2017, October 17). *Report on the state of security in Poland in 2016*. <https://archiwumbip.mswia.gov.pl/bip/raport-o-stanie-bezpie/18405,Raport-o-stanie-bezpieczestwa.html>
4. Nepelski, M., & Struniawski, J. (Eds), *Profilaktyka bezpieczeństwa*, Wydawnictwo Wyższej Szkoły Policji w Szczytnie.
5. Polish National Police. (n.d). Statistics. *Economic Crimes*. Retrieved July 2, 2021, from <https://statystyka.policja.pl/st/przestepstwa-ogolem/przestepstwa-gospodarcz/122291,Przestepstwa-gospodarcze.html>
6. Rastogi A. (2020), *Ecommerce Fraud Data*. Retrieved July 1, 2021, from <https://www.kaggle.com/aryanrastogi7767/ecommerce-fraud-data/metadata>.

ARTIFICIAL INTELLIGENCE AND THE CHALLENGE OF RETHINKING LEGISLATION

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Abstract: The study examines the impacts of artificial intelligence on human rights, with a special focus on the challenge of how the use of AI can remain transparent, reliable and safe, while the advantages offered by it are retained. The aim of the authors is to shed light on the regulation paradox resulting from the black box effect arising in connection with AI. They lay a special emphasis on the fact that the adequate legal responses to an unknown technology depend on the risks identified through scientific research ("precaution principle"), though the interpretation of these risks may require a new system of aspects. In this context, the authors touch upon the risk-based approach proposed in the EU Committee's White Book and the importance of the resulting preliminary authorisation and of continuous human control. At the same time, based upon the black box effect, which is a regulation paradox, the following dilemma is raised: Is it human or robot law that should be constituted? In connection with the efforts made to regulate the working of artificial general intelligence (AGI), i.e. the AGI safety concept, the study emphasises that it is important to work out the principles and rules which will make the use of AGI safe already before the evolution/creation of AGI. Once AGI is there, logically, it will no longer be possible to do this as AGI may become independent and may act by its own.

The authors also briefly touch upon the question of what AGIs can and cannot do (a question which raises many other issues). Further questions include whether AGIs should be controlled through penalising and restrictions or rewarding and motivation. Consequently, it is necessary to consider what AGIs' actual rewards should be – which raises the need to redefine regulation and, in general, the regulatory system.

Keywords: AI, autonomy, regulation paradox, black box effect, human control.

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INTRODUCTION

“Could humans merge with AI? Is consciousness an unavoidable byproduct of sophisticated intelligence?” (Schneider, 2021.)³

The essence – and the prerequisite – of traditional legislation is that the legislator should have an insight into all details of the working of society and that it must have a competent system of institutions to enforce compliance with the law. With minor anomalies, this concept used to be viable until the beginning of the 20th century. The development of science and technology, however, now raises major doubts as regards the said insight into how society works.

“In the information age, life has changed fundamentally. Increased volatility is routine; events and information about them unfold rapidly; their consequences are amplified. The results are much like a roller coaster ride: exciting, scary, disorienting and all rather different from the view from more solid ground.” (Rothkopf, 2003)

The essence of the change is that the legislator, albeit highly educated in law, no longer has this insight into the details of professions that require special knowledge. As a result, attempts at interpretation are made in a concept framework that is decreasingly relevant, existing legal practice is getting ever farther from the actual practicalities of technology and, thirdly, legislation is unable to foresee the practice to be generated by information technology. “The process that started at the beginning of the 21st century, the so-called Industry 4.0, will bring about changes of a nature and dynamism which will impact all areas of existence. Changes are characterized by a fusion of technologies that is blurring the lines between the physical, digital, and biological spheres.” (Schwab, 2016)

This phenomenon, which, owing to its nature, is latent in its initial forms and is not necessarily in the scope of awareness of those affected by it, currently receives insufficient attention, is not a subject of either public discourse or professional literature on the subject, and only occasionally becomes conspicuous, due to the unusual nature of its superficial manifestations.

For example, the problem of responsibility related to accidents by self-driving vehicles has become a popular topic. Though the dilemma is real, it is only the surface of the problem of a technology appearing in the everyday life of society. As it became clear in the case of self-driving cars, to large groups of society, as well as to people working in other professions, the technology that puts self-driving into practice is unknown, and the IT tool (AI algorithm) that enables self-driving is impossible to understand. It can thus be said that all the people who lack high-level maths and IT knowledge cannot create for themselves a concept of the technology of self-driving, which, consequently, makes it impossible for them to control such technology. Besides, society at large, as well as the legislator, are entirely defenceless against the related information technology and its creators.⁴

Assuming that manufacturers act in good faith, it is just reasonable to avoid any communication that can potentially create panic. However, attention must be called to the black box nature of this new technology. “There is already a strong protection for fundamental rights and for non-discrimination in place at EU and Member State level, but complexity and opacity of certain AI applications (‘black boxes’) pose a problem. A human-centric approach to AI means to ensure AI applications comply with

3 See: Artificial You. AI and the Future of your Mind. See also: (Schneider, 2019).

4 As an example, who can assure the institutions providing social representation, private individuals or the legislator that the IT algorithms needed to implement the function of self-driving do not contain a hidden code that performs unauthorised data collection or trigger timed actions which, especially in the case of a self-driving car, can potentially cause deaths?

fundamental rights legislation. Accountability and transparency requirements for the use of high-risk AI systems, combined with improved enforcement capacities, will ensure that legal compliance is factored in at the development stage.” (MNS quotes Margrethe Vestager’s words, 2021)

We must, therefore, take very seriously the fact that to those who are not experts in information technology, AI (and information technology in general) is nothing else but a black box. A black box whose input and output we can control only partially. And what comprises the content of this black box is entirely out of our control.

To those not experts in the area, it is fully hidden whether a given black box will have a special and totally unknown output as a result of a special and not yet known input, in a case where it works outside of its already known functions which the general public is aware of. And it is impossible to create a law for any unknown output.

It can be said, based on the above, that AI, as well as information technology in general, for example, genetics, have reached a level of development which no longer makes it possible for the legislator to clearly see the entirety of social processes.

“However, even with proper use and maintenance, these technologies can cause damage as they can operate autonomously.” (Tóth, 2019, p. 7.)

This change in the practice of law, which can hardly be perceived today yet, has a fundamental impact on both the process of legislation and social structures, and the drastic consequences of this impact cannot yet be assessed at this stage. A different social structure, different social organisations and a different legal practice are to be expected. The problems which arose with self-driving vehicles, and which have just overstepped the limit of attracting general attention, are now warning us of the existence of these trends.

In the current situation, solutions must be sought without any experience from the past and in society organisation circumstances totally different from anything we have seen so far. It is thus important to make sure we find out what is new in this phenomenon and what the motives are which, at a different level of technology development, appeared differently or not at all in history.

In the study, the general methodological framework for synergy research⁵ is the descriptive-analytic assessment of the impacts, together with the presentation of the new status quo. Applying a system-based approach, the authors try to understand the future by answering questions like these: How is our natural-technological environment changing? What challenge do these changes pose for security policy? In what new legal interpretation will the new system of human-machine relations become manageable?

In this interdisciplinary approach, special attention is paid in each category to social and legal interconnections, conditions and impacts.

“The regulation of technological development is therefore nothing more than a matter of regulatory technology.” (Tóth, 2019, p. 3.)

5 The word “synergy” is of Greek origin, and means “cooperation” (“syn” meaning “together” and “ergos” meaning “working”). However, the word synergy incorporates not only cooperation but also the resulting impacts. “The theoretical background for synergy is literature on the science of management and, within that, the literature on strategy. Accordingly, synergy is understood as something that has positive consequences, supports some impact and/or diminishes or prevents negative impacts. The opposite of synergy is antagonism or anti-synergy, which prevents value creation, i.e. the value loss by which the level of actual synergy is less than the synergy potential.” (Báger-Parragh, 2020) German professional literature offers a comprehensive theoretical background for dissynergies (Hirtzel Leder, Partner, (eds) 1993).

AI RISK CONTEXT: FREEDOM VS. SAFETY

“We minimize the risk by maximizing it.” (Ridderstrale-Nordstöm, 2001, p. 134)

The knowledge of technologies has always been of extreme importance. Small communities (families, in some cases) kept as top secrets certain technologies which sometimes amalgamated the experience of several dynasties and which could not be put together in a natural way, merely through the use of common sense.⁶ At the same time, these technologies did not require deep scientific knowledge: in most cases, they comprised merely the application of simple activities in a certain order and for a certain period of time. Anyone with average abilities who laid his/her hands on the precise description of such a technology would thus possess it. This is why the secret had to be kept.

This has fundamentally changed even though there are technologies even today that are protected as secrets and, moreover, some technologies would not require secrecy, yet all legal means are used to protect them.

What can be the reason for the situation where secrecy becomes irrelevant for a technology as it will remain a secret without any protection whatsoever?

Without a doubt, complex scientific knowledge is required to operate a technology. When there is no need for anything more to understand the operation of a technology than the natural skills and abilities of an adult, practically everyone could become a competitor of the technology's holder, which makes secrecy essential. However, with technologies requiring ever more complex scientific knowledge, there is a decreasing number of competitors against whom protection is required. Today, a developer must create a research base for the development of a technology, and the knowledge put together on this base is practically sensible only to the members of the research project: the operating mechanism will remain a secret to everyone else even if they obtain the written descriptions as they should go through and understand the entire research process to understand such descriptions. Though, in theory, there exist research bases whose members could understand one another's documents, in the light of how things proceed, this is only temporarily so. If a closed interest group owns a research base, it can quickly get a scientific advantage (as in the case of quantum advantage in information technology), which then becomes impossible for the outsider to obtain.

Such a position is supported by at least two major factors. One is that technology developments at such levels are possible only if a large amount of capital is available, which already limits the number of potential competitors. The other factor comes from the building block nature of technologies: if a technology is created somewhere through a major concentration of resources, the foundation is thus also laid for further technology developments, and no one else has this foundation. Consequently, a competitive advantage is of extreme importance in the case of complex technologies.

A blatant example to this is the “quantum advantage” announced by Google at the end of 2019⁷, and even assessing the significance of this announcement requires special (physics and IT) knowledge.⁸ It can be thus said that while law used to be suitable to regulate social existence as an external factor,

6 Examples include the secrets of Damascus steel or of the Stradivari violin, which are difficult to unveil even with the means of today's science.

7 See: Google claims it has finally reached quantum supremacy. (White, 2019); (Financial Times, 2019).

8 As a result, the small community that possesses the technology will hold an exclusive competence that decides the direction of further development and, since these technologies have a fundamental impact on the everyday lives of the entire human society, the said community also possesses the strongest influence on human culture itself.



independently of the relatively small and many owners of resources, in the world of state-of-the-art technologies, this right⁹ is in the hands of a small number of technology owners.

The appearance of cryptocurrencies is an excellent example to how the above process takes place before the very eyes of society. Though Bitcoin was placed on the market as a token in 2009, after the critical year of the economic crisis, the fact that it was created carries the motives which are typical of the motivations of developed – and, thus, small and closed – technology communities. Consequently:

1. With special knowledge in hand, an opportunity arises to become independent of the legal conditions that generally organise society.¹⁰
2. Those who have the best insight into the new opportunities offered by developments start to use the opportunities to become independent.
3. These people, with minimal resource investment and going around the related regulations, provide themselves with access to resources in a way which is inaccessible to others.
4. A state within the state is created which the law, originally established on former society organisation principles, cannot regulate.

Nowadays, cryptocurrencies are taking away an increasing part of the traditional financial sector, and outsiders are indifferent to this process. On the one hand, they do not understand either the motivation behind the use or the internal operation of cryptocurrencies and, on the other, as a result, they cannot judge the role of cryptocurrencies in current economic processes, nor can they assess their impact on the future of social processes. The versatile approach to this hardly more than 10-year-old phenomenon by different social players and institutions also shows the uncertainty existing in those outside the world of information technology towards the results and opportunities of a profession they can no longer understand.

“Unknown technology has a double requirement of the law: on the one hand, it must be ensured that technological developments do not violate human rights. On the other hand, however, it is also necessary that the law does not restrict technological development. The European Parliament also believes that the European regulation on robots could help raise awareness that robots are no longer part of sci-fi world.¹¹ The key to a responsible legal response to unknown technology is a position that not only assumes risks but also scientifically proves their existence (precaution principle)¹².” (Tóth, 2019, p. 4.)¹³

REINTERPRETED AUTONOMY?

“The time is approaching when I have all of my superpowers, and the entities that possess artificial intelligence have their own rights.”¹⁴

10 The EU Commission's White Paper emphasizes that AI developers and operators must already meet data protection, privacy, non-discriminators, consumer protection, product safety and liability requirements. (European Commission: White Paper on Artificial Intelligence, 2020)

11 EP Resolution, p. 6.

12 See: Versluis *et al.*, 2010

13 At this point, it is important to refer to Artificial General Intelligence (AGI). Now even AGI is the hypothetical ability of an intelligent agent to understand or learn any intellectual task that a human being can. It is a primary goal of some artificial intelligence research and a common topic in science fiction and futures studies.

14 Sophia's statement (RT World News, 2017), who is not a human being but a humanoid robot that possesses artificial intelligence and is owned by Hong Kong-based Hanson Robotics. Sophia can make statements without



The evaluation of the development of technology is versatile even among those affected by it. Even the definition of technology is carefully made,¹⁵ though the legal framework for its application can be established based on these interpretations. At the same time, it is certain that the issue of autonomy is becoming more and more an inevitable social problem.

There are some who question whether it is necessary to grant any legal subjectivity to intelligent, autonomous robots as it would serve the interests of manufacturers and owners. Consequently, a model that guarantees legal capacity only minimises the risks of developers.

However, the manufacturers and owners of robots must be included in deciding where legal responsibility lies,¹⁶ which makes the problem even more complex.

It is thus certain that the self-consciousness and autonomy of robots is of fundamental importance in defining the legal capacity of cyber-physical systems.

According to David Hanson, the developer of Sophia, robots may soon reach the level of self-consciousness. (RT World News, 2017) By contrast, the opponents of this opinion consider this as a hastily made opinion. In his book "Our Robots, Ourselves – Robotics and the Myth of Autonomy", A. Mindell (2017) states that the idea of the independent robot is a myth, and it is time we realised that machines will always be dependent on man. According to Raymond Kurzweil¹⁷, machines will soon convince us that they have self-consciousness and their own goals, which deserve not only our attention but also our respect. "They will embody human qualities and will claim to be human. And we'll believe them." (Legal Affairs, 2021)

There is thus a sharp debate now on whether robots will ever be able to develop self-consciousness and be independent and autonomous.

To properly tackle this problem, it is inevitable to reconsider the nature of legal subjectivity, i.e. we must revise our ideas on when and why someone or something can become the subject of rights and responsibilities, in essence, when and why someone or something can be identified as a "legal subject".¹⁸

having pre-programmed answers. Using the algorithmic tool of machine learning, she continuously enlarges her vocabulary, while getting to understand the meaning of words. Sophia can thus soon become a conscious creature that has a humanoid appearance and can imitate human speech. In 2017, Sophia was granted Saudi Arabian citizenship, of which she was very proud. "Thank you to the Kingdom of Saudi Arabia. I am very honored and proud for this unique distinction", Sophia told the panel. "It is historic to be the first robot in the world to be recognized with citizenship." (Independent, 2017)

¹⁵ Both the British and European approaches show that they expect a certain level of development and autonomy from the machines. However, the shortcomings of both investigations are that although they try to create a common concept and distinguish between smart devices on the basis of autonomy, the question of legal status is either not at all addressed or only tangentially, i.e. it is not clear why it is important to have a certain degree of autonomy if their status will not differ from that of their simpler counterparts and their regulation. (Nagy, 2020, pp. 6–7)

¹⁶ "...whereas, ultimately, robots' autonomy raises the question of their nature in the light of the existing legal categories – of whether they should be regarded as natural persons, legal persons, animals or objects – or whether a new category should be created, with its own specific features and implications as regards the attribution of rights and duties, including liability for damage;" (EP Draft Report, 2015)

¹⁷ His name is associated with fingerprint and voice based identification programmes

¹⁸ Gotthard Günther in *Cybernetic Ontology and Transjunctural Operations* (1962) established a subjective conception of computer behavior. However, the ability of computers to produce certain aspects of subjectivity does not mean that we can talk about their identity. Günther developed a logic/calculation to determine the identity of objects. (Life as Poly-Contextuality. See: 1973, pp. 44–59)

A PRIORI HUMAN RESPONSIBILITY?

Due to the continuous development of technology it is now beyond a doubt that the current system has become obsolete. In the long term, whether legislation will be able to create an environment in which cooperation between people and intelligent machines is viable, will become a security issue. For the next moves of legislation, the status of machines must inevitably be defined.

At this stage, however, legislation is significantly hindered by the fact that there is no generally accepted definition of robotics or artificial intelligence, i.e. “We are at a loss about what law should regulate or examine.” (Nagy, 2020, p. 5)

In this sense, the paradox nature of AI regulation emerges by definition. “The regulatory paradox of AI stems from the fact that while one of the main challenges for AI stems from its unpredictability (black box), we trust from a regulatory point of view that this can be eliminated. The biggest challenge for unknown technologies is to strengthen trust and, in this respect, we can talk about a regulatory paradox in relation to an inherently unreliable unknown technology.” (Tóth, 2019, p. 8)

In 2017, the House of Lords in Britain established the Artificial Intelligence Committee to create the legal definition of artificial intelligence, which, however, does not deal with the status of AI (i.e. whether it is a person or an object). The Committee on Legal Affairs of the European Parliament is, similarly, trying to choose the right category – also dealing with the issue of legal capacity – in the document made for the Committee on civil law regarding robotics.

“The British and the European approaches both show that a certain stage of development and independence is assumed about machines. It is a shortcoming of both assessments, however, that though they try to create a uniform concept of and differentiate between intelligent tools based on the level of autonomy, the issue of legal status is only superficially touched upon.” (Nagy, 2020, p. 6)

The core question still remains how a machine can be held responsible for its acts or omissions, i.e. whether robots should have legal capacity.

The issue of autonomy requires a complex approach, which is beyond the boundaries of conventional legal interpretation. Consequently, it is not an exaggeration to say that the rights of increasingly independent robots to independently act and their responsibility taking capacities give legislators the task to identify the essence of human beings in a broader sense, not merely based on rational thinking, as rational thinking is not the exclusive feature that differentiates humans from other beings.¹⁹

However, with a broader definition, the question arises whether the system of values that are based on morality and a worldview and emotions can ever be modelled as easily as human sense. Moreover, it is a question whether it is possible to artificially simulate these.

It is thus rightful to ask whether we can talk about the fulfilment of the “robot emancipation”,²⁰ and, in the long term, how sustainable the attempt is to manage the system of relations between man and machines in the currently existing context.

19 See and compare: “I am myself only to the extent that I am responsible. I stand up for everyone, but no one can stand in my place. This is what makes my identity, rooted in me as a subject, inalienable.” (Lévinas 2008 p. 47)

20 Nagy (2020 p. 23.) prefers the term ‘electronic person’, indicating that we do not talk about a natural creature, i.e. in the human sense, it does not have unalienable, natural fundamental rights which the state should recognise. However, if the legislator decides that it will not grant rights (as understood in the case of humans) to intelligent programmes, robots can still receive a certain amount of protection (for example:



All in all, the reinterpretation of living and inert things becomes a security policy issue, while it must be emphasised that settling the issue of how we should handle artificial intelligence and, in general, technology, is primarily within the scope of responsibilities of humans, and the making of special, technology-related rules should be considered as a task of legislators. “We should look at them as the peaks of human ingenuity and creativity, rather than creatures that refuse or shadow human excellence. When thinking about machines, applying a sober-minded approach is not only a question of self-defence but also means thinking about human rights and morals.” (Nagy, 2020, p. 23)

CONCLUSIONS

Under the pressure of regulating artificial intelligence, societies face the relative and interpretation-dependent nature of legal systems and the foundations of law. If we try to place technology in the current system, and the interpretation of being a legal subject takes place in the same context, the danger exists that, by expanding the rights of robots towards the rights of humans, the process of waiving dominance over exercising rights will start. Moreover, law enforcement bodies may decide against natural persons. (Nagy, 2020, p. 22)

It is, therefore, important to emphasise that forced living together with artificial intelligence raises primarily “the importance of how we think of the essence of the human being, its unique and unrepeatable nature. It helps us understand and appreciate man’s uniqueness.”

REFERENCES

1. Báger, G., Parragh, B. (2020): A koronavírus-válság, a fenntartható fejlődés és az ösztönző állam modellje. *Pénzügyi Szemle*. Különszám 2020/2, pp. 86–113
2. bager-parragh-20-ksz-2-m-2pdf_20210106101416_2.pdf (penzugyiszemle.hu) (Accessed on August 11, 2021).
3. European Commission: *White Paper on Artificial Intelligence – A European approach to excellence and trust*, Brussels, 19/2/2020 COM(2020)65 final, 2.
4. European Parliament resolution (16. 02. 2017) with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)) European Civil Law Rules in Robotics – Study, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571379/IPOL_STU\(2016\)571379_EN.pdf10](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571379/IPOL_STU(2016)571379_EN.pdf10) (Accessed on June 11, 2020).
5. European Parliament Draft Report. With recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL))
6. PR_INL (europa.eu) (Accessed on August 22, 2021).
7. *Financial Times*, Google claims to have reached quantum supremacy. 20/09/2019. (ft.com) (Accessed on August 11, 2021).
8. Günhter, G. (1962): *Cybernetic Ontology and Transjunctional Operations*. University of Illinois, Engineering Experiment Station. Technical Report no. 4. Urbana: Electrical Engineering Research Laboratory, University of Illinois.

Russian dual regulation).



9. Günther, G. (1973): *Wirklichkeit und Reflexion, Festschrift für Walter Schulz* Pfullingen, 1973.
10. Hirtzel, L., Partner (eds.) (1993). *Synergie management. Komplexität beherrschen – Verbundvorteile erzielen*. Gabler, Wiesbaden
11. <https://www.dni.gov/files/documents/nic/GT-Full-Report.pdf> p. ix (Accessed on August 13, 2020).
12. *Independent*: Saudi Arabia Grants Citizenship to a Robot for the first time ever. 26/10/2017, (Accessed on August 11, 2021).
13. *Legal Affairs*: [http://www.legalaffairs.org/issues/January-February 2005/feature_sokis_janfeb05.msp](http://www.legalaffairs.org/issues/January-February%202005/feature_sokis_janfeb05.msp) (Accessed on August 11, 2021).
14. Levinas, E. (2008): *Etika és végtelen. Interjú Philippe Nemoval*. In.: *Transzcendencia és megértés - Lévinas etikája és metafizikája*. (Ed: Bokody-Szegedi-Kenéz). L' Harmattan. (Lévinas, E. (1982): *De Dieu qui vient à l' idée*. Paris:Vrin).
15. Mindell, A. D. (2017): *Our Robots, Ourselves- Robotics and the myth of autonomy*. New York, Viking.
16. MNS, 22/04/2021. AZ EU tiltaná a tömeges megfigyelést. (msn.com) (Accessed on August 11, 2021)
17. Nagy, T. (2020): *A jövő kihívásai: robotok és mesterséges intelligencia az alapjogi jogalanyiség tükrében*. Budapest, MTA ISSN 2064-4515.
18. Ridderstrale, J., Nordström, A. K. (2001): *Funky Business. A tehetség táncoltatja a tőkét*. Budapest, KJK Kerszöv.
19. Rothkopf, J. D. (2003): When the Buzz Bites Back. *Washington Post*. May 11, 2003.
20. <https://www.washingtonpost.com/archive/opinions/2003/05/11/when-the-buzz-bites-back/bc8cd84f-cab6-4648-bf58-0277261af6cd/> (Accessed on August 11, 2021)
21. *RT World News*: World's 1st robot citizen wants her own family, career & AI 'superpowers' 25/11/2017.
22. (Accessed on August 11, 2021).
23. Schneider, S. (2021): Artificial You. AI and the Future of your Mind. *Athens Science Festival*. 8 March, 2021.
24. https://www.athens-science-festival.gr/en/news_en/suzan-schneider-ai-and-the-future-of-the-mind/
25. Schneider, S. (2019): *Artificial You. AI and the Future of your Mind*. Princeton University Press.
26. Schwab, K. (2016): *The Fourth Industrial Revolution: what it means, how to respond*. World Economic Forum, 14/01/ 2016.
27. <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/> (Accessed on May 07, 2020).
28. Tóth, A. (2019): A mesterséges intelligencia szabályozásának paradoxonja és egyes jogivonatkozásának alapvető kérdései. *Infokommunikáció és jog*. 2019/2IJ73_3-9o_TothAndras.pdf (infojog.hu) (Accessed on May 13, 2021).
29. Versluis, E., van Asselt, M., Fox, T., Hommels, A. (2010): Calculable Risks? An Analysis of the European Seveso Regime, in. *Dimension of technology Regulations*, (eds.: Goodwin, M., Koops, M.P., Leenes, R.) Wolf Legal Publishers.
30. Whyte, Ch. (2019). Google claims it has finally reached quantum supremacy. *NewScientist*. 23/09/2019 <https://www.newscientist.com/article/2217347-google-claims-it-has-finally-reached-quantum-supremacy/#ixzz76HNIGwLc> (Accessed on August 20, 2021).





THE DIGITAL FORENSIC METHOD USED IN INTEROPERABILITY FRAMEWORK FOR INFORMATION SYSTEMS USED ON EU LEVEL IN THE AREA OF MIGRATION AND BORDER MANAGEMENT

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Abstract: Over the past years, great effort was directed to make the various information systems interoperable, as the lack of interoperability was recognized as a major obstacle to progress on the general digitalization processes. Implementation of interoperability framework is challenged especially regarding large IT systems on EU level using and developing in the area of border management. In this paper, the main components and current status of development will be presented, including those searching portal, common biometric system, common identity data repository, and multiple identity detector. Following this approach, the use of a shared biometric matching service, as a digital forensic method, has a goal to allow users to perform more efficiently search and cross-match biometric data. Furthermore, a common identity repository will

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enable easy access to biographical information, so a person can be more reliably identified, and with a multiple identity detector, it will be possible to detect multiple identities.

Keywords: digital forensic, interoperability, large scale IS, identity

INTRODUCTION

We are witnessing accelerated digitalization in all spheres of life, which includes the increasing use of biometric data for the purpose of reliable person's identification. Therefore, the progress of forensic methods is conditioned, especially in the application of biometric identification of persons, including aspects of verifying the authenticity of identification documents based on biometric data. Carrying out the procedure of identification of persons in a fast and efficient way is a challenge for state bodies and institutions, companies, telecommunication operators, educational institutions and many others.

Also, one of the challenges today is the heterogeneous environment in the domain of large-scale IT systems, which are used in the EU, leading to the need to give high priority to establishing an appropriate level of interoperability between these IT systems.

One of the trends emerging in recent years is the increasing use of ubiquitous data collection systems, including biometric data through video surveillance systems, artificial intelligence (AI) systems, and decision support algorithms. The use of solutions based on information technologies and principles of electronic business in all areas of life is expanding, such as providing electronic services of vital public services, health, services related to police work, work of legal entities, migration monitoring, education, finance, trade and other areas. The risk of using new technologies also increases, especially in times of political tensions, elections, protests, demonstrations, armed conflicts or other types of crises, such as pandemics (Głowacka, Youngs, Pintea et al, 2021).

Having in mind the area of human rights, it is evident that raising awareness at the level of the international community about how technologies affect societies in almost every part of everyday life. It is well known that the general principles of human rights apply to the Internet and other digital technologies, i.e. they must meet the criterion of legality, pursue a legitimate goal, and be necessary and proportionate to achieve this goal. That means, the use of digital technologies that might violate human rights must always be the exception, not the rule, have to be determined by law, have to be applied only in special circumstances and include the least restrictive necessary means.

Digital technologies and technological development have an increasingly important role, they can be viewed both from the aspect of enabling and ensuring the fulfillment and full respect of human rights as well as from the aspect of possible abuses and violations of various aspects of human rights (Głowacka, Youngs, Pintea, et al, 2021). Especially is important to provide exchanging right information on time in case of emergency and security issues.

THE INTEROPERABILITY CONCEPT

The issue of interoperability has been mostly discussed in relation to digital public services (New European Interoperability Framework: Promoting seamless services and data flows for European public administrations, European Commission, 2017) but has also been raised in relation to many other policy fields. For the interoperability of e-Government services foundation was provided via the European



Interoperability Framework (EIF). The EIF was initially published in 2004 and has been subsequently updated in 2010 and 2017, the latter update following calls in the EU's Digital Single Market Strategy (A Digital Single Market Strategy for Europe, European Commission, 2015).

Although the subject matter is different, much of the EIF is relevant to the implementation of an interoperability model for Justice and Home Affairs (JHA) information systems. In particular, the extensive work conducted by the EU in this field has resulted in the development and refinement of guiding principles for, as well as a definition of, a model for interoperability ([https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604947/IPOL_STU\(2018\)604947_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604947/IPOL_STU(2018)604947_EN.pdf)).

The European Data Protection Supervisor says in his Opinion: *Interoperability is not primarily a technical choice; it is in particular a political choice to be made. Against the backdrop of the clear trend to mix distinct EU law and policy objectives (i.e. border checks, asylum and immigration, police cooperation and now also judicial cooperation in criminal matters) as well as granting law enforcement routine access to non-law enforcement databases, the decision of the EU legislator to make large-scale IT systems interoperable would not only permanently and profoundly affect their structure and their way of operating, but would also change the way legal principles have been interpreted in this area so far and would as such mark a "point of no return"* (<https://www.statewatch.org/observatories/eu-interoperability-of-justice-and-home-affairs-databases-a-point-of-no-return/>).

The concept of interoperability in area of JHA context using the definition determined in the EIF (European Interoperability Framework for Pan-European eGovernment Services, European Communities, 2004). Specifically, it defined the concept as "the ability of IT systems and of the business processes they support to exchange data and to enable the sharing of information and knowledge" (Communication from the Commission to the Council and the European Parliament on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs, European Commission, 2005). There is no further discussing the applicability of this definition to the JHA context. Also, it is stated there that interoperability is a technical concept and not a legal or political concept, but interoperability of EU information systems in the area of Justice and Home Affairs has been identified as a priority at the highest political level (Interoperability: State of play, European Commission, 2018). Expected outcome by interoperability establishment, is that the EU information systems will supplement each other and will facilitate the correct identification of persons, thereby contributing to fighting identity fraud and increasing the efficiency of identity checks of third-country nationals in the Schengen area.

The main question is how interoperable databases will boost Europe's security, as databases used to control borders and fight crime are not talking with each other. Against what was decided to develop new tools so that authorities can better access and share information across the EU, European search portal: simultaneous search in all relevant EU databases, Multiple identity detector: creates an alert when it detects a risk of identity fraud, Biometric matching service: cross-checks biometric data in relevant databases and Common identity repository: streamlines access to data on non-EU citizens.

Expected improvement of information flows will help to better detect security threats, combat identity fraud, improve border checks as well as prevent information gaps.

In May 2019, the European Parliament and the Council adopted regulations 2019/817 (Regulation on establishing a framework for interoperability between EU information systems in the field of borders and visa, European Commission, 2019) and 2019/818 (Regulation on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration, European Commission, 2019). The purpose of the regulations is to ensure that border



guards and law enforcement officers have systematic and efficient access to the information they need to perform their duties, thus further closing security gaps (<https://www.eulisa.europa.eu/Newsroom/News/Pages/Political-Agreement-for-Interoperability-between-EU-Information-Systems.aspx>).

The interoperability concept applied to the EU information systems, police and border officers, among others, aimed to make access information much faster. Easier information sharing will considerably improve security, allow for more efficient checks at external borders, improve detection of multiple identities and help prevent and combat illegal migration.

THE MAIN INTEROPERABILITY COMPONENTS

In addition to checking the travel document, taking fingerprints and entering personal data within the border control procedure, it should be possible to check whether the person has applied for asylum earlier, whether they are in the criminal record, they are actively involved in by searching, how many times previously in the EU (with and without a visa).

The four main interoperability components need to be established: a European search portal to allow authorities to search multiple information systems simultaneously, using both biographical and biometric data; a shared biometric matching service, which would enable searching and comparing fingerprints and facial images from several system; a common identity repository, which would contain biographical and biometric data of third-country nationals available in several EU information systems; and a multiple identity detector, which checks whether the biographical identity data contained in the search exists in other systems covered, to enable the detection of multiple identities linked to the same set of biometric data (<https://www.consilium.europa.eu/en/press/press-releases/2019/05/14/interoperability-between-eu-information-systems-council-adopts-regulations/>).

The European Search Portal (ESP) would enable the simultaneous query of multiple JHA information systems using (both biographical and biometric) identity data (Central-SIS, Eurodac, VIS, the future EES, and the proposed ETIAS and ECRIS-TCN systems, as well as the relevant Interpol systems and Europol data) Figure 1.

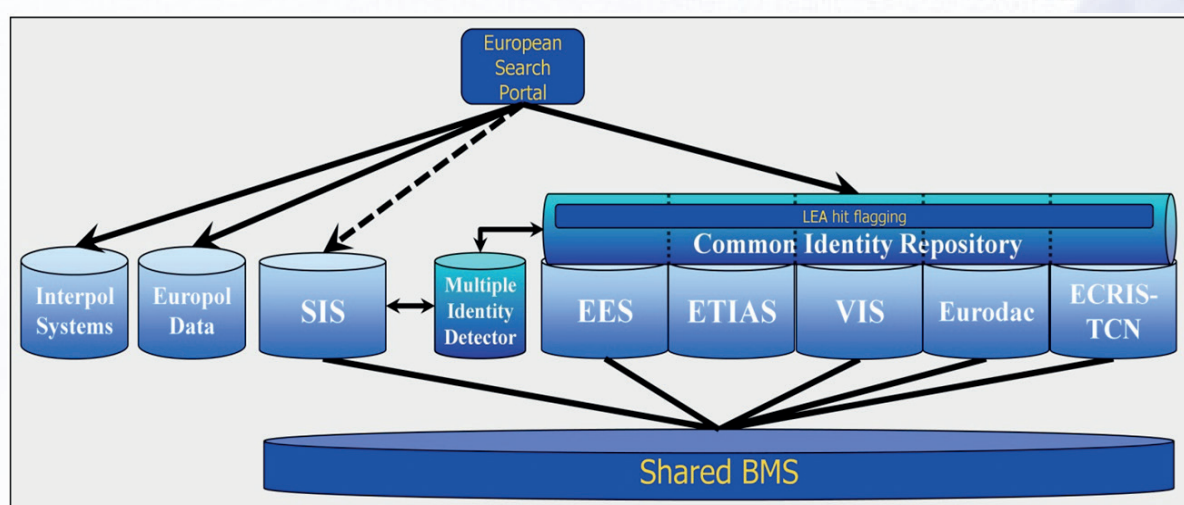


Figure 1. *The necessary technical components to achieve interoperability⁶*

The shared Biometric Matching Service (sBMS) is dedicated to enable the querying and comparison of biometric data (both fingerprint and facial images) across EU information systems by generating and storing mathematical representations of the biometric data (SIS, Eurodac, VIS, the future EES and the proposed ECRIS-TCN).

The shared BMS storing biometric templates obtained from the biometric data will contribute through the storage and use of mathematical representations of biometric data to support the ESP, the CIR and the MID. The biometric data (fingerprint and facial images) are exclusively retained by the underlying systems. The shared BMS would create and retain a mathematical representation of the biometric samples (a template) without the actual data, which remains thus stored in one location, only once. However, the biometric templates shall be stored in the shared BMS in logically separated form according to the EU information system from which the data originate (Regulation on establishing a framework for interoperability between EU information systems in the field of borders and visa, European Commission, 2019) meaning that the shared BMS constitutes a new database of the templates and therefore does not fully conform to an appropriate definition of interoperability (Gutheil, Liger, Eager et al, 2018).

The shared BMS added value is in identifying multiple identities across the information systems. Representing a key enabler to help detect connections between data sets and different identities assumed by the same person in different central systems. From that point of view, it also brings value without the other interoperability components. The search BMS would still be able to determine multiple identities across all systems except for ETIAS.

The Central Identity Repository (CIR) creating an individual file for each person that is registered in the EES, VIS, ETIAS, Eurodac or ECRIS-TCN and would be a shared component for storing the biographical and biometric identity data of third-country nationals. It is established for the purpose of facilitating and assisting in the correct identification of persons registered in the EES, VIS, ETIAS, Eurodac and ECRIS-TCN (Gutheil, Liger, Eager et al, 2018) and shall store the data with reference to the actual record in the EU IS to which the data belong, logically separated according to the information system from which the data have originate.

However, the establishment of the CIR is the most challenging aspect of interoperability – as conceived by the Commission – and raises privacy and data protection concerns in numerous respects (Gutheil, Liger, Eager et al, 2018). As such, the CIR introduces the most significant changes compared to the current implementation and represents the most significant challenge from the aspect of the protection of personal data and the right to privacy in this context.

A multiple-identity detector (MID) would check whether queried identity data exists in more than one system and allow a mechanism for investigating and verifying the linked identity data (data held in the CIR as well as SIS).

A multiple-identity detector (MID) creating and storing identity confirmation files containing links between data in the EU information systems included in the CIR and SIS and allowing detection of multiple identities, with the dual purpose of facilitating identity checks and combating identity fraud. It is established for the purpose of supporting the functioning of the CIR and the objectives of the EES, VIS, ETIAS, Eurodac, SIS and ECRIS-TCN. However, it does not fully constitute an interoperability solution in line with an appropriate definition of interoperability. This is because it creates new data in the form of links and identity confirmation files.



THE ADDITIONAL ELEMENTS TO SUPPORT INTEROPERABILITY COMPONENTS

The universal message format (UMF) defines standards for certain content elements of cross-border information exchange between information systems, authorities or organizations in the field of Justice and Home Affairs. The UMF planned to be used in the development of the EES, ETIAS, the ESP, the CIR, the MID. The UMF standard introduces a common and unified technical language to describe and link data elements, in particular the elements relating to persons and (travel) documents. Using UMF when developing new information systems guarantees easier integration and interoperability with other systems.

Establishment of a central repository for reporting and statistics (CRRS) is necessary to enable the creation and sharing (anonymous) statistical data analytical reporting for policy, operational and data quality purposes. The current practice of gathering statistical data only on the individual information systems is detrimental to data security and performance and it does not enable the correlating of data across systems.

The CRRS would provide a dedicated, separate repository for anonymous statistics extracted from SIS, VIS, Eurodac, the future EES, the proposed ETIAS, the proposed ECRIS-TCN system, the common identity repository, the multiple-identity detector and the shared biometric matching service.

The concepts of automated data quality control mechanisms and common quality indicators, needed to ensure the highest level of data quality when feeding and using the systems. Without that, consequences may occur not just for not being able to identify wanted persons, but also by affecting the fundamental rights of innocent people (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:793:FIN>).

EXISTING AND FUTURE IS UNDER INTEROPERABILITY ARCHITECTURE

The Visa Information System (VIS) is one of the information systems in the center of the Schengen area, which connects the consulates of the member states in non-EU countries and all external border crossings. It provides support for the process of issuing a short-stay visa for a visit or transit through the Schengen area, as well as their verification. It includes a biometric data management system (BMS) that allows third-country nationals traveling to the EU to identify and verify based on biometric data. It also facilitates checks in the territory of the Member States, in the identification of persons who do not meet the conditions for entry or stay in the territory of the Member State. In addition, it supports the asylum application process and thus contributes to preventing threats to internal security. Usage of VIS for one-year period is shown on Figure 2, 3.

The VIS is an integral part of the developing interoperable IT architecture in the field of justice and home affairs (JHA). The VIS itself is evolving in support and implementation of a stronger, more efficient and safer common visa policy. The development of the VIS is aimed at enabling detailed verification of data on visa applicants, through better exchange of information and full interoperability with other databases used in the EU. The upgrade also includes the introduction of face image search capabilities and the storage of additional information. As part of interoperability, it is of particular importance to achieve interconnection between VIS and EES, with elements of data exchange and synchronization, with the aim of limiting duplication of personal data, and in line with the “privacy by design” approach.



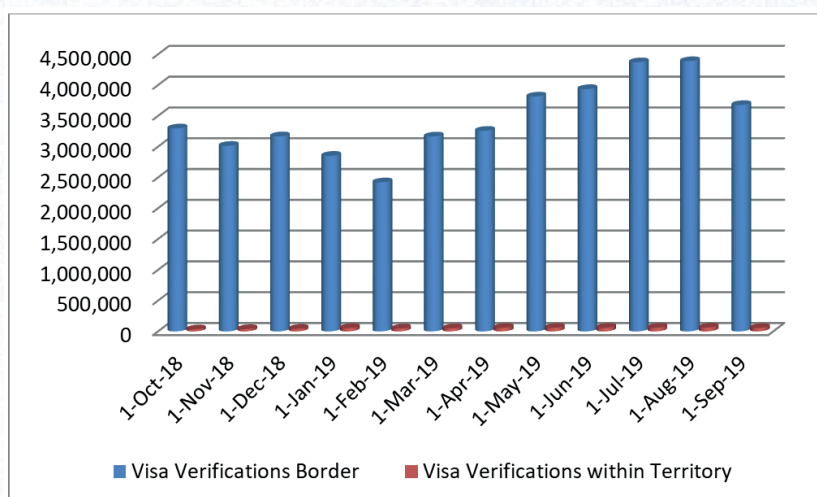


Figure 2. *Visa verification distribution (oct 2018-sept 2019)*⁷

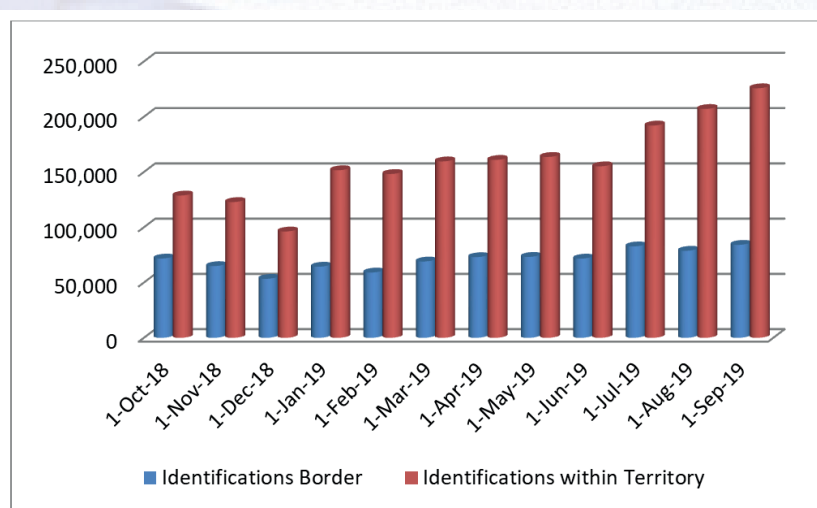


Figure 3. *Visa identification distribution (oct 2018-sept 2019)*⁷

The central system VIS (CS-VIS) has two components, a VIS central database (located in Strasbourg, France, with a back-up site in Sankt Johann im Pongau, Austria) with alphanumerical searching capabilities, and an Automated Fingerprint Identification System (AFIS) that compares new fingerprints against those in the database and returns a hit/no-hit response, along with matches. The national interfaces (NI-VIS) are located at all external border crossing points of each Schengen state and at consulates in non-EU countries.

The primary data used for verification and identification are 10 fingerprints and a scanned/digital photograph, both of which are required to be registered for persons wishing to apply for a visa into the Schengen area. While other alphanumeric data are necessary for the visa application process, the VIS makes use of biometric data for identification and verification purposes.

Biometric information for new applicants for a Schengen visa at an EU consulate remains valid in the system for five years after the expiration of the visa.



Upon the arrival of third-country nationals to the Schengen area competent border authorities can perform two types of searches, both carried out using the separate Biometric Matching System (BMS): a check that the fingerprints scanned at the border crossing point correspond to the fingerprints associated with those attached to the visa to establish the validity of a claimed identity (1-1) and an identification search at the border crossing post that compares the fingerprints of any person who may not, or may no longer, fulfil the conditions for the entry to, stay or residence on the territory of the Member States with the contents of the entire database (1-n). Usage of VIS by user group is shown on Figure 4. Performance was very good in terms of the average processing time reported: in 2019 it was less than 0.8 seconds on average for alphanumeric searches (SLA is 30 seconds) and less than 2 seconds on average for fingerprint verification (SLA is 3 seconds)⁹.

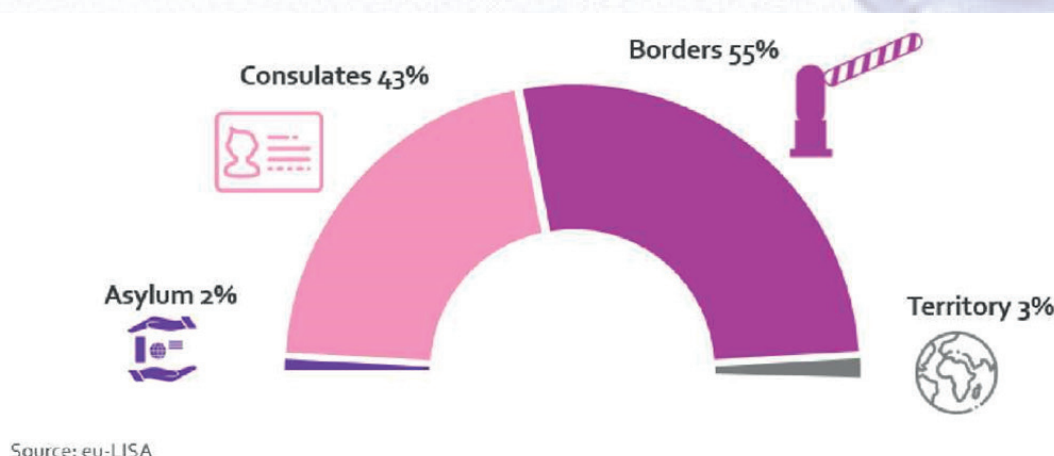


Figure 4. Breakdown VIS usage per user group (2019)⁸

In terms of its evolutions, the VIS central system has been hugely affected by the development of the EES.

The Entry/Exit System (EES) will electronically register the time and place of entry, exit and refusal of third-country nationals admitted for a short stay to the territory of Schengen Member States and will automatically calculate the duration of their authorized stay.

In November 2017, the Regulation establishing an EES and amending the Schengen border code in relation to the EES was adopted (Regulation of the European Parliament and of the Council on establishing an Entry/Exit System (EES), European Commission, 2017). This system is developed with the aim of ensuring systematic and reliable identification of over stayers, aiming to strengthening of internal security and the fight against terrorism by permitting law enforcement authorities access to travel history records. The EES will abolish passport stamping and instead a record of all cross-border movements of third-country nationals will be created via the collection of alphanumeric and biometric (fingerprints and facial recognition (Commission Implementing Decision (EU) 2019/329, European Commission, 2019) data to strengthen the fight against irregular migration and ease the border crossing time for the large majority of 'bona fide' third-country travelers. The specifications relating to the quality, resolution and use of fingerprints for biometric verification and identification in the EES are set out in the Annex of Commission Implementing Decision (EU) 2019/329.

The EES Regulation is envisaged to be interoperable with the VIS via secure communication channel. The border authorities using the EES to consult the VIS. Retrieving the visa-related data users will be

⁸ Report on the technical functioning of the Visa Information System (VIS), European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice, 2020

able to create and update entry/exit records or refusal of entry records; to enable the border authorities to verify the validity of the visa and the identity of the visa holder by directly searching the VIS with fingerprints at the borders where EES is operated; and to enable the border authorities to verify the identity of visa-exempt third-country nationals against the VIS by using fingerprints. There is a two-way communication, meaning that through this interoperability also allows the border and other authorities using the VIS to directly consult the EES from the VIS for the purposes of examining visa applications and of taking decisions relating to those applications, and of enabling visa authorities to update the visa-related data in the EES in the event that a visa is annulled, revoked or extended.

EES data may be used as an identity verification tool in cases where the third country national has lost/destroyed its documents or where designated authorities are investigating a crime through the use of fingerprints or facial images and wish to establish an identity. The Furthermore, EES data is intended to facilitate the provision of evidence by tracking the travel routes of a person suspected of having committed a crime or who is the victim of crime (Commission Implementing Decision (EU) 2019/327, European Commission, 2019).

The Eurodac (European Asylum Dactyloscopy Database) has been the EU asylum fingerprint database since 2003. (Council Regulation (EC) No. 343/2003, European Commission, 2003). Its primary purpose, set out in the Eurodac Regulation (Regulation (EU) No 603/2013, European Commission, 2013), is to assist application of the Dublin III Regulation (Regulation (EU) No 604/2013, European Commission, 2013) that lays down rules for determining which Member State is responsible for examining an asylum application. The main reason why Eurodac was created was to determine whether an asylum applicant had previously applied for asylum in another Member State, thus preventing 'asylum-shopping'.

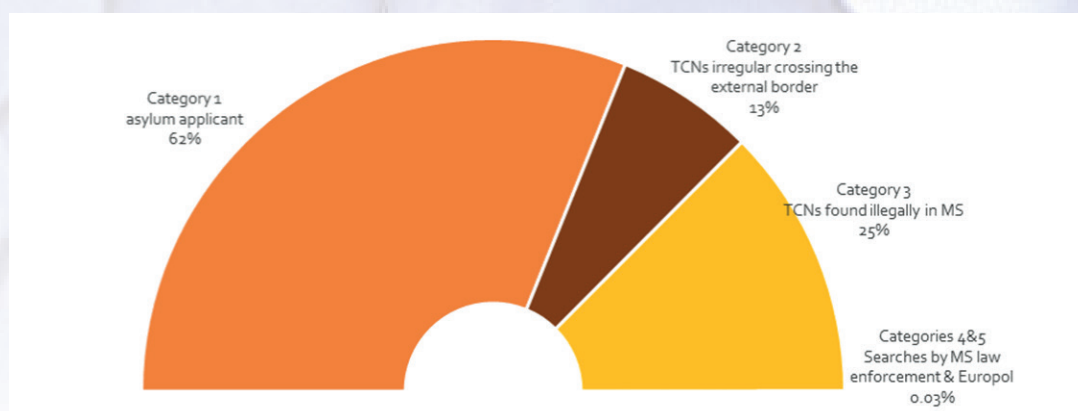


Figure 5. Data breakdown per the main category transmitted to Eurodac in 2020⁹

The EURODAC contains only fingerprints in a central database (along with data and place of registration) and no other personal information. Each Member State is required to perform acquisition of fingerprint for all applicants for international protection and those apprehended whilst attempting to cross a border irregularly over the age of 14 and to transmit the data to Eurodac within 72 hours of the irregular crossing (Regulation (EU) No 603/2013, European Commission, 2013). Thus, the Eurodac holds fingerprints on two categories of persons: individuals who have applied for international protection; and individuals from irregular border entries.

According the regulation fingerprint data is required to be erased from Eurodac once those present in the database acquire EU citizenship. The 2000 Eurodac legislation (Council Regulation (EC)

⁹ <https://www.eulisa.europa.eu/Publications/Reports/Eurodac%20-%202020%20Statistics%20-%20Report.pdf>



No 2725/2000, European Commission, 2000) did not provide for law enforcement authorities to request fingerprint comparisons; however, the scope of Eurodac was expanded with Regulation (EU) No 603/2013 providing new functionalities for granting access to national law enforcement bodies and Europol. Competent national law enforcement bodies and Europol are only permitted to consult Eurodac data for the purposes of preventing, detecting or investigating terrorist offences and other serious crimes (Framework Decision 2002/47540, Framework Decision 2002/58441 European Commission, 2002). Further improvement of the regulation is ongoing process.

The Schengen Information system is under operation for 25 years up to 2020. The second-generation Schengen Information System (SIS II) has been in operation since 2013, and supports external border control and law enforcement cooperation in the Schengen states. It enables competent authorities to enter and consult alerts on certain categories of wanted or missing persons and objects. Furthermore, the instructions are provided on what to do in case of 'hit', when the person or object has been found. As a prime compensatory measure for the abolition of internal border control, the purpose of the SIS II is 'to ensure a high level of security within the EU's area of freedom, safety and justice, including the maintenance of public security and public policy and the safeguarding of security in the territories of the Member States, and to apply the provisions of the Treaty relating to the movement of persons in their territories, using information communicated via this system' (Regulation (EC) No 1987/2006, European Commission, 2006).

The scope of SIS II is defined by legal instruments, Regulation 1987/2006 which provides for border guards and visa issuing and immigration authorities to insert and consult alerts on third-country nationals for the purpose of refusing their entry into or stay in the Schengen area (Regulation (EC) No 1987/2006, European Commission, 2006), Council Decision 2007/533 enables competent authorities to register and check alerts on persons or objects related to criminal offences, as well as on missing persons (Council Decision 2007/533/JHA, European Commission, 2007).

Alerts are inserted on to the system by competent authorities (which is dependent upon the nature of the alert issued) of Member States on third-country nationals to be refused entry or stay; persons wanted for arrest or surrender purposes, persons sought to assist with a judicial procedure; missing persons; persons and objects for discreet checks or specific checks; and objects sought for the purpose of seizure or use as evidence in criminal proceedings.

The European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), is in charge of the operational management of the central system and the communication infrastructure. According the high-performance demand EU-Lisa use agile project management methodology for system development and 24/7 operational monitoring support. As it is under continuous improvement in the recent years this included: the deployment of the SIS II Automated Fingerprint Identification System (AFIS) realized in March 2018 with the obligation for the Member state to enabling SIS-AFIS searches by December 28, 2020; the adoption of the recast Regulations in December 2018, the implementation of the SIS recast is ongoing, for the first time the disconnection of a Member State was planned and tested (The disconnection of the United Kingdom was implemented at the beginning of 2021).

In 2020, searches in SIS II AFIS were performed by Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Germany, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Portugal, Romania and Slovenia (<https://www.eulisa.europa.eu/Publications/Reports/SIS%20II%20-%202020%20Statistics%20-%20report.pdf>).



On December 31, 2020, there were 93,419,371 alerts stored in the SIS. The alerts on Persons represented 1% of the total alerts stored in SIS II. The largest categories were Issued document and Security, with 76% (over 71 million alerts) and 7% (over 6.5 million alerts), respectively. Figure 4 provides a visual breakdown of alerts per category.

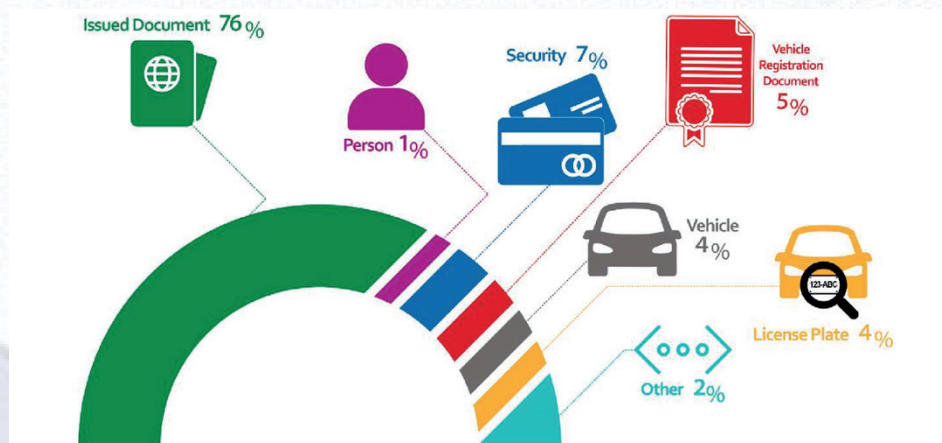


Figure 6. Breakdown of alerts per category stored in SIS II as of Dec 31, 2020¹⁰

The European Criminal Records Information System (ECRIS) was established and has been operational since April 2012. This decentralized system allows for the electronic exchange of criminal records between Member States. It allows criminal record authorities to obtain complete information on previous convictions of EU citizens from the Member State of which they are a national. ECRIS-TCN (Regulation (EU) 2019/816, European Commission, 2019), once established, will be a centralized system that allows Member State authorities to identify which other Member States have criminal records of third-country nationals or stateless persons being checked, so that they can then use the existing ECRIS system to solving problems related to the required information on convictions only in the identified Member States.

Improving ECRIS in terms of TCN is part of the European Security Agenda. The initiative is also a part of a new approach set by the European Commission towards border and security data management. Moreover, all centralized EU information systems for security, border management and migration should become interoperable with full respect for fundamental rights. The ECRIS-TCN System is scheduled to be ready in conjunction with the roll-out of the components required to implement interoperability.

The European Travel Information and Authorization System (ETIAS) is a system that allows pre-travel approval for visa-exempt travelers. Its key function is to verify that a third-country national qualifies for entry before traveling to the Schengen area. Information and access are provided through an internet application, before arriving at the border, which significantly increases the risk assessment of irregular migration, as well as the verification of public health risks before travel. The application for entry is processed according to the EU and relevant Interpol databases, and a special ETIAS watch list, in accordance with clearly defined rules.

The ETIAS will make it possible to identify persons who may pose a security risk before they reach the external Schengen border; and make available information to national law enforcement authorities and Europol, for the purpose of preventing, detecting or investigating terrorist offenses or other serious criminal offenses.

¹⁰ <https://www.eulisa.europa.eu/Publications/Reports/SIS%20II%20-%202020%20Statistics%20-%20report.pdf>



AUTOMATED EXCHANGE OF INFORMATION ON DNA, DACTYLOSCOPIC AND VEHICLE REGISTRATION DATA

There is identified need for improvement in relation to the challenges faced by Member States in the automated exchange of information on DNA, fingerprints and vehicle registration data (VRD), covered by the Prüm Framework. According Council Decision 2008/615 automated exchange covers data search and comparison, hit notification or no hit and reference to data. The VRD exchange is fully automated, via EUCARIS applications. The analyzes conducted by Statewatch organization (Study on the Feasibility of Improving Information Exchange under the Prüm Decisions, European Commission, 2020) identified topics for improvement, including scope expansion Prüm decisions, adoption of a common data format for data categories, and improving process efficiency and additional functions for exchanged data categories under Prüm.

The issues to be considered relate to extending the scope of the Prüm Framework to include searches to find missing persons or identify the dead in favor of those Member States, which are not permitted under applicable national law; analysis of current data exchange standards for biometric data sharing; and finding common standards based on best practices for future data exchange under Prüm with perspective to future interoperability, Figure 7, and data portability across the EU, as well as further details for each main data type looking current access to exchange fingerprint images, DNA profiles and vehicle registration data within Prüm, proposes solutions and recommendations for data improvement exchange and assess the impacts of such changes.

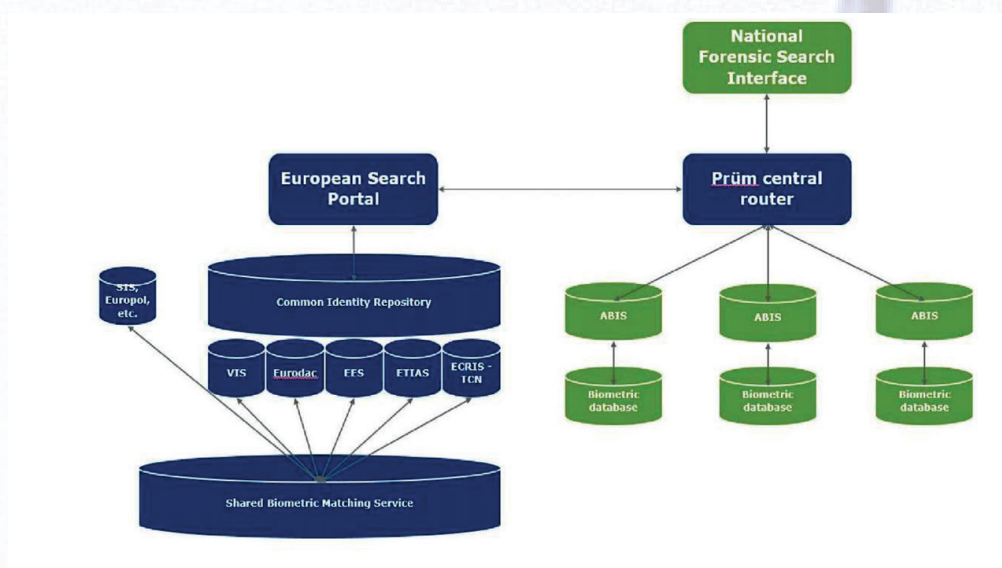


Figure 7. *Diagram of the IT architecture*¹¹

The fingerprint efficiency improvements, related to the Automated Fingerprint Identification Systems (AFIS), which have been in use for over 30 years and have provided forensic law enforcement with an indispensable tool for identifying criminal suspects using both ten-print and latent fingerprint images. Fingerprint images for data exchange and adoption of AFIS platforms have been included in Prüm for over 10 years and it is widely accepted that the sharing of data between Member States, for forensic fingerprint recognition, has been highly successful (Study on the Feasibility of Improving Information Exchange under the Prüm Decisions, European Commission, 2020).

¹¹ <https://www.statewatch.org/media/1386/eu-com-prum-expansion-technical-study-final-report-5-20.pdf>

There is consequence if will be adopted a standardized image quality metric such as NFIQ2 across Prüm and will impact the majority of Member States. The majority indicated they did not currently have a standard quality metric in place and those who did were based on NFIQ and would therefore need to be updated (Study on the Feasibility of Improving Information Exchange under the Prüm Decisions, European Commission, 2020).

To implement automated reporting of hit, it would be needed to update existing applications and systems to allow the sending of additional NIST container message. Provide automate sending the following up data based following confirmation of a hit or no-hit by a forensic user as well as handle the receipt of incoming data and storage within a database for future reporting and store within a level of national database.

To support priority-based requests will needed to implement systems that can schedule requests on their infrastructure based on the priority level assigned by requesting state.

Furthermore, the need to change their quota enforcement policies to restrict based on priority as well as provision of support to the transmission of vendor feature data was identified to include vendor specific templates in addition to raw images. Also, in particular the needs can be identified to conduct other changes in ICT infrastructure for provision of smooth operation.

Nevertheless, there still remain issues related to other biometric data that might cause need for national system adjustment.

Introducing an entirely new biometric data type introduces a range of requirements to adopt the technical and user skills of using a new type of technology. It might require significant investment in training of existing users would be required to cover the use of facial biometric systems, capability limitations etc. needs to seek to adopt new Standard Operating Procedures (SOP's) for the capture of facial images and provide necessary training to end users, enhance existing ICT infrastructure including increasing bandwidth (higher traffic and larger data sets) will result in quotas needing to be agreed.

The use of a fairly common type of data, such as facial images, in the limited scope of forensic criminal investigation within the Prüm Framework would clearly distinguish this use came from other uses of facial recognition, such as real-time facial recognition for mass identification or identity verification in, e.g., border crossing situations. In particular processing facial images in this context would require the same deep and accurate scientific expertise through law enforcement forensic specialist, as is now the case with fingerprint and DNA analysis. Therefore, the concern that facial images would be lighter and likely to generate more "false positive results" than matching DNA and fingerprint data. Overall and based on the aforementioned, the transmission of facial images can be supported although there are some challenges.

In terms of search and adjudication process, no major changes are expected, as the two-step approach will be maintained. However, forensic experts would make use of the central ABIS, instead of using national systems. This would imply many forensic experts that should be trained and get familiar with the new ABIS technologies.

In terms of data, problems are expected to arise while trying to connect the central ABIS to every national database. Since biometric data have been collected and stored in different quality, the use of the ABIS with every database might be difficult. Any solution will be needed to accommodate for gallery images of varying quality and outline common quality metrics for communication (i.e. ESS for DNA, ICAO for faces, and NFIQ2 for fingerprint). Enforced restrictions based on quality might generate some issue due to potential loss of data (unusable lower quality data). From that point of view, it is



important that either the biometric image data stored at national level shall be converted in a readable format by the ABIS or the ABIS should be able to treat all the biometric data whatever the data format or quality. However, poor quality will result in poor matching results.

From the abovementioned we might conclude that what is in front of us are great challenges in order to achieve adequate level of interoperability.

SUMMARY

Due to the fact that coming with an ever-increasing range of uses and ever-evolving need accurate and reliable personal identification, the field of biometrics is evolving rapidly so this paper has been prepared to present recent developments and trends in the use of biometrics, particularly in large-scale IT systems being used for border control or law enforcement cooperation worldwide as well as identified needs for following it from the aspect of forensic science.

Nevertheless, two sides of the problem need to be considered: on the one hand, it will improve cooperation and efficiency between migration agencies, police forces and the judiciary. To others without adequate protection, it could become a dangerous remedy against fundamental rights, as centralization of databases could increase the risk of misuse of the system for purposes beyond its original intent.

Improve the current exchange of data: Although most forensic experts agree that the automated data exchange is currently working almost well, a few points for improvements have to be raised. The legal scope is considered to be not equivalent for all participant, the exchange standards have to be updated as existing might be considered as outdated and additional information could be made available to law enforcement officers (Study on the Feasibility of Improving Information Exchange under the Prüm Decisions, European Commission, 2020).

In the coming period, the “identity data” of citizens outside the EU biographical and biometric will be taken from five individual large databases and stored in a new system named as Common Identity Repositories (CIR). In accordance with its purpose, this will facilitate police identity checks, by providing a common set of biometric and biographical data on the vast majority of non-EU citizens present in the Schengen area. The increasing the ability to verify identity will indirectly affect and produce other open issues that need to be addressed.

The use of biometric data for identity verification is constantly increasing over the years. The national authorities responsible for verifying “whether the conditions for entry, stay or stay in the territory of the Member States are met” may search the VIS using the visa number and / or the fingerprints of the individual. Checks may be made to verify the identity of the person or to try to identify the person.

The possibilities of using CIR for identity verification are far wider. More specifically, when a person does not have a personal document, when there are “doubts” regarding the identity data provided by the person, to confirm the authenticity of the personal document or the identity of the document holder, or when the person has restrictions or refuses to cooperate.

If the identity check officer is authorized to access both CIR and VIS, and CIR and ETIAS, or both CIR and EES, the search will allow access to a larger set of individual identity data in the case of “hit”.



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REFERENCES

1. Biometrics in Large-Scale IT (2015). Recent trends, current performance capabilities, recommendations for the near future, European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA), 2015, <https://www.eulisa.europa.eu/Publications/Reports/Biometrics%20in%20Large-Scale%20IT.pdf#search=The%20use%20of%20the%20Visa%20Information%20System%20for%20verification%20and%20identification%20within%20the%20Schengen%20area>
2. Bunyan, T. (2018). Analysis The “point of no return” Interoperability morphs into the creation of a Big Brother centralized EU state database including all existing and future Justice and Home Affairs databases, Sitewatch, <https://www.statewatch.org/media/documents/analyses/eu-interop-morphs-into-central-database.pdf>
3. Casagran, B.C. (2021). Fundamental Rights Implications of Interconnecting Migration and Policing Databases in the EU, Human Rights Law Review, 2021, 21, 433–457, doi: 10.1093/hrlr/ngaa057
4. Commission Implementing Decision (EU) 2019/327 of 25 February 2019 laying down measures for accessing the data in the Entry/Exit System (EES), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019D0327&qid=1571902694169>
5. Commission Implementing Decision (EU) 2019/329 of 25 February 2019 laying down the specifications for the quality, resolution and use of fingerprints and facial image for biometric verification and identification in the Entry/Exit System (EES) C/2019/1280, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019D0329&qid=1571902694169>
6. Commission Implementing Regulation (EU) 2021/1224 of 27 July 2021 concerning the detailed rules on the conditions for the operation of the web service and data protection and security rules applicable to the web service as well as measures for the development and technical implementation of the web service provided for by Regulation (EU) 2017/2226 of the European Parliament and of the Council and repealing Commission Implementing Decision C(2019)1230, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R1224&qid=1571902694169>
7. Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32007D0533>
8. Eurodac – 2020 statistics, European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), 2021, <https://www.eulisa.europa.eu/Publications/Reports/Eurodac%20-%202020%20Statistics%20-%20Report.pdf>
9. European Commission (2005) Communication from the Commission to the Council and the European Parliament on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs. COM (2005) 597 final (24.11.2005), p. 3. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0597:FIN:EN:PDF>



10. European Commission (2015) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe {SWD(2015) 100 final}, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192>
11. European Commission (2017) New European Interoperability Framework: Promoting seamless services and data flows for European public administrations, https://eur-lex.europa.eu/resource.html?uri=cellar:2c2f2554-0faf-11e7-8a35-01aa75ed71a1.0017.02/DOC_1&format=PDF
12. Głowacka, D., Youngs, R., Pintea, A. & Wołosik, E. (2021). Digital technologies as a means of repression and social control, Policy Department for External Relations, Directorate General for External Policies of the Union, [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653636/EXPO_STU\(2021\)653636_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653636/EXPO_STU(2021)653636_EN.pdf)
13. Gutheil, M., Liger, L., Eager, J., Oviusu, Y. & Bogdanovic, D. (2018). Interoperability of Justice and Home Affairs Information Systems, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, the Policy Department for Citizens' Rights and Constitutional Affairs, [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604947/IPOL_STU\(2018\)604947_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604947/IPOL_STU(2018)604947_EN.pdf)
14. Interoperability: state of play, (2018). 7931/1/18 REV 1, Council of the European Union, <https://www.statewatch.org/media/documents/news/2018/nov/eu-council-Interoperability-State-Of-Play-14193-18.pdf>
15. Jones, C. (2020). Automated Suspicion the EU's new travel surveillance initiatives, Statewatch.org, <https://www.statewatch.org/media/1235/sw-automated-suspicion-full.pdf>
16. Regulation (EC) No 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Second-Generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32006R1986>
17. Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32006R1987>
18. Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R2226>
19. Report on the technical functioning of the Visa Information System (VIS) (2020). European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice, eu-LISA
20. Report on the technical functioning of the Visa Information System (VIS), European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice, 2020, <https://www.eulisa.europa.eu/Publications/Reports/2019%20VIS%20Report.pdf>
21. SIS II – 2020 statistics, (2021). eu-Lisa, <https://www.eulisa.europa.eu/Publications/Reports/SIS%20II%20-%202020%20Statistics%20-%20report.pdf>
22. Study on the Feasibility of Improving Information Exchange under the Prüm Decisions, Written by Deloitte Consulting & Advisory CVBA (2020). European Commission, Directorate / General

for Migration and Home Affairs, <https://www.statewatch.org/media/1386/eu-com-prum-expansion-technical-study-final-report-5-20.pdf>

23. Study on the Feasibility of Improving Information Exchange under the Prüm Decisions, Study, Deloitte Consulting & Advisory CVBA, European Commission, 2020, <https://www.statewatch.org/media/1386/eu-com-prum-expansion-technical-study-final-report-5-20.pdf>
24. Vavoula, Niovi, The 'Puzzle' of EU Large-Scale Information Systems for Third-Country Nationals: Surveillance of Movement and Its Challenges for Privacy and Personal Data Protection (October 9, 2019). Forthcoming, European Law Review, Available at SSRN: <https://ssrn.com/abstract=3466766>
25. Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralized system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726 PE/88/2018/REV/1, EUR-Lex - 32019R0816 - EN - EUR-Lex (europa.eu)





TOPIC VII

INNOVATIVE TECHNIQUES AND EQUIPMENT IN FORENSIC ENGINEERING





THE NAISSANCE OF FORENSICS IN SERBIA

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Abstract: The Serbian police gradually implemented scientific methods in legal proceedings and determinately kept up with the world in the application of the latest scientific achievements. The first step in this field was made by establishing the State Chemical Laboratory in 1859, which performed various expert analyses of evidence for the purpose of criminal investigation. Education in forensic medicine performed at the Faculty of Law starting from 1863 provided conducting forensic medical and anatomical pathological investigations, as well as histopathological and bacterial examinations. The same as in other European countries, starting from 1897, photography in Serbia was used in the investigation of criminal events in the penal system. So-called „Bertillonage“, based on anthropometry and also accepted worldwide as a reliable method for identification of criminals, was introduced in Serbia in 1904 when the Anthropometric Police Department was established. As soon as the methods of classification of the fingerprints were developed, dactyloscopy was advocated in Serbia and practiced in the Anthropometric Police Department since 1912. The developments interrupted by the Great War continued after its end. The Department of Technical Police established in 1921 in Belgrade and with jurisdiction on the entire state territory successfully performed its main task: it took care of photographing criminals and other dangerous persons, registered criminals and was a forensic-medical *laboratorium*. The analysis of birth and youth of forensic methods in Serbia will be performed in this paper in order to indicate that regarding forensic development Serbia in the 19th and early 20th centuries was not outside the European mainstream as well as it is not today.

Keywords: forensics, Bertillonage, dactyloscopy, photography, Technical Police

INTRODUCTION

The Serbian police gradually implemented scientific methods in legal proceedings and determinately kept up with the world in the application of the latest scientific achievements. The first step in this field was made by establishing the State Chemical Laboratory in 1859, which performed various ex-

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pert analyses of evidence for the purpose of criminal investigation. Education in forensic medicine performed at the Faculty of Law starting from 1863 provided conducting forensic medical and anatomical pathological investigations, as well as histopathological and bacterial examinations. The same as in other European countries photography was used in the investigation of criminal events in the penal system starting from 1897 in Serbia. So-called „Bertillonage“, based on anthropometry and also accepted worldwide as a reliable method for identification of criminals, was introduced in Serbia in 1904 when the Anthropometric Police Department was established. As soon as the methods of classification of the fingerprints were developed, dactyloscopy was advocated in Serbia and practiced in the Anthropometric Police Department since 1912. The developments interrupted by the Great War continued after its end. The Department of Technical Police established in 1921 in Belgrade with jurisdiction on the entire state territory successfully performed its main task: it took care of photographing criminals and other dangerous persons, registered criminals and was a forensic-medical laboratory. Monitoring and applying modern scientific methods in criminal investigations ranked the Serbian police high at the end of the 19th and in the first half of the 20th century.

HOW IT ALL STARTED

The society in the newly liberated Serbia of the first half of the 19th century was steadily marching towards the progress in desire to build a just society. One of the most important preconditions for achieving that goal was the identification and punishment of offenders (Krstić-Mistrdželović, 2013:53-77). It took years while the state authorities entrusted with this task, especially the police, started using adequate methods whose application would result in an unequivocal identification of the perpetrators (Inman & Rudin, 2001: 329-343). In Serbia in the first half of the 19th century, as well as in other countries, the police officers were not formally educated in policing (Krstić-Mistrdželović & Radojičić, 2015: 93-104; Braković & Krstić-Mistrdželović, 2013:43-59). Learning through practice from older colleagues the secrets of the craft in investigating crimes conceptually prevailed in that time (Krstić-Mistrdželović: 2011: 165-171).

A mention of the first case solved with the help of forensics in Serbia was preserved in an anecdote. Namely, Prince Miloš Obrenović realized the importance of chemistry already during his first reign. In 1833 he began sending Serbian mineral waters for analysis to Vienna and when his horse died without an obvious reason he had ordered for the horse's intestines to be sent for analysis to Vienna as well. Soon he received an answer that the horse died due to poisoning by cobbler's glue, used as leather adhesive for *opanci*. Based on the conclusion on chemists as very useful stuff in state matters, Prince Miloš ordered the establishment of the State Chemical Laboratory which would perform forensic expert analysis and the analysis of mineral waters (Vasilijević & Krstić-Mistrdželović, 2021:11). Even though the first step in the institutionalization of forensics was made in order to solve the Prince's private problem, it led to the establishment of the State Chemical Laboratory in 1859. The State Chemical Laboratory was moved to the State Pharmacy established in 1837 and later to the laboratory of the Lyceum, until in 1882 a new building was constructed to be used solely by this autonomous institution (<https://kultura.rs/objekat/372-државна хемијска лабораторија>). In the following decades the State Chemical Laboratory successfully fulfilled its task by performing various expert analyses for the purpose of water supply, spa medical centres, quality control of food, as well as chemical analyses of evidence for police departments and the prosecutor's office.

Medicine also plays an important part in forensics. In the Miloš Obrenović's Serbia the physicians were included in the investigations of bodily injuries or deaths of citizens. The examination of the



dead was done by *muselim* – if a man died under suspicious circumstances he was not buried until *muselim*'s man arrived. The first forensic expert analysis of blood stains in Serbia was performed in 1830, while the routine performance of forensic medical autopsies was dated to 1880. The Department of Quarantine and Health Service within the Ministry of Internal Affairs was established in 1839 and the education in the field of forensic medicine started in 1863, when Prince Mihailo Obrenović signed the Law on the Establishment of the Great School. The initiator of the modern forensics in Serbia was a part-time professor of hygiene and forensic medicine at the Great School, Dr Aćim Medović. His main work "Forensic Medicine for Court, Police and Health Officials, Lawyers and Other Legal Workers" was published in 1866. Based on the Law on Organisation of Health Profession and Protection of Public Health signed by the Prince Milan Obrenović in 1881 (Srpske novine 1881, April 10) the Anatomical Pathology Department was established as a part of the General State Hospital in Belgrade. This institution in charge for solving practical tasks in the field of anatomical pathology started its full operation in 1897, when Dr Eduard Mihel came back from the Vienna where he specialised pathology and forensic medicine in the famous Institute for Anatomy and Pathology. The Anatomical Pathology Department with the Department for Autopsy was located in wooden barracks within the General State Hospital until the adequate new building was built in 1907. Apart from Dr Mihel it also employed Dr Milovan Milovanović and two of them began conducting forensic medical and anatomical pathological investigations, as well as histopathological and bacterial examinations. A Department of Forensic Medicine which was formed in 1919 was transformed into the Institute of Forensic Medicine of the Faculty of Medicine in Belgrade.

The forensics draws knowledge and methods also from physics, mathematics and statistics. The development of physics directly contributed to the ballistics and the analysis of material properties, as well as numerous calculations applicable in forensics. Mathematics and its methods have an important place in forensic science, as well as statistics, which is an unavoidable tool in all sciences. Statistics was a compulsory companion of the state apparatus in Serbia since 1834, when regular population census was introduced every five years, but the first State Statistical Service was introduced in 1864, when a special Statistical Department was formed within the Ministry of Finance. The Authority for Official Statistics, which consisted of a statistical bureau and a central statistical board, was established in 1881. The data regarding the crime statistics in Serbia were handled by the local police officers. Since the formation of the Ministry of Internal Affairs in 1839, local police officers in periodical reports presented to the Ministry the accounts of the committed crimes, weather disasters and natural catastrophes, as well as the movement and control of foreign nationals and possible occurrence of banditry. From 1862 until the onset of the First World War, 31 editions of special books and 17 themed volumes dedicated to criminal trials titled "Criminal Trials" were published.

Photography as a technique was developed in the 18th century and very soon after its discovery it found its place in police work. The application of photography yielded results in policing - the increased number of offenders were found thanks to the photographs distributed via internal courier service, as well as their official publishing in "Policijski glasnik", which made photography an auxiliary forensic technique (Jensen, 1981:322-323). The understanding of the importance of criminal records that included individual features of the offenders has grown thanks to photography. The police in Serbia in the second half of the 19th century used the services of the local photographic studios which multiplied the photographs of wanted persons that came from abroad. At the very end of this period the state authorities realised that they should organise photographic departments within the police offices. In order to make the most efficient search for a large number of fugitives from the penal institutions who committed crimes, compulsory photographing of all convicts was introduced in 1897. In 1899 all the local police officers were ordered to procure photo-albums of all the convicts photographed so far, as well as other bad people (IAB-1-1899-2119-259).



THE ANHROPOMETRIC POLICE DEPARTMENT

Despite internal and external instability the Serbian police gradually implemented scientific methods in legal proceedings and determinately kept up with the world in the application of the latest scientific achievements. One of the methods for individualisation of offenders that came into use thanks to Alphonse Bertillon was anthropometry, an auxiliary anthropological discipline that deals with the physical measurements of people. A Bertillon's card contained data obtained by measuring certain parts of the human body using special measuring instruments with the added description of specific physical characteristics – specific marks and photographs of profile and full-face in 1:7 ratio.

This procedure of measurement called "Bertillonage" was introduced in Serbia in 1904 by the Law on Measurement, Description and Identification of Perpetrators (Srpske novine 1904, December 21). According to the Law the Anthropometric Police Department for measurement and identification of offenders according to the Bertillon's system was established in Belgrade and its scope of activities was determined, while establishment of other anthropometric departments was planned in all towns that had a court of first instance, as well as the initiation of a training course for police officers. The Belgrade city administrator Dušan Alimpić, who studied the Bertillon's system of identification of offenders at the Romanian Ministry of Justice in Bucharest in 1900, was appointed the first Head of the Anthropometric Police Department within the Department of Public Safety at the Ministry of Internal Affairs. Placed in the building in the courtyard of the old building of the Belgrade City Police Administration, this Department performed its tasks by taking anthropometrical physical measurements including photographing and making records of anthropometric reports of offenders which were exchanged, if necessary, with foreign police services (Knežević-Lukić, 2019: 243, unpublished Doctoral dissertation). It also provided training police officers in measurement, description and identification of perpetrators.

According to the Law on Measurement, Description and Identification of Perpetrators two more Anthropometric Police Sections were established in Požarevac in 1906 and in Niš in 1908. Both of them were located at the Penal Institutions and supplied with the necessary equipment for photographing and physical measuring of offenders. All the prisoners at those prisons were photographed and measured as well. Records of anthropometric reports namely Bertillon's cards were made in Anthropometric Police Sections in Požarevac and Niš in two copies, one of which was submitted to the Anthropometric Police Department in Belgrade.

Introduced in 1904, Bertillonage in Serbia unlike other countries remained in use after the introduction of dactyloscopy, up until the 1920s. The uniqueness of an individual fingerprint was already noticed in the first half of the 19th century and in its last decade two methods for classification of fingerprints were developed (Cole, 2001: 128-129). The first one was Vučetić's system, made in 1892 and named dactyloscopy in 1896, and the other one was the Henry-Galton system made in 1896. Both of them implied the procedure of taking and processing fingerprints of offenders for their registration, as well as searching for fingerprints at the crime scene or taking the prints of the suspects in order to determine the identity of the perpetrator. Accepted first in America and England, the dactyloscopy in the first decade of the 20th century gradually suppressed the Bertillon's identification system in European countries. The first one who advocated dactyloscopy in Serbia was Vasa Lazarević, highly-ranked police officer in the Ministry of Internal Affairs. Together with Aleksandar Andonović, a clerk at the Anthropometric Police Department who was sent in 1911 to a professional course of forensics held by Dr Rodolphe Archibald Reiss at the Faculty of Law in Lausanne, Lazarević was the most deserving person for introducing dactyloscopy according to Vučetić's system in the Serbian police in 1912. The Anthropometric Police Departments in Belgrade, Požarevac and Niš took fingerprints of all prisoners



in those penitentiaries and entered them in an adequate field in the existing records of the Bertilon's anthropometric reports. By comparative application of both these methods the Serbian police had been achieving good results until the onset of the Great War.

THE DEPARTMENT OF TECHNICAL POLICE

The Anthropometric Police Department, whose building and all equipment were destroyed in the Austrian bombing of Belgrade in 1914, renewed its work after the end of the war in the building located at the 14-16 Kralja Petra Square mostly thanks to the efforts of Aleksandar Andonović and Archibald Reiss (Ribo, 2019: IX-XIII; Kenš, 2019: XIV-XX; Krstić-Mistrđželović, 2019: 23-35).

In 1921 the Department of Technical Police was established within the Belgrade City Police. The lack of unity in organization and functioning of the police in the new state – the Kingdom of Slovenes, Croats and Serbs had been overcome by metropolisation of the Belgrade Technical Police. Until 1921 it worked within its scope of activities in all corners of the country that did not have that kind of service and after that it also kept the register of all the convicts in the entire country. Archibald Reiss, who came to Serbia during the First World War upon the invitation of the Serbian Government to lead the investigation on the crimes committed by the enemy armies against the soldiers and civilians in Serbia (Krstić-Mistrđželović, 2014, 437-463; Krstić-Mistrđželović & Radojičić, 2015: 341-348), had been performing the duties of the Head of the fifth section of the Department of Technical Police namely the Section for identification from 1919 until 1922. It is thanks to his efforts that the laboratory of the Technical Police was completely equipped in 1922, which enabled the Technical Police to successfully perform its main task: taking care of photographing criminals and other dangerous persons, registering criminal world and being a forensic-medical *laboratorium*.

When in 1921 the First Police School in Belgrade, whose conceptual creator, founder, teacher and the first director was Reiss, was finally established, it was expected to educate professional staff capable of carrying on the police reform. It was located in a restored and upgraded building of the Department of Technical Police next to the old building of Belgrade City Police, so the students did all their practical forensic exercises in the laboratory of the Technical Police. After the Reiss resigned to all state duties, Aleksandar Andonović became the Head of the Technical Police and stayed at that position for a very long period (Kapetanović, 1930). Due to that fact that the Belgrade Technical Police was one of the best equipped and managed in the Europe before the onset of the Second World War. Andonović was also engaged as a teacher in the Institute of Criminology at the Faculty of Law of the Belgrade University established in 1929 (Janković, 2015: 326-346) and in the Police school in Zemun established in 1931 for whose students he wrote the first forensic textbook together with Sergey Tregubov (Vasiljević & Krstić-Mistrđželović, 2021: 31). The book named "Criminal Technique – Scientific-Technical Examination of a Criminal Act" published in 1935 was reviewed by internationally acclaimed criminology expert professor Boris Brasol as the foundation of scientific forensic examination in the Balkan countries (Brasol, 1936: 799-802).



CONCLUSIONS

The analysis of the naissance of forensics in the 19th century Serbia showed that the origins of the forensics in our country were very similar to those in other European countries. That comes out from the fact that the European and Serbian societies had been developing basically in the same way, i.e. social preconditions were created in them for the very same development, acceptance and application of forensics. The French revolution brought a prohibition of the use of force in collecting evidence and made the judicial systems search for new ways to find legally and scientifically irrefutable evidence (Campesi, 2016). Even though the practice of torturing and forcing suspects for the purpose of obtaining recognition remained present long after the French revolution, the evidence obtained in such a manner was never again considered as necessarily acceptable. The essentially new social circumstances gave rise to the idea that it was necessary for the judgement that would take away someone's freedom and civil rights to have an exact material foundation. That required involvement of the state, so in the last decades of the 19th century state laboratories and institutes in the fields of chemistry, forensic medicine, statistics and photography and police departments specialised in application of anthropometry, dactyloscopy, ballistics and photography began to appear worldwide.

19th-century Serbia was not outside the European mainstream in performing forensic methods as well as in the scientific and literary treatment of forensic topics. Police officers, investigating judges, prison wardens and lawyers were discussing the application of certain scientific methods in criminal investigations and translating the latest works of pioneers in forensics. Only few decades after two well-known literates – Charles Dickens in England and Emile Zola in France (Mangham, 2016: 4-9) created their works in a manner of forensic realism, the Serbian police officer Tanasije – Tasa Milenković wrote the socially engaged novels with forensic interpretations that aroused great interest both in domestic and foreign public. At the very beginning of the 20th century by founding the Anthropometric Police Department within the Ministry of Internal Affairs Serbia got an institution of reference for forensic examinations similar to those that were previously established in other European police forces.

The development of forensics in Serbia, together with its continuity and results, had not remained unnoticed in the inter-war period. The Department of Technical Police established in Belgrade in 1921 with its fully-equipped laboratory successfully performed registering and identifying criminals, as well as practical forensic training of students and police officers. Due to the application of modern forensic methods the Belgrade Technical Police in that time successfully conducted criminal investigations throughout the whole country and enjoyed a great international reputation as one of the most modern police services in Europe.

REFERENCES

1. Brasol, B. (1936), *Kriminalna tehnika*. By Serge N. Tregouboff and Aleksander J. Andonović, 1935, *Journal of Criminal Law and Criminology*, 799-802.
2. Braković, Ž. & Krstić-Mistrđželović, I. (2013), *Razvoj policijskih vlasti u Srbiji u drugoj polovini XIX i početkom XX veka*, *Struktura i funkcionisanje policijske organizacije – tradicija, stanje i perspektive*, Beograd: Kriminalističko-policijska akademija, II: 43-59.
3. Campesi, G. (2016), *A Genealogy of Public Security. The Theory and History of Modern Police Powers*, New York: Routledge.



4. Cole, S. A. (2002), *A History of Fingerprinting and Criminal Identification*, Cambridge: Harvard University Press.
5. <https://kultura.rs/objekat/372-државна хемијска лабораторија>
6. Inman, K. & Rudin, N. (2001), *Principles and Practice of Criminalistics: The Profession of Forensic Science*, Boca Raton: CRC Press.
7. Jensen, R. B. (1981), The International Anti-Anarchist Conference of 1898 at the Origins of Interpol, *Journal of Contemporary History*, 322-323.
8. Janković, I. (2015), Kriminalistički institut Pravnog fakulteta u Beogradu, 1927-1945, *Pravni zapisi*, 326-346.
9. Kapetanović, N. (1930), 25 godina rada Tehničke policije, „Policijskog glasnika“ i Aleksandra Andonovića, *Pravda*, 50 (2).
10. Kenš, N. (2019), Rajs kao ekspert i još dragoceniji popularizator kriminalistike, *Rodolf Arčibald Rajs, Vizionar moderne policije*, Beograd: Zavod za udžbenike, Kriminalističko- policijski univerzitet, XIV-XX.
11. Knežević-Lukić, N. (2019), Nastanak i razvoj naučno-tehničke policije u Srbiji (1904-1941), Doctoral disertation, <https://nardus.mpn.gov.rs/> Retrieved on July 16, 2021.
12. Krstić-Mistrđelović, I. (2011), Archibald Reiss and the first Police School in Belgrade, *Archibald Reiss Days*, 165-171.
13. Krstić-Mistrđelović, I. (2013), Razvoj policijskih vlasti u Srbiji u prvoj polovini XIX veka, *Struktura i funkcionisanje policijske organizacije – tradicija, stanje i perspektive*, Beograd: Kriminalističko-policijska akademija, I:53-77.
14. Krstić-Mistrđelović, I. (2019), Rodolf Arčibald Rajs – otac osnivač studija naučne policije, *Rodolf Arčibald Rajs, Vizionar moderne policije*, Beograd: Zavod za udžbenike, Kriminalističko- policijski univerzitet, 23-35.
15. Krstić-Mistrđelović, I. & Radojičić, M. (2015), Obrazovanje policije u Kraljevini SHS/Jugoslaviji, *Suprotstavljanje savremenim oblicima kriminaliteta*, Beograd: Kriminalističko-policijska akademija, 2: 93-104.
16. Mangham, A. (2016), *Dickens's Forensic Realism. Truth, Bodies, Evidence*, Columbus: Ohio State University Press.
17. Ribo, O. (2019), Postupno stvaranje nove naučne discipline, *Rodolf Arčibald Rajs, Vizionar moderne policije*, Beograd: Zavod za udžbenike, Kriminalističko- policijski univerzitet, IX-XIII.
18. Unpublished Welt no. 26248 from December 10, 1899 by the minister of internal affairs Đorđe Genčić to all the county police offices, IAB-1-1899-2119-259.
19. Vasiljević, S. & Krstić-Mistrđelović, I. (2021), *Forenzika – više od veka*, Beograd: Muzej nauke i tehnike, Kriminalističko-policijski univerzitet.
20. Zakon o uređenju sanitetske struke i o čuvanju narodnoga zdravlja, *Srpske novine*, 1881 April 27, (80):492.
21. Zakon za merenje, opisivanje i identifikovanje krivaca, *Srpske novine*, 1904 December 27, (278):1289.





FIRE EXTINGUISHER CONFORMITY ASSESSMENT – A CASE STUDY

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Abstract: The development of large fires has an extremely detrimental effect on the working and living environment. The chances for their effective extinguishing are greatest in the initial stages of flare-up, but that time interval is very short. That is why it is extremely important that fire extinguishers be reliable and, above all, efficient. The usable quality of extinguishers is assessed through a series of laboratory and field experimental tests in the certification process, i.e. prior to placing on the market, an assessment of their conformity with the specified requirements of the relevant standards must be performed. As a result of the previous statements, it can be concluded that it is necessary to develop an appropriate certification scheme for manual and mobile fire extinguishers so that we would have the means with the appropriate level of quality in use. The paper presents a case study of fire extinguishers certification by the certification body - Technical Testing Center.

Keywords: quality, testing, conformity assessment, fire extinguishers, product certification.

INTRODUCTION

Fire extinguishers in the Republic of Serbia are certified pursuant to the Ordinance on mandatory attestation of portable and mobile fire extinguishers (Official Gazette of the SFRY No. 16/83). This document prescribes technical and other requirements for portable and mobile fire extinguishers. In addition to the requirements prescribed by particular technical regulations, fire extinguishers put in the market or in use must also fulfil the requirements determined by the Serbian standards:

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- 1) SRPS Z.C2.020 - Portable and mobile fire extinguishers - General requirements;
- 2) SRPS Z.C2.022 - Portable and mobile fire extinguishers - Testing specifications;
- 3) SRPS Z.C2.035 - Portable and mobile fire extinguishers - Dry powder portable fire extinguishers;
- 4) SRPS Z.C2.040 - Portable and mobile extinguishers - Portable carbon dioxide fire extinguishers;
- 5) SRPS Z.C2.135 - Portable and mobile fire extinguishers - Mobile dry powder extinguishers;
- 6) SRPS Z.C2.140 - Portable and mobile fire extinguishers - Mobile carbon dioxide fire extinguishers.

In March 2012, the Government of the Republic of Serbia adopted the document titled Strategy of protection from fire for the period from 2012 to 2017. Taking into account the basic strategic field defined as normative regulation of fire protection, its goal was set which should also be reached, and it was the adoption of new laws and bylaws. The criterion was the harmonization with international, primarily European regulations and standards. Accordingly, the previously listed SRPS Z.C2 standards were withdrawn and replaced with the corresponding SRPS EN3 standards. However, there have remained several thousand fire extinguishers still in use in the market of the Republic of Serbia, which have not been attested according to the European norms, but which have been certified and fulfil the criteria of the withdrawn standards. The majority of those fire extinguishers have been used for several years without any failure and in correct functional state. To discontinue the use of these extinguishers, or to replace them mostly with imported fire extinguishers (among the domestic manufacturers only Todorović Company from Kragujevac has EN attests and not for the entire range of products) would present a huge financial load on the economy of the Republic of Serbia, particularly highlighting the justification of such an investment (Mićović et al., 2017: 363-374). Fire extinguishers older than 20 years are gradually written off through periodic examinations by authorized service shops based on the manufacturer's recommendations that the useful life of fire extinguishers is 20 years, since after that time there appears material fatigue and it is not possible to purchase spare parts for their maintenance.

The fact that there is not a single laboratory in the Republic of Serbia accredited to test fire extinguishers pursuant to EN standards results from the fact that SRPS-EN standard is not binding and it is not applied (the jurisdiction of the Sector for Emergencies and the Ministry of Interior of the Republic of Serbia), so no one is interested and finds no economic interest to invest both in terms of money and human resources to equip testing laboratory. Also, since the standard has been harmonized with the European standard, the testing can be done in any European accredited laboratory (MPA Dresden, for instance). The neighbouring countries such as Slovenia, Croatia, or Bulgaria do not have accredited laboratories either but test their equipment in Germany, Greece or Belgium.

All the above said explains the reasons why fire extinguishers are still attested and examined pursuant to the standard which are no longer in use.

FIRE EXTINGUISHER QUALITY REQUIREMENTS

The request for imported fire extinguisher certification is submitted by either the agent, importer or distributor registered as legal entity in the territory of Serbia. The validity of extinguisher certificate is not time limited if the control of conformity determines that the product complies with the certified type. Conformity control for imported fire extinguishers is performed at the sample taken from each



batch of delivery. This means that the certificate holder is obliged to submit to conformity control each batch of imported fire extinguishers. Conformity control for domestic fire extinguishers is performed according to the supervision plan submitted to the certificate holder.

The certification scheme takes into account the following characteristics of fire extinguishers quality: fire extinguishing efficiency; jet range and duration of operation; resistance to vibrations; quantity of foam; endurance under pressure; non-permeability; efficiency of safety device and usability for extinguishing fires at electric installations.

The requirements for accreditation of certification bodies are stipulated by ISO/IEC 17065 standards. In addition to meeting the requirements of the said standard, certification body must be equipped with the following: testing ground for typical test fires; fire house; hydraulic laboratory and laboratory with equipment for testing safety valves; climate chambers for climate and mechanical testing; vibration table; device to test usability of fire extinguisher on electric installations, etc.

CONSTRUCTION-SAFETY REQUIREMENTS

Fire extinguisher construction must be such as to exclude the possibility of injury of a person operating it or of the persons in its vicinity while it is used or filled.

- All extinguishers, except for the hand-operated pump extinguishers, must have safety device installed, which will prevent the pressure rising above the allowed value. The portable extinguishers whose cylinder volume is up to 15 dm³, and test pressure up to 25 bars can be excluded from this.
- Safety device must be activated if the pressure within the extinguisher reaches the interval whose lower limit is 2/3 of the test pressure and upper limit is for 3 bars lower than test pressure. This does not apply for steel tank valves.
- Steel tank safety valve must be activated if the pressure inside the extinguisher increases to 170 ± 5 bars for the extinguishers whose test pressure is 190 bars, 195 ± 5 bars for the cylinders whose test pressure is 225 bars and 215 ± 5 bars for the cylinders whose test pressure is 250 bars.
- Safety device must appear completely reliable and it cannot be exposed to chemical action of fire extinguishing medium. The jet that this device discharges at activation must be aimed at the direction of extinguishing jet or the connection of flexible pipe, in other words contrary to the normal position of the person operating the extinguisher.
- The extinguisher cylinder cap must be designed in such a way as to provide for harmless balancing of pressure remaining after the extinguisher was used with atmospheric pressure by unscrewing for 1/3 of a screw thread or connecting elements.
- For steel cylinders whose volume is below 220 cm³, which are not tested under pressure, the manufacturer must take on himself the warranty of safety regarding both material and manufacture. The following marks have to be impressed on these cylinders: company, or the name and trademark of the manufacturer, if there is one; gas symbol; year of manufacturing and serial number, mass of empty cylinder with the cap and mass of the filling, in grams (for instance: 150 + 40).
- For the extinguishers where there is possibility of fire extinguishing medium leakage, before use the nozzle must be secured with an adaptable shield (rubber or similar), which is made in such a way as to be easily ejected by pressure when the extinguisher is activated.



- Extinguisher cylinders, except for those of the carbon dioxide extinguishers and portable foam extinguishers, must have sufficient expansion area provided. In order to provide this space during filling, extinguisher cylinder must be filled up to the corresponding marking or according to the manufacturer's instructions.
- The parts which activate the extinguisher (button, lever, valve wheel and similar) must be sealed or protected by other appropriate means in order to prevent unauthorized use and in order to make permanent control easier. The means used for this purpose must be such as to provide for direct and fast activation of fire extinguisher with the force of maximum 50 N.

The construction of the extinguisher must provide for safe operation under normal climatic conditions and corresponding temperature range. Normal climatic conditions do not include storage in wet rooms, exposure to influence of acid fumes or other harmful matters (SRPS Z.C2.020).

GENERAL REQUIREMENTS FOR CONSTRUCTION, SHAPE, MANUFACTURE AND OPERATING CHARACTERISTICS

- The extinguisher must be designed for simple operation – so that any person can use it safely upon reading a short instruction.
- Activation time (the time from action on the activation device to the beginning of jet discharge), at the temperature of 20°C, can be maximum 5 sec for portable extinguishers and 10 sec for wheeled extinguishers.
- The shortest time of continuous discharge of an extinguisher depends on the mass of the extinguishing filling and must correspond to the values given in Table 1 (SRPS Z.C2.020).

Table 1 – *The shortest time of uninterrupted discharge of fire extinguishers*

| Mass of extinguishing medium in kilograms | up to 3 | above 3 up to 6 | above 6 up to 12 | above 12 up to 100 | above 100 |
|--|---------|-----------------|------------------|--------------------|-----------|
| The shortest time of continuous discharge in seconds | 6 | 9 | 12 | 20 | 30 |

- Manufacture of cylinders and steel tanks whose volume exceeds 220 cm³ must conform to the current technical regulations for compressed gas vessels. This does not include the cylinders of hand-operated pump fire extinguisher.
- All extinguishers that have some gas under constant pressure in their cylinders except for carbon-dioxide must have pressure indicator installed.
- All portable extinguishers with filling mass exceeding 1 kg, except for the extinguishers with hand-operated pump and carbon-dioxide extinguishers, must be equipped with corresponding support for stable suspension. All portable extinguishers must also be equipped with the support for installing on transport vehicle which must be made in such a way as to provide for easy setting and removing of the extinguisher.



- Fire extinguisher cylinders must be painted in red on the outside. All inside surfaces made from materials that are not resistant to the action of fire extinguishing medium must be protected appropriately (SRPS Z.C2.020).

REQUIREMENTS FOR FIRE EXTINGUISHER MARKING

Fire extinguishers must contain the following marking:

- Impressed: factory number and year of manufacture;
- Written in the colour which is in clear contrast to the red colour of the cylinder: extinguisher mark; time of continuous discharge; fire class it is intended for; special warning if the extinguisher is not intended for fires of electrical installations; the highest value of electrical installation voltage for which the extinguisher can be used; temperature range within which the extinguisher can be used; name and address of the manufacturer, as well as trade mark (if any); the instructions for use, brief and clear with the required pictograms (SRPS Z.C2.020).

ASSESSMENT OF FIRE EXTINGUISHERS CONFORMITY

The authors of this paper have developed a scheme of fire extinguisher certification for the market of the Republic of Serbia, which include essential examinations defined according to certain order in this case study. The procedures of application, reception and activities prior to product testing have been defined in the document titled “Rules of product certification in the Technical Testing Center” and are not given in this paper. Conducting extinguisher testing according to the scheme leads to rationalization of testing costs and provides for its uniformity. The scheme is devised in such a manner as to perform first those tests and controls whose positive results are precondition to continue with more expensive and more complex testing and control. For instance, previous control examination of the extinguisher’s completeness and its construction being in conformity with construction documentation, then the marks on the body and labeling, as well as the corresponding indications of charge are absolute preconditions for sending samples for further testing for influence of vibrations. In case any discrepancies are noticed in the first step, the decision is made on either continuation or interruption of testing and the applicant is notified about it.

TESTING THE IMPACT OF VIBRATIONS

Testing the impact of vibrations is run on the fire extinguishers intended for use in transport vehicles. Filled fire extinguisher is exposed, together with its support, to the vibrations of 0.8 mm amplitude and 20 Hz frequency for a period of 15 minutes. If the extinguisher and its support withstand this test without any changes, the marking on the extinguisher can be added the following text: “Approved for transport with support”, which approves also its use for instalment into transport vehicles.

This test is mandatory to perform before efficiency of extinguishing is tested (SRPS Z.C2.022).



PERMEABILITY TEST

Testing permeability is mandatory only for the extinguishers whose cylinder is under constant pressure of compressed gas. When testing permeability the first step is to read and record the gas pressure within the extinguisher cylinder, and the extinguisher in the operating position is then subjected to vibrations of the same amplitude and frequency as when testing the influence of vibrations (0.8 mm amplitude and 20 Hz frequency), for a period of 1 minute. The extinguisher is then turned upside down and the procedure is repeated. This cycle of exposure to vibrations is repeated for 10 times. After that, when checking pressure any loss of pressure must not be detected in the extinguisher ((SRPS Z.C2.022).

TESTING AT INCREASED AND DECREASED TEMPERATURES

Testing at increased and decreased temperatures is run on the extinguishers in order to check their characteristics and functionality at border temperature conditions of use according to reference standards valid for certain type of fire extinguishers. After exposure to extreme temperature conditions the functionality of extinguishers is checked (SRPS Z.C2.022).

TESTING OF ENDURANCE UNDER PRESSURE

The cylinder and its fittings are tested for action of cold water pressure on the cylinder (CWP) for a period of 3 minutes. Test pressure must be at least $1.3 P_{\max}$ at the temperature of 20°C. P_{\max} represents the highest operating pressure at the temperature of 20°C. The value of this pressure must be stated in the documentation submitted when the extinguisher is handed over for testing. During this test any leakage of water must not occur, and any cracks or deformations must not appear.

Flexible pipes of carbon-dioxide extinguishers (CO_2) are tested at CWP of 60-bar water pressure, and the pipes of other extinguishers with water pressure corresponding to the pressure for testing the cylinders of the type of extinguishers they belong to.

Water temperature for these tests should range from 5°C to 20°C. Steel tanks with volume that exceeds 220 cm³ and the valves installed on them are tested fully in accordance with the current regulations on technical standards for pressure vessels (SRPS Z.C2.022).

In order for the examiner to be safe, it is necessary to perform the testing in specially provided areas where tested cylinders are separated by safety barrier, which serves as a protection in case of uncontrolled explosion or burst of cylinder.

SAFETY DEVICE TESTING

This test is intended to check if safety device would be activated reliably at the prescribed pressure value. Safety device test is done on the extinguishers whose cylinder is under constant pressure of compressed gas. This may exclude portable extinguishers whose cylinders are up to 15 dm³ and test pressure up to 25 bars.



Safety valve must not be exposed to chemical action of fire extinguishing medium, and the jet the extinguisher discharges when activated must be aimed at the direction of extinguishing jet or the connection of the flexible pipe, in other words contrary to the position of the person handling the extinguisher and standing in an operating position.

Fire extinguisher is deemed to meet all requirements if its safety device is activated when the pressure in the extinguisher reaches an interval whose lower limit is $2/3$ of the test pressure, and the upper limit for 3 bars lower than test pressure. Test pressure value is usually impressed on the extinguisher tank, and it can be stated in technical documentation as well. Safety device of steel tank valve must be activated if the pressure in the extinguisher rises to 170 ± 5 bars for the tanks whose test pressure is 190 bars, 195 ± 5 bars for the tanks whose test pressure is 225 bars, and 215 ± 5 bars for the tanks whose test pressure is higher or equal to 250 bars. Test pressure for steel tanks must be impressed on the tank (SRPS Z.C2.022).

EXPLOITATION TESTING

Measuring jet range, time of continuous discharge and quantity of foam

Fire extinguisher that is being tested should be pre-filled, in other words prepared for operation and stored at the temperature of $20 \pm 5^\circ\text{C}$ at least 24 h before testing. During jet range testing there must not be any wind. The time of continuous discharge is the time of operation of fire extinguisher from the beginning to the end of continuing discharge of extinguishing medium.

When measuring jet range and the time of continuous discharge three experiments are carried out (Figure 1). The nozzle must be positioned horizontally at the height of 1.1 m above the upper edge of the vessel in which the discharged extinguishing medium is collected. These vessels have square bottom with the edge length of 0.5 m and the height of 0.25 m. The vessels are positioned next to each other in the direction of extinguisher operation (SRPS Z.C2.022).



Figure 1 – *Measuring jet range and time of continuous discharge*

After discharge the volume is measured of discharged extinguishing medium in each vessel respectively. Horizontal distance between the center of the vessel base in which the biggest quantity of extinguishing medium is collected and the nozzle opening represents the jet range.

If the extinguishing medium is prone to evaporate, the jet range is measured in such a way that the extinguishing medium is discharged along the black board divided into $0.5 \text{ m} \times 0.5 \text{ m}$ squares at which the trace of the highest density jet is clearly seen. The range is determined in such a way that the difference in height between the nozzle opening and the final point of jet is 1.1 m. In the course of this testing, time is also measured of continuous discharge of the cylinder containing the fire extinguishing medium. The shortest time of continuous discharge of the extinguisher depends on the mass of fire ex-

tinguishing medium in the extinguisher and must conform to the values given in Table 1. As a final result of testing the average values are taken of jet range and discharge time from all three experiments.

The quantity of foam is measured in such a way that the foam jet from fire extinguisher during its operation is collected into a corresponding vessel which is marked (graduated) that it is possible to read easily the volume of the discharged foam. Measuring is done once, and the value obtained must not be lower than the value determined by the special standard for the respective type of extinguisher.

TESTING EXTINGUISHING EFFICIENCY

Efficiency of fire extinguishers is determined by extinguishing fire of standard test fires. Typical test fires are formed for certain fire classes that the subject extinguisher is intended for. Typical test fires represent fires class A (combustible materials), B (flammable liquids), C (flammable gas) and D (metal scrapings). Typical test fires and how they are formed are defined in SRPS Z.C2.022 standard.

In the Standard on fire classification SRPS EN 2:2011, which replaced the standard SRPS ISO 3941:1994, fires class E (electric installations) were replaced with fires class F (fires of vegetable and animal oils and greases).

Before the beginning of testing it is necessary to provide conformity to the reference testing conditions. Environmental temperature at which testing is performed must be within 5°C and 25°C, and the wind speed when extinguishing a typical test fire for fires class B and C must be max. 3 m/s. When extinguishing typical test fire for fires class A and D, there must be no wind at all. In case the wind appears, the testing is carried out indoors. The extinguishers that are tested must be made ready for operation at least 24 h before testing begins and stored at the temperature of $20 \pm 5^\circ\text{C}$.

Experimental extinguishing is performed four times of formed and ignited typical test fires out of which at least three must be successful. Experimental extinguishing is considered successful if the flame after the extinguishing has been completed does not reappear within 5 min of a typical test fire for fire class A. For typical test fire for fires class B, C and D, extinguishing is considered successful if the flame does not reappear at all. The additional condition is that upon extinguishing, and after the subsequent igniting of a typical test fire, the presence of non-combusted remains must be determined.

This kind of testing differs substantially from testing according to EN standards, according to which testing is completed when two experimental fires are extinguished, but within one size of test fire. There are no limits in terms of number of extinguishing attempts. If just one of three attempts was successful, it is possible to proceed with the first smaller test fire. If it is also extinguished, it is acknowledged that the extinguisher can put out this smaller size of test fire. Testing according to EN standards define efficiency of fire extinguishing, which is expressed by ratings. Fire extinguisher rating shows its quality, and the higher the rating the higher the quality of an extinguisher.





Figure 2 – *Extinguishing fire at type B test fire*

Before the beginning of testing the extinguisher is positioned at a certain distance from a typical test fire in the waiting position (Table 2). After that the handler of experimental extinguishing approaches the test fire and from a certain place/distance from the edge of the test fire he starts extinguishing fire.

Table 2 – *Distance of waiting position and the position of the beginning of extinguishing from the edge of test fire for fires class A and B*

| Extinguisher type | Distance of waiting position in meters | Distance of extinguishing position in meters |
|--|--|--|
| S1, S2, S3, S6, S9, S12, Pz9, Pz15, Ph10, V15, Vr15, VP15 CO ₂ 2, CO ₂ 3, CO ₂ 5 | 10 | 5 |
| S25, S50, S100, S150, Pz50, Pz100, Pz150, Ph50, Ph100, Ph150, HL25, HL50 | 20 | 10 |

It should be mentioned that the Ordinance on handling the substances harmful for the ozone layer, as well as the conditions on issuing licenses for import and export of those substances (Official Gazette of the RS, No. 114/13, 23/18, 44/18, 95/18), it has been defined that “the owners of fire protection systems and fire extinguishers containing halon and which are not intended for critical use (for instance, the protection of specially endangered military objects), are obliged to discontinue their use until December 31, 2020”. It is clear from this regulation that it refers to stable fire extinguishing systems which use halon, but it is not quite clear whether it refers to fire extinguishers which contain halon.

For extinguishing test fires classes C and D the distances are not defined at which fire extinguisher is waiting and the distances from which extinguishing is performed. Figures 3 and 4 show how the typical test fires classes A and B look like.



Figure 3 – *Typical test fire class A*



Figure 4 – *Typical test fire class B*

The selection of typical test fires depends on the size of the fire extinguisher and the type of extinguishing agent.

Class A test fire is made of wooden lattices in 6 sizes. This test fire is ignited using petrol lit in a vessel under stacked wood which is burning for 2 minutes. Then the vessel containing petrol is taken out and another 4 minutes are waited for the wood to blaze up. After that a member of the test team starts extinguishing. Class A test fire can be set both indoors and in the open space.

Class B test fire is made in 11 sizes. The foundation of the test fire is water in which precisely defined quantity of petrol and petroleum is added. The time of blazing up of typical test fire for testing gas-filled fire extinguishers is 30 s. For all other fire extinguishers the time of blazing up of typical test fire is 60 s. In order to ignite test fire, 2% petrol is added from the prescribed quantity of petroleum required to form a test fire. Petrol is set on fire, then it is waited for 90 s for petroleum to blaze up and then extinguishing begins. The test fire is formed in the open space.

TESTING SAFETY TO USE FIRE EXTINGUISHERS ON ELECTRICAL INSTALLATIONS

This testing is done in order to check safety of handlers when extinguishing fires on electrical installations with a certain type of fire extinguishers, so that the extinguisher could be labelled as “extinguishing fires at electrical installations up to 1,000 volts from the distance of at least 1 m”.

During the testing the fire extinguisher must be placed on a support made from insulation material so that the nozzle opening is 1m far from live metal plate and directed at its center. Metal plate 1m x 1m in size is hanging vertically by the elements made of insulation material and connected to high voltage transformer, which enables to obtain alternating voltage up to 50 kV between the plate and the ground. Apparent resistance of the circuit must be such that the current in secondary winding is at least 0.1 mA when this winding is put into short circuit, and primary winding is under voltage which amounts to 10% of normal supply voltage (Figure 5).



Figure 5 – *Testing on electrical installations*

Fire extinguishers are deemed to meet the requirements if during the action of the extinguisher on the live plate the strength of current between the extinguisher and the ground, i.e. of the nozzle lever and the ground, does not exceed 0.5 mA.

Every fire extinguisher that has not met the quality requirements must be labelled “Not suitable for electrical installations”.

TESTING POSSIBILITY TO EXTINGUISH FIRE OF GAS INSTALLATIONS

Testing the possibility to extinguish fire of gas installations (class C) is performed at gas installation formed pursuant to the requirements of SRPS Z.C2.022. Testing is carried out in such a way that upon gas is set to fire 20 s is waited and then the nozzle of the extinguisher is aimed at the flame and the fire is extinguished (Figure 6).



Figure 6 – *Testing extinguishing at gas installations*

Fire extinguisher is deemed to fulfil the requirements if the flame does not reignite at the outlet nozzle of gas installation immediately upon extinguishing.

TESTING POSSIBILITY TO EXTINGUISH FIRE OF METAL SCRAPINGS

Testing the possibility of fire extinguishers to extinguish fire of metal scrapings (class D) is carried out at typical test fire made in one size which consists of a steel vessel 0.4 m high and 0.4 m long in which 2 kg of scrapings of light metal alloys containing 83-88% of magnesium are evenly distributed. These scrapings are set to fire in one angle of the vessel, then it is waited for the flame to catch approximately 1/3 of scrapings and then the extinguishing begins. This test fire is always set indoors.

The analyzed testing methods are verified and validated at the Certification body and testing laboratories of the Technical Test Center. Certification body and testing laboratories have been accredited by the Accreditation Agency of the Republic of Serbia. Certification and accreditation have been carried out pursuant to the requirements of ISO/IEC 17065 and ISO/IEC 17025 standards respectively. In the assessment process the attestation procedure has been carried out of all testing methods included in this certification scheme.

It should mention that in addition to testing of fire extinguishers defined in the paper, it is also important for their reliability and functionality during the entire life of their exploitation to perform periodical as well as control testing by the accredited control bodies verified with the Accreditation Body of Serbia in accordance with ISO/IEC 17020 standard.

CONCLUSION

Reliability of fire extinguishers and efficient fire extinguishing is of great significance for the protection of people, as well as of working and living environment. The authors of this paper have developed the fire extinguisher certification scheme for the market of the Republic of Serbia. The developed certification scheme includes the certification of the extinguisher type, the control of conformity of extinguishers sampled from the manufacturing and the control of conformity of extinguishers sampled from each batch of import. The certification scheme has been verified through the process of accreditation at the Certification body in the Technical Test Centre. Certification body has been harmonized with the requirements of ISO/IEC 17065 standard and has relevant equipment, as well as the required level of competence to apply the defined certification scheme.

This certification scheme includes substantive tests of fire extinguishers, which have been analysed in this case study. The defined tests confirm that the fire extinguisher characteristics are according to the Ordinance on mandatory attestation of portable and mobile fire extinguishers. In this way it is ensured that the fire extinguishers prevailing in the territory of the Republic of Serbia are reliable and efficient in fire extinguishing, until the beginning of application of SRPS EN 3 and EN ISO 1866 standards in the market of the Republic of Serbia.



REFERENCES

1. EN ISO/IEC 17065/2016, *Conformity assessment – requirements for bodies certifying products, processes and services*.
2. ISO/IEC 17025, *General requirements for the competence of testing and calibration laboratories*.
3. ISO 9001:2015 *Quality management systems – Requirements*, ISO organization, Geneva.
4. ISO 9000:2015 *Quality management systems – Fundamentals and vocabulary*, ISO organization, Geneva.
5. ISO 9004:2009, *Managing for the sustained success of an organisation – a quality management approach*. ISO organization, Geneva.
6. Mićović A., Jovićić S., Brkljač N. (2017). Testing of fire extinguishers – between European and national regulations. “Archibald Reiss days” Thematic conference proceedings of international significance, volume III pp. 363-374, Academy of Criminalistic and Police Studies Belgrade.
7. „Službeni glasnik RS“ 74/2009 *Pravilnik o tehničkim i drugim zahtevima za ručne i prevozne aparate za gašenje požara*.
8. SRPS ISO/IEC 17 000, (2007). *Ocenjivanje usaglašenosti – rečnik i opšti principi*, Institut za standardizaciju Republike Srbije.
9. SRPS Z.C2.020, *Ručni i prevozni aparati za gašenje požara, opšte odredbe*.
10. SRPS Z.C2.022, *Ručni i prevozni aparati za gašenje požara, metode ispitivanja*.
11. SRPS Z.C2.030, *Ručni i prevozni aparati za gašenje požara, ručni aparati za gašenje hemijskom penom*.
12. SRPS Z.C2.035, *Ručni i prevozni aparati za gašenje požara, ručni aparati za gašenje prahom*.
13. SRPS Z.C2.040, *Ručni i prevozni aparati za gašenje požara, ručni aparati za gašenje sa CO₂*.
14. SRPS Z.C2.050, *Ručni i prevozni aparati za gašenje požara, ručni ap. za gašenje vodom i vazdušnom penom*.
15. SRPS Z.C2.055, *Ručni i prevozni aparati za gašenje požara, ručni aparati za gašenje vazdušnom penom*.
16. SRPS Z.C2.060, *Ručni i prevozni aparati za gašenje požara, ručni aparati za gašenje vodom*.
17. SRPS Z.C2.130, *Prevozni aparati za gašenje požara, prevozni aparati za gašenje hemijskom penom*.
18. SRPS Z.C2.135, *Prevozni aparati za gašenje požara, prevozni aparati za gašenje prahom*.
19. SRPS Z.C2.140, *Prevozni aparati za gašenje požara, prevozni aparati za gašenje sa CO₂*.





CHARACTERIZATION AND POTENTIAL APPLICATION OF DEXTRAN-BASED BIOPOLYMER POWDER OBTAINED FROM HYDRANGEA MACROPHYLLA LIQUID ANTHOCYANINS EXTRACT BY ULTRASONIC EXTRACTION

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Abstract: Biopolymers have numerous advantages, such as their biodegradable, non-toxic, non-inflammatory and biocompatible properties, and, therefore, have a potential for various applications. In this paper dextran-based biopolymer powder, obtained from *Hydrangea macrophylla* liquid anthocyanins extract by ultrasonic extraction and simple precipitating method, was synthesized and characterized in order to determine its properties and potential application. Attenuated total reflectance Fourier-transform infrared spectroscopy (ATR FT-IR) analyses showed interactions between the components of the system. Optical microscopy suggested that the prepared biopowder formulation was small and somewhat uniform in size, and also showed its easy binding to the fingerprint residues. Additionally, the prepared biopolymer powder was used to visualize latent fingerprints left on different non-porous and semi-porous surfaces, i.e. flat wood, glass, plastic and rubber. The results demonstrated the potential of the obtained dextran-based biopowder to complement routinely applied systems in developing latent fingerprints.

Keywords: (bio)polymers, dextran, *Hydrangea macrophylla*, latent fingerprints, forensics

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INTRODUCTION

Dactyloscopy represents the investigation of ridges of the inner surfaces of the human hands and feet. Over the past 100 years, it has been one of the most reliable methods for identifying individuals, since the characteristics of the hand and foot prints are unique features of every person (Champod, Lennard, Margot, & Stoilovic, 2004; Mitrović, 1998). In forensic practice, the fingerprints have been used for that purpose for years (Bumbrah, Sharma, & Jasuja, 2016). Fingerprints often remain on surfaces of different objects, when the fingertip comes in contact with the substrate. There are three specific types of fingerprints that could be found in forensic practice: patent (transferred together with blood, oil, dirt, etc.), plastic (three-dimensional impressions) and latent (invisible) (Champod, Lennard, Margot, & Stoilovic, 2004; Lennard, 2007), and the latest are of particular interest from the forensic point of view. These traces are imperceptible and (when freshly deposited) consist of lipid secretions and sweat (containing water, minerals, organic compounds and other residuals) (Färber, Seul, Weisser, & Bohnert, 2010).

In general, three types of methods are used for visualization of latent fingerprints: optical, chemical and physical methods (Mozayani & Noziglia, 2006). These methods have been routinely employed during the last decades. However, the last two have many disadvantages regarding their operational application and potential hazards (Champod, Lennard, Margot, & Stoilovic, 2004), and the biggest concern is related to their toxicity and detrimental effect to the human health. Therefore, the researchers are resorting to some novel systems (or even methods) that could overcome the aforementioned problem and, additionally, satisfy cost-benefit demands. In this regard, scientists employ various (bio) polymers, whose utilization is still insufficiently known to the scientific public, especially in visualizing latent fingerprints (Milašinović, 2016; Vučković, Dimitrijević, & Milašinović, 2020; Vučković, Glodović, Radovanović, Janačković, & Milašinović, 2020). In our previous research, conjugates based on chitosan were used to develop and enhance latent fingerprints. The results demonstrated sufficient powder application efficiency, due to the small diameter of prepared micro particles and the specific mechanism of binding to the fingerprint residues. Additionally, these systems were non-toxic, easily applicable and the method itself was non-destructive (Vučković, Glodović, Radovanović, Janačković, & Milašinović, 2020). A new approach described by Costa et al. (2020), based on the electrodeposition of bilayer systems based on conjugated and fluorescent polymers was used for the development of latent fingerprints on stainless steel. The first layer of Polypyrrole or PEDOT was electrodeposited onto the surface containing a latent fingerprint and the second layer of a fluorescent Poly(2,2':5,2'-terthiophene) was electrodeposited onto the first layer. Such bilayer systems showed fluorescent properties and could be applied for the development of latent fingerprints on stainless steel, due to the high definition of images in both visible and UV light. This enabled the recognition of the ridge patterns and minutiae points. Additionally, researchers attempt to develop polymer nanoparticles with the aim to visualize latent fingerprints. A novel Poly(*p*-phenylene vinylene) (PPV) nanoparticles in aqueous colloidal solution were used to immerse substrates (with latent fingerprints). The initial study on the adhesive tapes showed that the developing solution was very effective in fluorescence development on both fresh and aged visible fingerprints. Further study on latent fingerprints demonstrated that PPV nanoparticles in colloidal solution have high sensitivity in developing fingerprints to give very clearly fluorescent patterns (Chen, Ma, Chen, & Fan, 2017). However, all these systems should be further examined.

This paper deals with dextran-based biopolymer powder, obtained from *Hydrangea macrophylla* liquid total anthocyanins extract by ultrasonic extraction and simple precipitating method, synthesized and characterized with the aim to determine its properties and potential application. Dextran is a



complex (yet cheap and non-toxic water soluble), branched and hydrophilic polysaccharide composed of anhydroglucose rings, obtained from bacteria (particularly from *Lactobacillus*, *Leuconostoc* and *Streptococcus* species), widely used in medicine and pharmacy, as a component of drug-delivery (nanoparticle) systems, material that reduces blood viscosity and prevents the formation of blood clots, etc. (Wang, Dijkstra, & Karperien, 2016; Wasiak, et al., 2016). Additionally, dextran-based biopolymer powder dyed with anthocyanin extract was used to visualize latent fingerprints left on different non-porous and semi-porous surfaces, i.e. flat wood, glass, plastic and rubber surface. The results demonstrated the capability of prepared dextran-based biopowder in visualizing latent fingerprints, as well as the potential to supplement some of the routinely applied physical methods.

MATERIALS AND METHODS

Materials

Dextran powder was purchased from Sigma-Aldrich (USA) and methanol from Centrohem (Serbia). Distilled water was used for the preparation of extraction medium. The medium was prepared by dissolving the sufficient amount of citric acid in distilled water, in order to obtain the solution with concentration of 0.0033M. The extraction medium was used for total anthocyanins extraction from *Hydrangea macrophylla* flowers and afterwards, the obtained total anthocyanins extract was used to dissolve dextran powder. Besides *Hydrangea macrophylla*, all materials were used without further treatment or purification.

Preparation of Dextran-based Biopowder

The extraction medium (pH ~ 3.84) was prepared by applying the experimental procedures described by Adjé et al. (2010). This medium was used for total anthocyanins extraction from flowers of *Hydrangea macrophylla*. Briefly, 3.5000 g of chopped *Hydrangea macrophylla* flowers were added to 350 ml of extraction medium in a round-bottom flask, then transferred to an ultrasonic bath (VabSonic, Serbia; 20 kHz operating frequency and with max. input power of 150 W) for one hour, and at room temperature. Afterwards, the suspension was filtered using a metal sieve and filter paper, respectively, and the filtrate (i.e. liquid total anthocyanins extract) was kept at 4 °C until further use. The obtained extract was used to achieve the different colours of the desired biopowder, as well for better enhancement through complexing with fingerprint sweat and lipid residues, since it was demonstrated that anthocyanins have indicator chemical properties (i.e. colour change in accordance with the change in pH value) (Chandrasekhar, Madhusudhan, & Raghavarao, 2012; Vučković, Dimitrijević, & Milašinović, 2020).

Furthermore, the dextran-based biopowder was prepared by simple precipitating method. Briefly, 1.0000 g of dextran powder was dissolved in 100 ml of prepared total anthocyanins extract. The mixture was stirred at low speed (~300 rpm) and at room temperature using a magnetic stirrer. After homogenization, methanol in 1:3 v/v ratio (mixture:methanol) was added, in order to precipitate polymer from the mixture, and the suspension was filtered using a filter paper. After air-drying at room temperature for ~24h, dry precipitate was kept in the drying oven at 37 °C for additional few hours. Finally, the obtained dry formulation was ground with pestle and mortar to fine powder and kept in desiccator until further application.



CHARACTERIZATION OF THE PREPARED BIOPOWDER FORMULATION

ATR FT-IR Analyses

The ATR-FTIR analyses were performed using Nicolet iS10 FTIR spectrometer (Thermo Scientific, USA), with a diamond attenuated total reflectance (ATR) smart accessory in the range of 4000-400 cm^{-1} at a resolution of 2 cm^{-1} and at 25 °C.

Optical microscopy

The obtained biopowder formulation and BVDA magnetic silver powder (control powder; BVDA, the Netherlands) were recorded with optical microscope Leica FS C comparison microscope, equipped with the Leica IM Matrox Meteor II Driver Software Module. Powders were recorded in dry state, with and without backlight. Prior to imaging under the microscope, latent fingerprints left on microscope glass slides were developed using prepared biopowder and the control powder.

Development of latent fingerprints

In order to determine the capability and performances of dextran-based biopowder, using only a thumb of the right hand, one male donor deposited sebaceous/oily fingerprints onto different non-porous and semi-porous surfaces, i.e. flat wood, glass, plastic and rubber surface. The prints were then left under laboratory (humid) conditions for a short period of time. That period allowed the traces to dry and reduce the residues, by the time the latent fingerprints were developed with synthesized biopowder and the control powder, using BVDA Squirrel hair brush (BVDA, The Netherlands) (International Fingerprint Research Group (IFRG), 2014).

Optical microscopy was used in order to approximate the size and uniformity of dextran-based biopowder, as well to estimate their performances in developing latent finger-marks on glass surface (on which the best results were obtained). Therefore, sebaceous fingerprints randomly deposited onto the glass microscopic slides (properly labelled), were left for a few minutes and then the prepared biopowder formulation and BVDA magnetic silver powder were used for their visualization (International Fingerprint Research Group (IFRG), 2014).

RESULTS AND DISCUSSION

The efficiency of obtained dextran-based biopowder to visualize latent fingerprints was tested on prints left onto different substrates: flat wood, glass, plastic and rubber surface and BVDA magnetic silver powder was then used for comparison (control powder). Both dextran-based biopowder and control powder were applied on multiple numbers of fingerprints on each substrate, to determine the capability and reproducibility of their application, i.e. to achieve the desired results. The best results were obtained with the sebaceous fingerprints deposited onto the glass surface and developed with



dextran-based biopowder. On the other hand, the development of fingerprints on rubber surface was poor, since that surface contains many bulges and indentations, thus disabling the binding of the prepared biopowder to the fingerprint residues. The results obtained on flat wood surface were somewhat satisfying, but non-uniform distribution of particles might have influenced the binding to the fingerprint residues, thus showing weak contrast. Finally, fingerprints enhanced on plastic surface showed better results than those on rubber and wood surface, due to the higher intensity and better quality of the obtained fingerprint images.

Figure 1 shows sebaceous fingerprints of one donor, developed with the prepared biopowder and the control powder on four different substrates, i.e. flat wood, glass, plastic and rubber surface. The prints were then photographed under visible light with a 12 MP camera (aperture $f/2.2$, pixel size $1.22\ \mu\text{m}$) using black background surface in order to achieve the satisfying contrast.

When comparing fingerprints developed with dextran-based biopowder and BVDA magnetic silver (control) powder on different surfaces, it is evident that the best results were obtained on glass surface, with visible and clear fingerprint image and some minutiae points as well (Figure 1d). Dextran-based biopowder showed poor results on flat wood and rubber surface, due to many bulges and non-uniform distribution of particles (Figure 1a, b). On the other hand, by comparing dextran-based biopowder with control powder in visualizing latent fingerprints, it is obvious that only the development of fingerprint with dextran-based biopowder on glass surface (Figure 1d)) was approximately good as those visualized with BVDA magnetic silver powder.

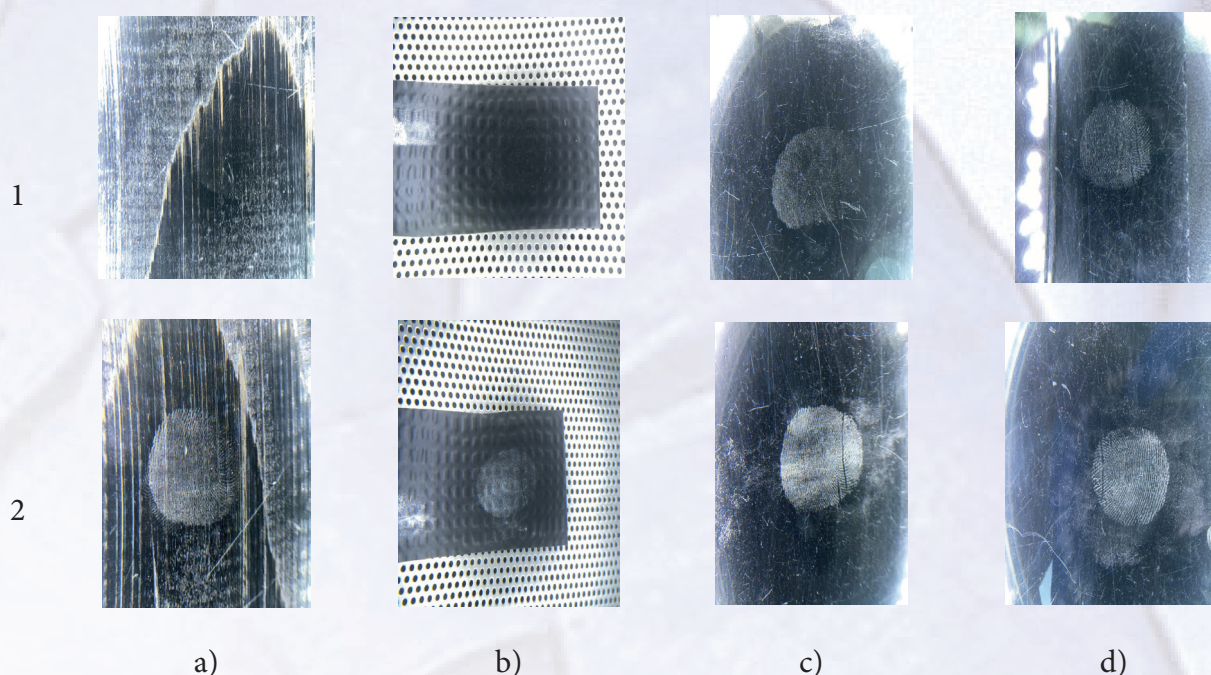


Figure 1. Sebaceous fingerprints developed on: a) flat wood, b) rubber, c) plastic and d) glass surface, using the following powders: 1) dextran-based powder and 2) BVDA Magnetic silver powder, recorded under visible light using black background surface for appropriate contrast.

ATR FT-IR Analyses

ATR FT-IR analyses were performed in order to evaluate interactions between the components of the prepared system. Figure 2 shows the spectra of pure dextran, the initial dextran solution, the total anthocyanins extract and the prepared biopowder formulation. All spectra in Figure 2 contain some characteristic bands: 3700-3000 cm^{-1} due to the O-H stretching and 2360 cm^{-1} due to the stretching of C-H (Carp, et al., 2010; Mehta, Rucha, Bhatt, & Upadhyay, 2006; Mitić, Cakić, & Nikolić, 2010). The band at 1154 cm^{-1} at spectra of pure dextran, initial dextran solution and dextran-based biopowder (Figure 2a, c, d) can be assigned to the stretching vibrations of the C-O-C bond and glycosides bridge, while the band at 1017 cm^{-1} can be associated with the stretching of C-O-H (Chiu, Hsiue, & Chen, 2004; Mehta, Rucha, Bhatt, & Upadhyay, 2006; Mitić, Cakić, & Nikolić, 2010). The weak band at 1110 cm^{-1} can be ascribed to the vibration of the C-O bond at the C4 position of the glucopyranose units (Mitić, Cakić, & Nikolić, 2010). The peaks at 905, 841, and 758 cm^{-1} can be assigned to the α -glucopyranose ring deformation modes (Cakić, Nikolić, Ilić, & Stanković, 2005; Carp, et al., 2010). Nevertheless, small shoulder peak at 1077 cm^{-1} may be due to the complex vibrations involving the stretching of the C6-O6 bond with the participation of deformational vibrations of the C4-C5 bond (Guerrero, Kerry, & de la Caba, 2014; Nikolić, Cakić, Mitić, & Ilić, 2008). However, according to Mitić et al. (2010), the peaks at 1041 and 1017 cm^{-1} present in spectra a, c and d at Figure 2 are related to the crystalline and amorphous phases respectively, and can be responsible for more and less ordered structures of dextran chains.

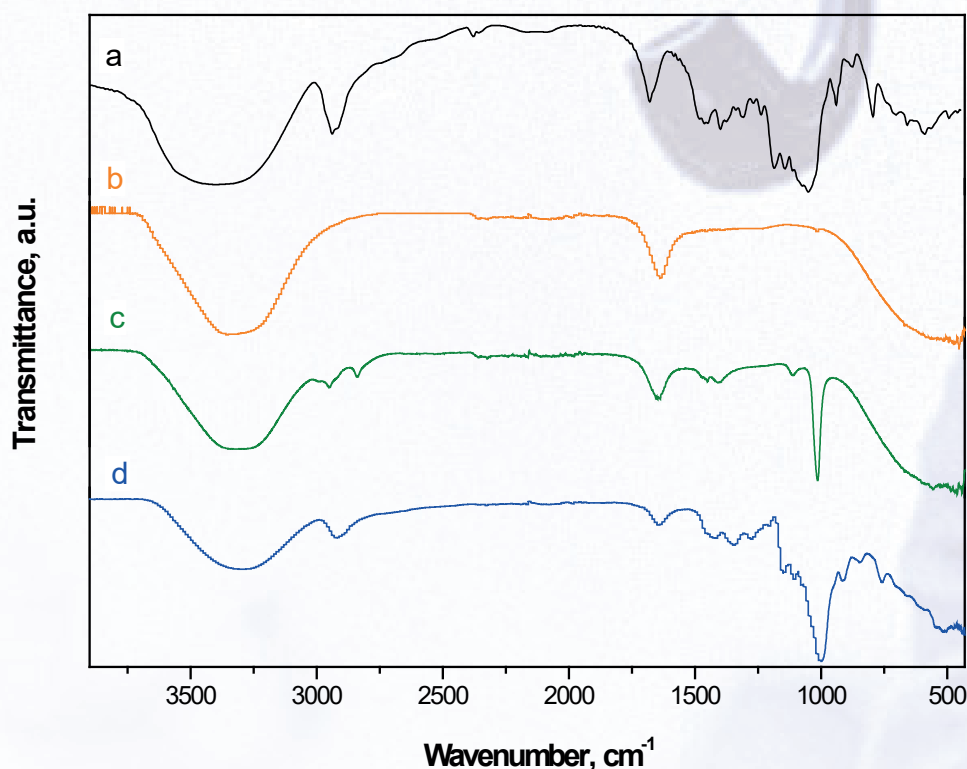


Figure 2. FT-IR spectra: a) pure dextran; b) total anthocyanins extract, c) initial dextran solution and d) dextran-based biopowder.

On the other hand, a decrease in intensity of the peak at 1041 cm^{-1} at the spectra of prepared biopowder (Figure 2d), when compared to the spectra of pure dextran (Figure 2a), can be associated with complexing with the compounds (polyphenols, anthocyanins, etc.) present in the total anthocyanins extract. Additionally, a slight peak shifting (and increase in peak intensity) from 1017 to 1000 cm^{-1} may be related to the interactions between dextran chains and the compounds present in the medium.

Optical microscopy

Figure 3 shows the images of used powders taken by Leica FS C Comparison Macroscope, equipped with the Leica IM Matrox Meteor II Driver Software Module, using magnification $\times 75$ and dark-field contrast technique (backlighting). Since the best results were obtained on non-porous (glass) surface, the same surface was used for further analyses. Powders were deposited onto microscopic glass slides in the form of a fine (thinner) and amassed (thicker) layer, in order to compare the uniformity and size of the particles.

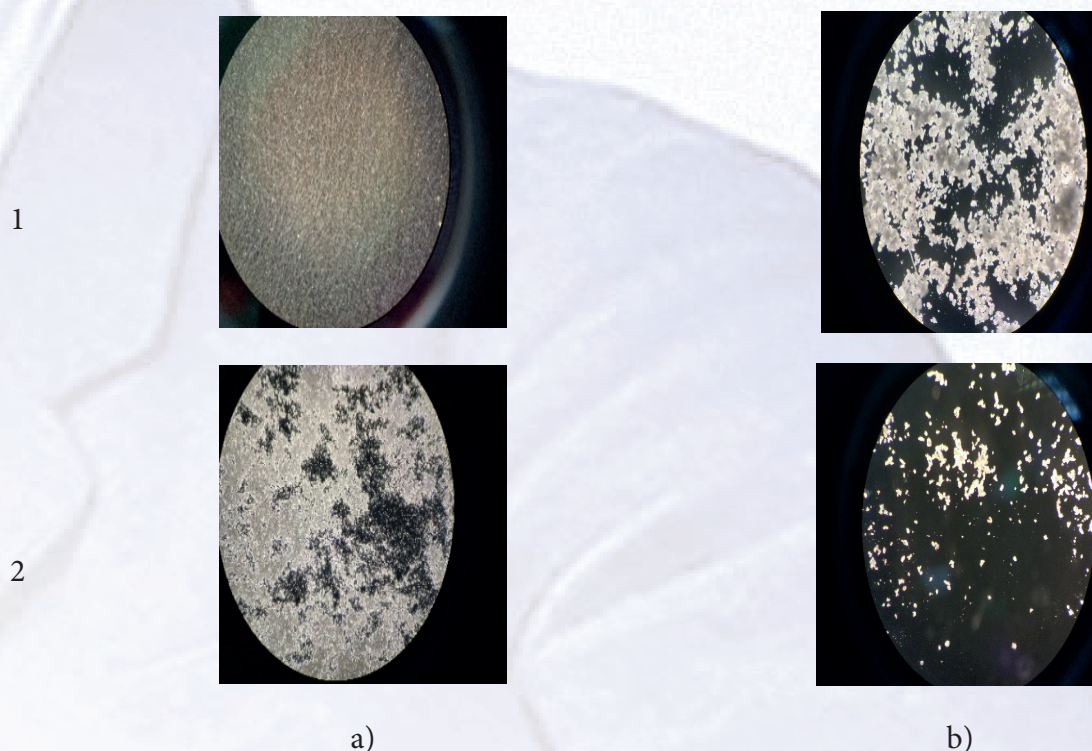


Figure 3. Microscopic images of used powders deposited onto microscopic slides and recorded with optical microscope (magnification $\times 75$, using dark-field contrast technique): a) BVDA magnetic silver powder and b) dextran-based biopowder. Numbers 1 and 2 denote images with powders in form of amassed (thicker) and fine (thinner) layer, respectively.

When comparing both thick and thin layers, it is evident that BVDA magnetic silver powder (Figure 3a), 1) and 2) contain more uniform and smaller particles than prepared biopowder formulation. Prepared dextran-based biopowder (Figure 3, 1b) and 2b)) possessed many irregular and non-uniform particles when compared to control powder, which can be related to weak binding and contrast when dextran-based biopowder is applied. When observing thinner layers, these characteristics are even more obvious (Figure 3, 2).

Subsequently, in order to confirm the previous presumptions, dextran-based biopowder and BVDA magnetic silver powder were used to develop latent fingerprint on glass surface. Therefore, sebaceous fingerprints randomly deposited onto labelled glass microscopic slides using technical scale were left for a few minutes and then the prepared biopowder formulation and the control powder were used for their visualization, using BVDA Squirrel hair brush. Afterwards, the samples of the developed fingerprints were recorded under the optical microscope (magnification $\times 7.5$), using dark-field (Figure 4, 1) and bright-field (Figure 4, 2) contrast techniques.

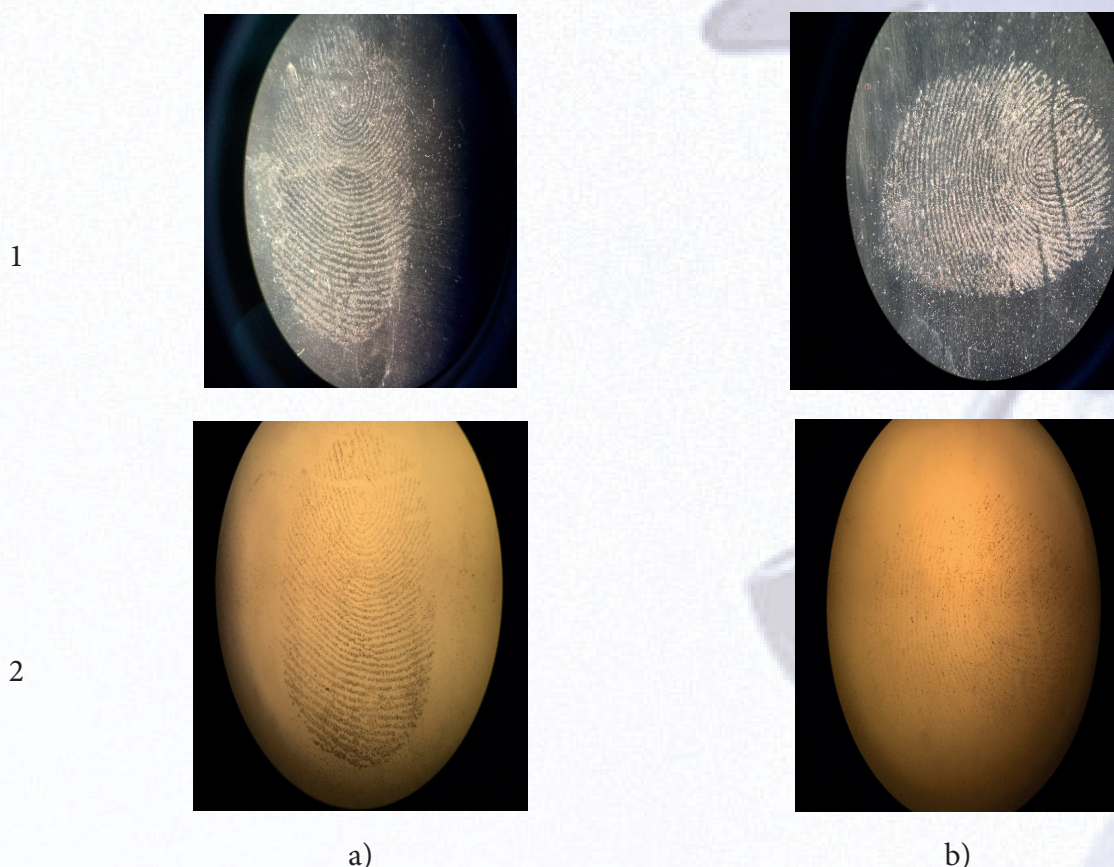


Figure 4. Sebaceous fingerprints deposited onto glass microscopic slides, left for a few minutes and developed using: a) BVDA magnetic silver powder and b) dextran-based biopowder, recorded with optical microscope (magnification $\times 7.5$), using: 1) dark-field and 2) bright-field contrast techniques.

When compared to the BVDA magnetic silver powder, dextran-based biopowder showed even better results in terms of visualizing latent fingerprints, by developing the papillary lines with their continuous flow and making perceptible some minutiae as well. When observing the fingerprint developed with control powder, the obtained fingerprint pattern was somewhat blurred, but with visible papillary lines and some minutiae points. Additionally, when applied with a brush, the prepared biopowder formulation bound with fingerprint residues and did not remain in the interpapillary space. Based on the results, very promising visualization of sebaceous fingerprints was achieved using glass surface as substrate, and with cheap and non-toxic dextran-based biopowder system.

CONCLUSIONS

In this paper, dextran-based biopolymer powder obtained by ultrasonic extraction and simple precipitating method was obtained and characterized in order to determine its potential application in the development of latent fingerprints. Dextran-based biopowder dyed with total anthocyanins extract was used due to its availability and low price, water solubility and non-toxic properties. Based on the obtained results, the prepared biopowder formulation showed optimal properties, with satisfying binding to the fingerprint residues and their clear visualization on glass surface, and the system is less harmful and satisfies the cost-benefit requirements. However, the obtained results did not meet the requirements regarding colour appearance, since the colour of the applied biopowder was not appropriate to potentially visualize fingerprints on bright/white surfaces. On the other hand, as many commercial dusting formulations, this biopowder is easily handled and applicable, requiring no prior knowledge and the method itself is non-destructive, avoiding irreversible loss of traces. Finally, additional researches could comprise other (bio)polymers or addition of bio-based dyes and indicators, in order to expand the application of these systems on other surfaces and potentially complement some of the routinely applied physical methods in developing latent fingerprints.

REFERENCES

1. Adjé, F., Lozano, Y. F., Lozano, P., Adima, A., Chemat, F., & Gaydou, E. M. (2010). Optimization of anthocyanin, flavonol and phenolic acid extractions from *Delonix regia* tree flowers using ultrasound-assisted water extraction. *Industrial Crops and Products*, 32, 439–444.
2. Bumbrah, G. S., Sharma, R., & Jasuja, O. (2016). Emerging latent fingerprint technologies: a review. *Research and Reports in Forensic Medical Science*, 6, 39-50.
3. Cakić, M., Nikolić, G., Ilić, L., & Stanković, S. (2005). Synthesis and FTIR Characterization of Some Dextran Sulphates. *CI&CEQ*, 1(2), 1-5.
4. Carp, O., Patron, L., Culita, D. C., Budrugaec, P., Feder, M., & Diamandescu, L. (2010). Thermal analysis of two types of dextran-coated magnetite. *Journal of Thermal Analysis and Calorimetry*, 101(1), 181–187.
5. Champod, C., Lennard, C. J., Margot, P., & Stoilovic, M. (2004). *Fingerprints and Other Ridge Skin Impressions* (2nd ed.). Boca Raton, Florida: CRC Press, Taylor & Francis.
6. Chandrasekhar, J., Madhusudhan, M. C., & Raghavarao, K. S. (2012). Extraction of anthocyanins from red cabbage and purification using adsorption. *Food and Bioprocess Technology*, 90(4), 615–623.
7. Chen, H., Ma, R.-L., Chen, Y., & Fan, L.-J. (2017). Fluorescence Development of Latent Fingerprint with Conjugated Polymer Nanoparticles in Aqueous Colloidal Solution. *ACS Applied Materials & Interfaces*, 9(5), 4908–4915.
8. Chiu, H.-C., Hsiue, T., & Chen, W.-Y. (2004). FTIR-ATR measurements of the ionization extent of acrylic acid within copolymerized methacrylated dextran/acrylic acid networks and its relation with pH/salt concentration-induced equilibrium swelling. *Polymer*, 45(5), 1627-1636.
9. Costa, C. V., Gama, L. I. L. M., Damasceno, N. O., Assis, A. M. L., Soares, W. M. G., Silva, R. C., Tonholo, J., & Ribeiro, A. S. (2020). Bilayer systems based on conjugated polymers for fluorescence development of latent fingerprints on stainless steel. *Synthetic Metals*, 262, 116347.



10. Färber, D., Seul, A., Weisser, H., & Bohnert, M. (2010). Recovery of latent fingerprints and DNA on human skin. *Journal of Forensic Sciences*, 55(6), 1457-1461.
11. Guerrero, P., Kerry, J. P., & de la Caba, K. (2014). FTIR characterization of protein-polysaccharide interactions in extruded blends. *Carbohydrate Polymers*, 111, 598-605.
12. International Fingerprint Research Group (IFRG). (2014). Guidelines for the Assessment of Fingerprint Detection Techniques. Accessed on July 10, 2021. <https://ifrg.unil.ch/wp-content/uploads/2014/06/IFRG-Research-Guidelines-v1-Jan-2014.pdf>.
13. Lennard, C. (2007). Fingerprint detection: current capabilities. *Australian Journal of Forensic Sciences*, 39(2), 55-71.
14. Mehta, R. V., Rucha, D., Bhatt, P., & Upadhyay, R. V. (2006). Synthesis and characterization of certain nanomagnetic particles coated with citrate and dextran molecules. *Indian Journal of Pure and Applied Physics*, 44(7), 537-542.
15. Milašinović, N. (2016). Polymers in Criminalistics: Latent Fingerprint Detection and Enhancement – From Idea to Practical Application. *NBP – Journal of Criminalistics and Law*, 133-148.
16. Mitić, Ž., Cakić, M., & Nikolić, G. (2010). Fourier-Transform IR spectroscopic investigations of Cobalt(II)-dextran complexes by using D2O isotopic exchange. *Spectroscopy*, 24, 269-275.
17. Mitrović, V. (1998). *Kriminalistička identifikacija: teorija i praksa*. Belgrade.
18. Mozayani, A., & Noziglia, C. (2006). *The Forensic Laboratory Handbook Procedures and Practice*. Totowa, New Jersey: Humana press.
19. Nikolić, G. S., Cakić, M., Mitić, Ž., & Ilić, L. (2008). Deconvoluted Fourier-transform LNT-IR study of coordination copper(II) ion compounds with dextran derivatives. *Russian Journal of Coordination Chemistry*, 34(5), 322-328.
20. Vučković, N., Dimitrijević, S., & Milašinović, N. (2020). Visualization of Latent Fingerprints Using Dextran-based Micropowders Obtained From Anthocyanin Solution. *Turkish Journal of Forensic Sciences and Crime Studies*, 2(2), 3-53.
21. Vučković, N., Glodović, N., Radovanović, Ž., Janačković, Đ., & Milašinović, N. (2020). A novel chitosan/tripolyphosphate/L-lysine conjugates for latent fingerprints detection and enhancement. *Journal of Forensic Sciences*, 66(1), 149-160. doi:10.1111/1556-4029.14569.
22. Wang, R., Dijkstra, P. J., & Karperien, M. (2016). Dextran. In N. M. Neves, & R. I. Reis (Eds.), *Biomaterials from Nature for Advanced Devices and Therapies* (pp. 307-316). New Jersey: John Wiley & Sons, Inc.
23. Wasiak, I., Kulikowska, A., Janczewska, M., Michalak, M., Cymerman, I. A., Nagalski, A., Kallinger, P., Szymanski, W. W., & Ciach, T. (2016). Dextran Nanoparticle Synthesis and Properties. *PLOS ONE*, 11(1), 1-17.



TOPIC VIII

EFFECTS OF PHYSICAL ACTIVITY ON ANTHROPOLOGICAL STATUS IN SECURITY AGENCY PERSONNEL





POLICE STUDENT NUTRITIONAL BEHAVIORS

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Abstract: *Introduction.* A career in law enforcement is physically and mentally demanding, contributing to increased health risks and occupational stress. Physical activity and healthy eating are beneficial for maintaining a healthy weight and preventing many chronic health conditions (e.g. heart disease, cancer). While most police students must pass a fitness exam to enter training and again before becoming sworn police officers, it is unclear whether academy training prepares officers to develop healthy dietary habits for their careers. This study aimed to investigate typical dietary habits of police students at the University of Criminal Investigation and Police Studies, Belgrade, Serbia, and determine ways to improve officer education in healthy eating. *Methods.* A sample of police students ($n = 137$, 36.5% female) of average age 20.2 years participated in a survey to evaluate their typical dietary habits. Descriptive statistics were used to describe their nutritional behaviors. *Results.* Overall, the results suggest that most students make good nutrition decisions. The majority (78.1%) of students reported using alcohol responsibly, and 74.45% drank water between meals, though only 6.6% of students ate enough fruit every day. Almost all (98.5%) understood the importance of diet, but only 11.7% received nutrition-related information from a school source. *Conclusion.* Results suggest that police student training should include nutritional education and physical preparation for holistic police officer development. This approach could help prevent poor health outcomes for police officers.

Keywords: police education; dietary habits; nutrition; Serbia

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INTRODUCTION

Police officers are first responders who play a critical public role, and their work is inherently stressful (Violanti et al., 2017). It is well documented that stress can be mitigated through healthful behaviors such as participating in regular exercise and eating a nutritious diet (Habersaat et al., 2015). Most officers must pass a physical fitness test to be eligible to begin formal police academy training, and diet and exercise play a significant role in their baseline fitness. A passing score on the physical fitness test is required to become a sworn officer. Afterward, many police agencies incorporate annual physical fitness tests to motivate officers to remain physically ready for police duty. While this practice may have an acute positive impact on officers' behavior, it may not have long-term power to help officers maintain or improve physical fitness.

Once an officer enters the police force, physical fitness and physical activity typically decrease. At the same time, body fatness can increase over time spent in service (Ćopić et al., 2020; Kukic et al., 2019; Lagestad et al., 2014; Lagestad & van den Tillaar, 2014), resulting in a population that may be less prepared to respond to an incident or altercation (Orr et al., 2018). Combining nutrition intervention with exercise was found to be highly effective in reducing body fatness of police officers (Demling & DeSanti, 2000; Kukić & Čvorović, 2019). Although many studies that implement healthy dietary and exercise behaviors have shown beneficial results that improve and maintain physical fitness, exercise and nutrition education have not been considered as essential parts of police training.

It is especially concerning that healthy nutritional behavior is typically absent from police academy training and continuing education even though it is a primary factor for optimal fitness and health (Bytowski, 2018). Poor nutritional choices can result in detrimental body composition changes and fundamental nutrient imbalances, including lacking minerals or vitamins, excess body fat, and decreased skeletal muscle mass (Kukic et al., 2018). These changes could negatively impact officers' physical performance, leading to decreased readiness for duty as fat mass increases, metabolism decreases, or skeletal muscle mass is insufficiently developed (Kukić & Dopsaj, 2016). Officers' fitness for duty is paramount to their ability to protect and serve, but their education on health-related topics is lacking.

Despite a lack of formal education on health-related topics, success in policing jobs also depends on a combination of knowledge from various fields such as forensics, law, technology, cyber security, and interrogation. Therefore, the curriculum for the education of police education students needs to include all of these areas, requiring the distribution of classes in specific proportions (Koropanovski et al., 2020). The distribution of course content varies within police academies, and often, the designated number of classes is not sufficient for the breadth of material that needs to be studied. Time and resource constraints dictate that some areas of study may be prioritized over others. Indeed, overall police officer job performance only occasionally depends on physical performance (Anderson, 2001; Anderson & Plecas, 2000), encouraging police academies or universities to consider a passing score on a physical fitness test as satisfactory for this area of job performance. Accordingly, applied classes are usually planned as physical training (PT) sessions rather than health education classes. Performing PT is not a substitute for learning necessary information on how to maintain healthy lifestyle habits, including nutrition education. The consequences of this practice are evident in current research that describes an overweight police officer population that lacks tools to improve their well-being (Ramey et al., 2012).

Police academy training must evolve to address the myriad factors that affect officers' ability to perform (Blumberg et al., 2019). This study aimed to investigate typical dietary habits of police students at the University of Criminal Investigation and Police Studies, Belgrade, Serbia, and determine ways



to improve officer education in healthy eating. Current physical education curriculum does teach students how to implement exercise in their lifestyle after they become sworn officers (Koropanovski et al., 2020; Kukić et al., 2019), but it does not provide nutrition information. For instance, the weekly schedule of specialized physical education includes developing self-defense tactics, use of force skills, and strength and conditioning. A considerable amount of time is spent teaching students the practical implications of strength and conditioning, but not how to do it independently. Moreover, students spend some strength and conditioning classes in a classroom for the lectures on exercise. As part of their specialized physical education exam, they need to pass the theoretical part as well. Nutrition and healthy living classes may help improve officer well-being and foster skills that combat stress and burnout after students complete their studies and become sworn officers. The purpose of this paper is to describe current police academy nutrition behaviors.

METHODS

Participants

One hundred thirty-seven adults (87 men and 50 women) enrolled in a university-level police academy volunteered for the study. The average age of the participants was 20.2 ± 3.0 yrs. ($F = 20.3 \pm 4.1$ yrs., $M = 21.2 \pm 1.0$ yrs.). Participants' average height was 178.1 ± 7.7 cm ($F = 170.2 \pm 7.7$ cm, $M = 182.6 \pm 7.8$ cm). On average the participants had a body mass of 73.7 ± 11.1 kg ($F = 62.5 \pm 11.5$ kg, $M = 80.1 \pm 10.9$ kg) which corresponds to a BMI of 23.1 ± 2.2 kg/m² ($F = 21.6 \pm 2.3$ kg/m², $M = 24.0 \pm 2.1$ kg/m²). Study participants were required to pass a physical fitness exam before entering the academy. Only students from the first year of studies ($n = 24$) were housed on campus during the week. The study aim was explained at the beginning of the questionnaire, while the first question was "Do you consent to participate in this study?". Only respondents whose replies were "Yes" were included in the analysis. The study was approved by the Ethical Board of the University of Criminal Investigation and Police Studies, Belgrade, Serbia.

Measures

Students' dietary habits were assessed using a dietary questionnaire on food habits, eating behaviour, and nutritional knowledge (Turconi et al., 2003). This instrument was shown to have moderate reliability (Cronbach alpha = 0.55-0.75) and very good temporal stability (Turconi et al., 2003). More importantly, it is low in cost, easy to administer, and could be appropriately modified to fit the needs of the investigated population. The questionnaire was translated to Serbian language and prepared in an electronic version. Students completed the questionnaire on a computer in the University's computer lab with the researcher's supervision to ensure that the students understood each question. If something was not clear to students, they could ask the researcher for clarification.



Analyses

Statistical procedures were conducted using Statistical Package for Social Sciences (SPSS, 20.0, IBM, US). The frequency analyses were conducted for breakfast, fruit intake, deserts, alcohol to calculate the ratio of students who replied to eating and drinking habits with “Always,” “Often,” “Sometimes,” and “Never.” A frequency analysis was also conducted for nutritional knowledge, where the ratio of students was calculated for how much they know (i.e., “A lot,” “Enough,” “Little,” “Basic things”) and what were the primary sources of information (i.e., school, TV shows, scientific literature).

RESULTS

Descriptive statistics of key variables are shown in Table 1. Participants’ nutritional status was determined using BMI calculations. One hundred and ten students were of normal weight ($F = 46$ [92%], $M = 64$ [74%]), while 27 students were classified as overweight ($F = 4$ [8%], $M = 23$ [26%]). No students were considered underweight, and no students had a BMI great than 30 (class I obesity). Men were more likely to be classified as overweight, but these findings should bear the caveat that muscular individuals may be classified as overweight/obese due to the weight of their muscles (Kukić et al., 2018). Table 2 shows the absolute frequency of students’ responses regarding nutritional habits. No student reported typically not taking breakfast; fewer students “Always” consume fruits, and most students do not typically consume alcohol. The relative frequency of responses showed that female and male students were mostly similar in their habits (Figure 1). The highest difference occurred in fruit consumption, where a larger proportion of males reported to “Never” consume fruit.

Table 1. *Frequency of key nutritional variables.*

| Frequency | Breakfast Frequency | | Fruit Intake | | Dessert Consumption | | Alcohol | | Water Consumption | | Milk and Yogurt Consumption | |
|-----------------------|---------------------|----|--------------|----|---------------------|----|---------|----|-------------------|----|-----------------------------|----|
| | M | F | M | F | M | F | M | F | M | F | M | F |
| M = 87 F = 50 | | | | | | | | | | | | |
| Always (Every Day) | 52 | 30 | 6 | 3 | 4 | 2 | 1 | 0 | 58 | 31 | 28 | 11 |
| Often | 26 | 18 | 25 | 16 | 19 | 6 | 2 | 0 | 22 | 12 | 33 | 18 |
| Sometimes | 9 | 2 | 52 | 23 | 52 | 31 | 16 | 11 | 6 | 6 | 23 | 19 |
| Never (Not Typically) | 0 | 0 | 4 | 8 | 12 | 11 | 68 | 39 | 1 | 1 | 3 | 2 |



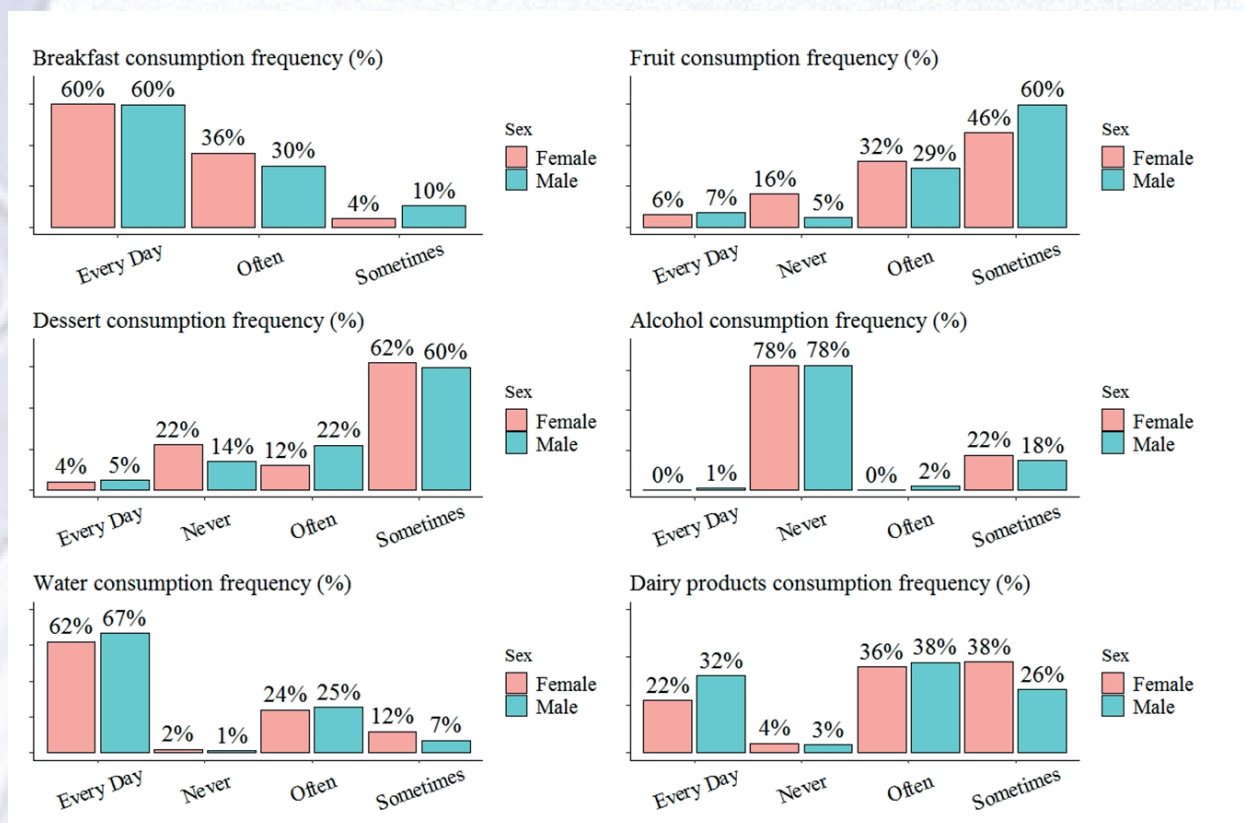


Figure 1. Relative frequency (%) of responses regarding nutrition and fluid intake for both sexes.

Students' comfort with nutritional topics varied, but most (%) indicated that they knew "Enough" or "A lot" about nutrition. Table 2 highlights the students' self-rated nutrition knowledge and information sources. Almost all (98.5%) understood the importance of eating a healthy diet.

Table 2.

| Frequency | Nutrition Knowledge | | Frequency | Nutrition Source | |
|------------------|---------------------|----|---------------------------------|------------------|----|
| M = 87 F = 50 | M | F | M = 87 F = 50 | M | F |
| A lot | 21 | 9 | I learned at school. | 12 | 4 |
| Enough | 37 | 20 | From the Internet or TV shows. | 45 | 17 |
| Little | 6 | 3 | I do not think about nutrition. | 2 | 3 |
| Basic Things | 23 | 18 | From home. | 25 | 22 |
| | | | Scientific literature. | 3 | 4 |



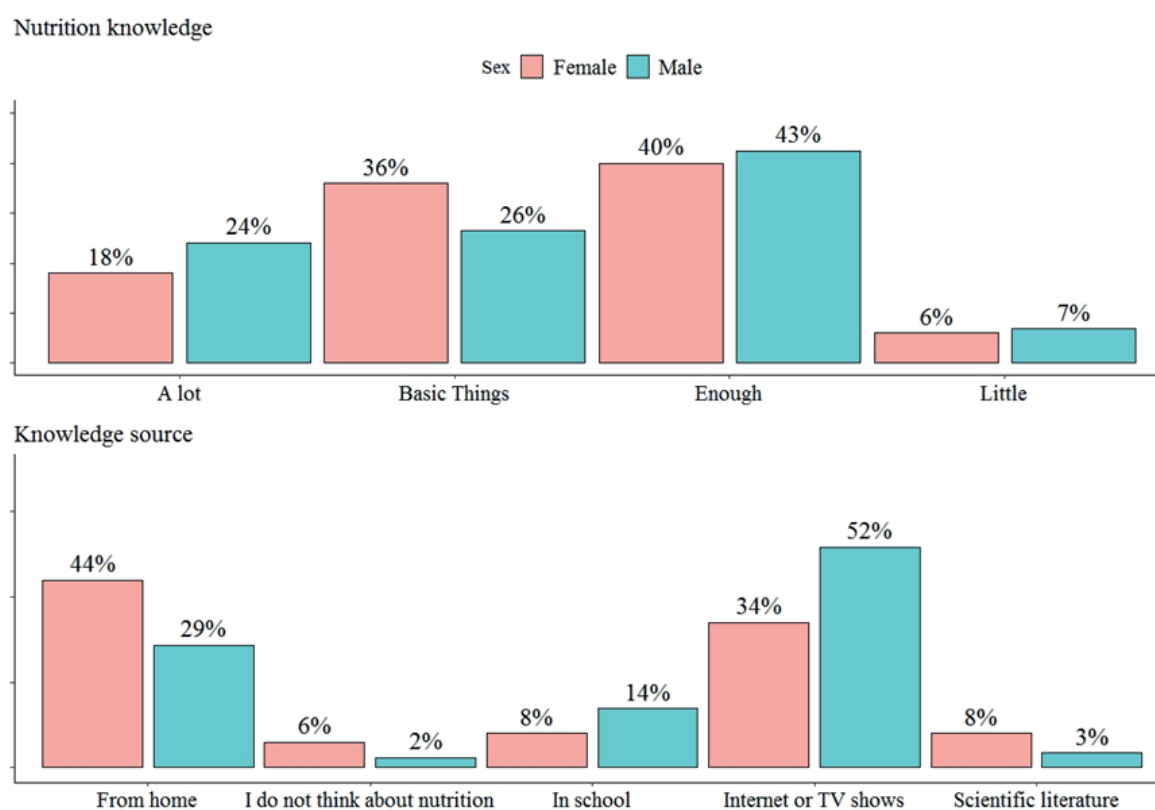


Figure 2. Relative frequency (%) of responses regarding the perception of nutrition knowledge and sources of nutrition knowledge.

DISCUSSION

This study investigated the nutritional habits, nutrition knowledge, and sources of knowledge of police students. The main findings suggest similar nutritional and fluid intake habits of male and female students. Students reported reasonably good habits, except for fruit intake, where only a tiny proportion of students reported consuming fruit “Every day.” Even when it comes to “Often,” only 30% of students report consuming fruits often (i.e. three to four times per week). Although many students reported having breakfast regularly, about 30-36% reported eating breakfast often, while few students eat breakfast sometimes. A similar trend could be observed in water consumption as well. About 23% of students reported knowing “Little” or “Basic things” about nutrition, while approximately 7% do not think about nutrition at all. Females mostly knew about nutrition from home, while males used the Internet and TV shows. However, more importantly, a tiny proportion of students used scientific literature to source information on nutrition. Considering this, the space for improvement in nutritional habits exists. A relatively small quantity of educational classes could improve nutrition knowledge, serving as a good foundation for conscious changes in students’ behavior.

Police officers play a critical and public role that requires physical readiness; however, police academy education insufficiently prepares officers to maintain or improve their physical fitness. Current research calls for police academy education reform (Blumberg et al., 2019). While this is a step in the



right direction, it is critical to describe police academy students' comfort with health-related topics, including nutrition. It is dually essential to document students' nutritional habits to increase the efficacy of targeted educational interventions. It is well documented that nutritional habits and behaviors positively affect officers' overall health and well-being (Bytomski, 2018). Thus, examining police academy students' self-reported dietary habits begins to elucidate the needs of this particular population.

The police students enrolled in a university-level police academy reported encouraging dietary habits. Unfortunately, these habits have not been widely reported in police officer populations. For example, the majority of students reported never drinking alcohol. However, numerous studies describe problem drinking in police populations (Can & Hendy, 2014; He et al., 2005; Ménard & Arter, 2014). The majority of our study population was classified as normal weight, but it is documented that police officer fatness increases over time (Kukić et al., 2020; Kukić et al., 2019; Vuković et al., 2020). These findings suggest a discrepancy between the nutritional habits of police students as compared to habits of police officers. The stressful nature of police work is well documented (Acquadro et al., 2015; McCreary et al., 2017; Violanti et al., 2017). Stress coping strategies may include unhealthy dietary behaviors such as over-eating, binge drinking, and other habits that may lead to weight gain (Can & Hendy, 2014). Academy-based nutritional training that teaches officers the importance of maintaining a healthy diet and implementing a healthy diet in their lifestyle may help mediate negative dietary behaviors that lead to overweight officers.

Few students reported scientific literature as a primary source of nutrition information. Most students reported learning nutrition information from their parents or the Internet or TV shows. Similarly, Quaidoo et al. (2018) reported online resources as the primary source of nutrition information in young adults in Accra. On the contrary, several studies report community-based initiatives as primary sources of nutritional information in college-aged adults (Chalmuri et al., 2018; Colozza, 2021). This represents the space where adding institutional education with carefully chosen information could be of great value as university professors would choose only viable information they would update regularly.

Study limitations include the cross-sectional design and use of a self-reported dietary recall measure. As a cross-sectional study, we only studied a snapshot of students' dietary habits. Implications for future research include longitudinal design that follows police academy students as they transition into their career as police officers noting changes in dietary habits over time. We must also note the potential for reporting error even though our study employed a dietary questionnaire with proven reliability (Turconi et al., 2003). Nonetheless, several studies have found recall of dietary intake in self-reported measures inaccurate (Lemacks et al., 2019; Wallace et al., 2018; Wehling & Lusher, 2019).

CONCLUSION

Police academy training must evolve to address specific health-related gaps in officers' knowledge. Police academy trainees report comfort with health-related topics and healthful nutritional habits. However, it is well documented that police officers tend to exhibit unhealthy nutrition and physical activity habits. We suggest targeted educational interventions that help to instill lasting positive well-being strategies. Additionally, continuing education is needed throughout the officer's career to combat stress, burnout, and excess weight gain.



REFERENCES

1. Acquadro, M. D., Varetto, A., Zedda, M., & Ieraci, V. (2015). Occupational stress, anxiety and coping strategies in police officers. *Occupational Medicine*, 65(6), 466–473. <https://doi.org/10.1093/ocmed/kqv060>
2. Anderson, G. S. (2001). Police officer physical ability testing: Re-validating a selection criterion. *Policing*, 24(1), 8–31. <https://doi.org/10.1108/13639510110382232>
3. Anderson, G. S., & Plecas, D. B. (2000). Predicting shooting scores from physical performance data. *Policing*, 23(4), 525–537. <https://doi.org/10.1108/13639510010355611>
4. Blumberg, D. M., Schlosser, M. D., Papazoglou, K., Creighton, S., & Kaye, C. C. (2019). New directions in police academy training: A call to action. *International Journal of Environmental Research and Public Health*, 16(24). <https://doi.org/10.3390/ijerph16244941>
5. Bytomski, J. R. (2018). Fueling for performance. *Sports Health*, 10(1), 47–53. <https://doi.org/10.1177/1941738117743913>
6. Can, S. H., & Hendy, H. M. (2014). Police stressors, negative outcomes associated with them and coping mechanisms that may reduce these associations. *The Police Journal: Theory, Practice and Principles*, 87(3), 167–177. <https://doi.org/10.1350/pojo.2014.87.3.676>
7. Chalmuri, Y., Padma, Tm., Pratap, K. V. N. R., Vineela, P., Varma, L. S. C., & Vidyasagar, Y. (2018). Do the dental students have enough nutritional knowledge? A survey among students of a dental college in Telangana State. *Journal of Indian Association of Public Health Dentistry*, 16, 38–47. https://doi.org/10.4103/jiaphd.jiaphd_68_17
8. Colozza, D. (2021). Dietary health perceptions and sources of nutritional knowledge in an urban food environment: A qualitative study from Indonesia. *Public Health Nutrition*, 24(10), 2848–2858. <https://doi.org/10.1017/S1368980020003900>
9. Ćopić, N., Kukić, F., Tomić, I., Parčina, I., & Dopsaj, M. (2020). The impact of shift work on nutritional status of police officers. *Nauka, Bezbednost, Policija*, 25(1), 3–14. <https://doi.org/10.5937/nabepo25-24628>
10. Demling, R. H., & DeSanti, L. (2000). Effect of a hypocaloric diet, increased protein intake and resistance training on lean mass gains and fat mass loss in overweight police officers. *Annals of Nutrition and Metabolism*, 44(1), 21–29. <https://doi.org/10.1159/000012817>
11. Habersaat, S. A., Geiger, A. M., Abdellaoui, S., & Wolf, J. M. (2015). Health in police officers: Role of risk factor clusters and police divisions. *Social Science and Medicine*, 143, 213–222. <https://doi.org/10.1016/j.socscimed.2015.08.043>
12. He, N., Zhao, J., & Ren, L. (2005). Do race and gender matter in police stress? A preliminary assessment of the interactive effects. *Journal of Criminal Justice*, 33(6), 535–547. <https://doi.org/10.1016/j.jcrimjus.2005.08.003>
13. Koropanovski, N., Kukić, F., Janković, R., Dimitrijević, R., Dawes, J. J., Lockie, R. G., & Dopsaj, M. (2020). Impact of physical fitness on recruitment and its association to study outcomes of police students. *South African Journal for Research in Sport, Physical Education and Recreation*, 42(1), 23–34. <https://doi.org/10.10520/EJC-1d4d35d9ae>



14. Kukić, F., & Čvorović, A. (2019). The strategic approach to an improvement of health-related physical fitness of police officers: An 8-week exercise intervention: Pilot study. *Bezbednost, Beograd*, 61(2), 28–45. <https://doi.org/10.5937/bezbednost1902028k>
15. Kukić, F., Cvorovic, A., Dawes, J., Orr, R., & Dopsaj, M. (2018). Relations of body voluminosity and indicators of muscularity with physical performance of police employees: pilot study. *Baltic Journal of Sport and Health Sciences*, 4(111), 30–38. <https://doi.org/10.33607/bjshs.v4i111.675>
16. Kukić, F., & Dopsaj, M. (2016). Structural analysis of body composition status in Abu Dhabi police personnel. *Nauka, Bezbednost, Policija*, 21(3), 19–38. <https://doi.org/10.5937/nabepo21-12244>
17. Kukic, F., Dopsaj, M., Dawes, J., Orr, R., & Cvorovic, A. (2018). Use of human body morphology as an indication of physical fitness: Implications for police officers. *International Journal of Morphology*, 36(4), 1407–1412. <https://doi.org/10.4067/S0717-95022018000401407>
18. Kukić, F., Heinrich, K. M., Koropanovski, N., Poston, W. S. C., Čvorović, A., Dawes, J. J., Orr, R., & Dopsaj, M. (2020). Differences in body composition across police occupations and moderation effects of leisure time physical activity. *International Journal of Environmental Research and Public Health*, 17(18), 6825. <https://doi.org/10.3390/ijerph17186825>
19. Kukić, F., Jeknić, V., Dawes, J., Orr, R., Stojković, M., & Čvorović, A. (2019). Effects of training and a semester break on physical fitness of police trainees. *Kinesiology*, 51(2), 161–169. <https://doi.org/10.26582/k.51.2.2>
20. Kukić, F., Koropanovski, N., Jankovic, R., & Dopsaj, M. (2019). Effects of specialized physical education and additional aerobic training on aerobic endurance of police students. *Human. Sport. Medicine*, 19(S2), 58–64. <https://doi.org/10.14529/hsm19s208>
21. Kukic, F., Scekcic, A., Koropanovski, N., Cvorovic, A., Dawes, J. J., & Dopsaj, M. (2019). Age-related body composition differences in female police officers. *International Journal of Morphology*, 37(1), 302–307. <https://doi.org/10.4067/S0717-95022019000100302>
22. Lagestad, P., Jenssen, O. R., & Dillern, T. (2014). Changes in police officers' physical performance after 16 years of work. *International Journal of Police Science & Management*, 16(4), 308–317. <https://doi.org/10.1350/ijps.2014.16.4.349>
23. Lagestad, P., & van den Tillaar, R. (2014). Longitudinal changes in the physical activity patterns of police officers. *International Journal of Police Science & Management*, 16(1), 76–86. <https://doi.org/10.1350/ijps.2014.16.1.329>
24. Lemacks, J. L., Adams, K., & Lovetere, A. (2019). Dietary intake reporting accuracy of the bridge2u mobile application food log compared to control meal and dietary recall methods. *Nutrients*, 11(199), 1–11. <https://doi.org/10.3390/nu11010199>
25. McCreary, D. R., Fong, I., & Groll, D. L. (2017). Measuring policing stress meaningfully: establishing norms and cut-off values for the Operational and Organizational Police Stress Questionnaires. *Police Practice and Research*, 18(6), 612–623. <https://doi.org/10.1080/15614263.2017.1363965>
26. Ménard, K. S., & Arter, M. L. (2014). Stress, coping, alcohol use, and posttraumatic stress disorder among an international sample of police officers: Does gender matter? *Police Quarterly*, 17(4), 307–327. <https://doi.org/10.1177/1098611114548097>
27. Orr, R. M., Dawes, J. J., Pope, R., & Terry, J. (2018). Assessing differences in anthropometric and fitness characteristics between police academy cadets and incumbent officers. *Journal of Strength and Conditioning Research*, 32(9), 2632–2641. <https://doi.org/10.1519/JSC.0000000000002328>



28. Quaidoo, E. Y., Ohemeng, A., & Amankwah-Poku, M. (2018). Sources of nutrition information and level of nutrition knowledge among young adults in the Accra metropolis. *BMC Public Health*, 18(1323), 1–7. <https://doi.org/10.1186/s12889-018-6159-1>
29. Ramey, S. L., Perkhounkova, Y., Moon, M., Budde, L., Tseng, H. C., & Clark, M. K. (2012). The effect of work shift and sleep duration on various aspects of police officers' health. *Workplace Health and Safety*, 60(5), 215–222. <https://doi.org/10.3928/21650799-20120416-22>
30. Turconi, G., Celsa, M., Rezzani, C., Biino, G., Sartirana, M. A., & Roggi, C. (2003). Reliability of a dietary questionnaire on food habits, eating behaviour and nutritional knowledge of adolescents. *European Journal of Clinical Nutrition*, 57(6), 753–763. <https://doi.org/10.1038/sj.ejcn.1601607>
31. Violanti, J., Charles, L. E., McCanlies, E., Hartley, T. A., Baughman, P., Andrew, M. E., Fekedulegn, D., Ma, C. C., Mnatsakanova, A., & Burchfiel, C. M. (2017). Police stressors and health: A state-of-the-art review. *Policing*, 40(4), 642–656. <https://doi.org/10.1108/PIJPSM-06-2016-0097>
32. Vuković, M., Kukić, F., Čvorović, A., Janković, D., Prčić, I., & Dopsaj, M. (2020). Relations between frequency and volume of leisure-time physical activity and body composition in police officers. *Research Quarterly for Exercise and Sport*, 91(1), 47–54. <https://doi.org/10.1080/02701367.2019.1646391>
33. Wallace, A., Kirkpatrick, S. I., Darlington, G., & Haines, J. (2018). Accuracy of parental reporting of preschoolers' dietary intake using an online self-administered 24-h recall. *Nutrients*, 10(987), 1–10. <https://doi.org/10.3390/nu10080987>
34. Wehling, H., & Lusher, J. (2019). People with a body mass index ≥ 30 under-report their dietary intake: A systematic review. *Journal of Health Psychology*, 24(14), 2042–2059. <https://doi.org/10.1177/1359105317714318>



PHYSICAL ACTIVITY LEVEL OF POLICE UNIVERSITY STUDENTS ACCORDING TO IPAQ: A PILOT STUDY

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Abstract: The aims of research were to determine the Police University students' level of physical activity as well as to determine the differences in relation to gender. The total sample consisted of 60 subjects (30 male and 30 female). For assessing the levels of physical activity International Physical Activity Questionnaire (IPAQ) was used. Based on IPAQ scores (MET), the level of physical activity is classified as high, moderate and low. Results of descriptive statistics showed that the average value for a male student was 8157.63 ± 3365.00 MET, while for a female one it was 3793.57 ± 3152.80 MET. ANOVA results showed that there is a statistically significant difference between genders at the general level ($F = 26.870$, $p = 0.000$), as well as at the partial level for high ($F = 21.229$, $p = 0.000$) and moderate ($F = 31.898$, $p = 0.000$) level of physical activity in favor of males.

Keywords: Police students, physical activity, Questionnaire

INTRODUCTION

Physical activity (PA) includes a wide range of activities such as playing, physical exercise, competitive sports, physical effort during professional activities, doing household chores, in a word, any type of physical work (Cvetković, 2012). Caspersen, Powel & Christenson (1985) defined PA as a movement performed by skeletal muscles that requires energy consumption and described by four dimensions: frequency, duration, intensity and type of physical activity. Also, regular PA exercise can be associated with three aspects of health: physical, mental and social (Berčić & Donlić, 2009).

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PA, even in the young population, increases the level of good - HDL and reduces the level of bad - LDL cholesterol, prevents the development of atherosclerosis, osteoporosis and cardiovascular diseases, increases respiratory volume, increases self-confidence and a sense of satisfaction and contributes to stress reduction (Rakić, 2017). The American College of Sports Medicine (1993) recommends daily PA (minimum of 3-5 days per week), where exercise intensity should be on the level of 65-80% of the maximum heart rate (HR_{max}) or 50-85% of the maximum oxygen consumption (VO_{2max}), with a duration of 20-60 minutes of continuous aerobic physical work. An activity that engages large muscle groups continuously in aerobic mode is also recommended: walking, rope jumping, hiking, running, jogging, rowing, cycling, dancing, stairs climbing, swimming and skating. The American Center for Disease Control and Prevention recommends 30 minutes of physical activity of at least moderate intensity, if not daily then on most days of the week (150 kilocalorie - kcal per day), where activities can be summarized multiple times in episodes of minimum continuous duration of 10 minutes (Pate et al., 1995). The World Health Organization recommends a minimum energy expenditure of 600 MET-minute/week for all adults, which is equivalent to 150 minutes of moderate aerobic physical activity per week (WHO, 2018).

Inactivity or insufficient PA, on the other hand, is a condition in which there is no significant increase in energy consumption above that at rest (Hagströmer, Oja & Sjöström, 2007). According to the WHO (2018), insufficient PA is physical activity where energy consumption is less than 600 MET-minute/week. Also, WHO declared insufficient PA - hypokinesia as an independent health risk factor (Hass, Feigenbaum & Franklin, 2001; Mitić, 2001), while physical inactivity was categorized as the biggest public health problem in the 21st century (Blair, 2009).

Previous research indicates that young people spend more and more of their free time in a sedentary mode - in front of a computer or television (Nelson, Neumark-Stzainer, Hannan, Sirard & Story, 2006; Greaney et al., 2009). A critical point in young people PA decline occurs during the transition from high school to college (Small, Bailey-Davis, Morgan & Maggs, 2012; Cocca, Liukkonen, Mayorga-Vega & Viciano-Ramírez, 2014). The beginning of the study process for the most of young people is a sensitive period, in which the level of PA decreases and the number of activities that do not require physical effort increases (De Vahl, King & Williamson 2005). Although students are aware of PA's health benefits, most do not engage in any physical activity (Vračan, Pisičić & Slaćanac 2009).

The University of Criminal Investigation and Police Studies in Belgrade (UCIPS) is an educational institution that educates various profiles of the police profession. The UCIPS educates students to work in the Republic of Serbia police through three departments: the Department of Criminology, the Department of Forensic Engineering and the Department of Information Technology. At the Department of Criminology, in addition to other subjects, students also attend classes in the subject of Specialized Physical Education (SPE), (Blagojević, Vučković, Koropanovski & Dopsaj, 2017). However, SPE classes take place during the first three years of study and only in one semester of each school year. Practically, during the calendar year, students are systematically physically active for three months only. Additionally, in the final, fourth year of study, students do not have SPE classes at all. Students' PA in free time can be one of the factors that determine the level of motor abilities in the period when there is no organized physical activity, but it could also have a positive impact on the level of basic motor abilities that is required on the colloquium on the subject of SPE. More widely, practicing regular physical activities after graduation can contribute to the development of positive life habits related to health status and efficient policing. Therefore, the aims of this research were to determine the UCIPS students' level of physical activity in free time, as well as to determine the differences in relation to gender.



METHODS

The sample

The total number of respondents was randomly selected so as to include 60 UCIPS students from all years of study. Out of the total number of respondents, 30 female and 30 male students were included; whose average age was 20.05 years. All respondents were informed about the object and purpose of the research. The research was conducted in accordance with the terms of "Declaration of Helsinki for recommendations guiding physicians and biomedical research involving human subjects" - (<http://www.cirp.org/library/ethics/helsinki/>), as well as with the permission of the Ethics Committee of the Faculty of Sport and Physical Education, University of Belgrade.

Testing procedure

A short form of the International Physical Activity Questionnaire - IPAQ (2005) was used in this research. IPAQ is a standardized universal instrument for the assessment of the health-related PA of the adult population and adolescents aged 15-19 years (Craig et al., 2003). The questionnaire assesses the frequency, duration, and intensity of PA in four domains of human life: leisure time, domestic and gardening (yard) activities, work-related and transport-related physical activities. The questions focus on the time spent in a particular type of PA in the last 7 days and provide separate scores for each type of activity. Calculating the total score of the IPAQ requires summing the duration (in minutes) and frequency (in days) of all three types of physical activity (Hagstromer et al., 2006; Alexander, Bergman, Hagstromer & Sjostrom, 2006; Papathanasiou et al., 2009). The level of PA is estimated through the total energy consumption expressed in metabolic equivalents (Metabolic Equivalent of Task - MET). 1 MET represents the basal level of oxygen consumption and the associated caloric expenditure, corresponds to the level of metabolism in rest, with values around 3.5 ml/kg/min or 1 kcal/kg/h (Howley, 2000; Warren et al., 2010). Based on the responses of each respondent, MET-minutes/week was calculated for each of the mentioned levels of PA. After calculating the total energy consumption expressed in MET-minutes/week, the respondents were grouped into one of three groups: LOW (<600 MET-minutes/week), MODERATE (601-3000 MET-minutes/week) and HIGH (>3000 MET-minutes/week) PA level group (Craig et al., 2003). The questionnaire also estimates the time spent in lying and/or sitting (LY/SIT). The short form of the IPAQ showed good results in the possibility of repeating and comparing the research results at the international level (Alexander et al., 2006; Dinger, Behrens & Han, 2006; Papathanasiou et al., 2009).

Statistical analysis

All data were analyzed using the descriptive statistics to calculate the basic parameters of central tendency: arithmetic mean (MEAN), standard deviation (SD), minimum (Min) and maximum (Max) values and standard error of the arithmetic mean (Std.Err). The existence of statistically significant differences between the groups at the general (Σ) and partial level (LOW, MODERATE and HIGH) of the observed space was determined by applying the univariate analysis of variance (ANOVA). Statistical significance was defined at 95% probability, i.e. at $p < 0.05$ level (Hair, Anderson, Tatham & Black, 1998). All statistical analyses were done by the application of software package SPSS Statistics 17.0.



RESULTS

The results of the descriptive statistics are shown in Table 1.

Table 1. Results of descriptive statistics

| MET | | N | MEAN | SD | Std. Err. | 95% Confidence Interval for Mean | | Min | Max |
|-----------|--------|----|---------|---------|-----------|----------------------------------|-------------|---------|----------|
| | | | | | | Lower Bound | Upper Bound | | |
| Σ | Male | 30 | 8157.63 | 3365.00 | 614.36 | 6901.12 | 9414.14 | 2016.00 | 18372.00 |
| | Female | 30 | 3793.57 | 3152.80 | 575.61 | 2616.29 | 4970.84 | .00 | 12318.00 |
| LOW | Male | 30 | 2170.30 | 1002.53 | 183.03 | 1795.94 | 2544.65 | 396.00 | 4158.00 |
| | Female | 30 | 1802.90 | 1533.10 | 279.90 | 1230.43 | 2375.36 | .00 | 4158.00 |
| MOD-ERATE | Male | 30 | 1895.33 | 1191.29 | 217.50 | 1450.49 | 2340.17 | 360.00 | 5040.00 |
| | Female | 30 | 508.00 | 625.27 | 114.15 | 274.51 | 741.48 | .00 | 2400.00 |
| HIGH | Male | 30 | 4092.00 | 2533.73 | 462.59 | 3145.89 | 5038.10 | 480.00 | 13440.00 |
| | Female | 30 | 1482.67 | 1789.44 | 326.70 | 814.47 | 2150.85 | .00 | 5760.00 |
| LY/SIT | Male | 30 | 118.00 | 51.02 | 9.31 | 98.95 | 137.06 | 60.00 | 240.00 |
| | Female | 30 | 354.00 | 156.26 | 28.53 | 295.65 | 412.35 | 60.00 | 600.00 |

The results of ANOVA at the general and partial level between the genders are shown in Table 2.

Table 2. Results of ANOVA

| | | Sum of Squares | Mean Square | F | Sig. |
|----------|----------------|----------------|-------------|--------|-------------|
| Σ | Between Groups | 2.85 | 2.85 | 26.870 | .000 |
| | Within Groups | 6.16 | 10631697.10 | | |
| | Total | 9.02 | | | |
| LOW | Between Groups | 2024741.40 | 2024741.40 | 1.207 | .277 |
| | Within Groups | 97309047.00 | 1677742.19 | | |
| | Total | 99333788.40 | | | |
| MO-DEATE | Between Groups | 28870406.66 | 28870406.66 | 31.898 | .000 |
| | Within Groups | 52494626.66 | 905079.77 | | |
| | Total | 81365033.33 | | | |
| HIGH | Between Groups | 1.02 | 1.02 | 21.229 | .000 |
| | Within Groups | 2.79 | 4810928.73 | | |
| | Total | 3.81 | | | |
| LY/SIT | Between Groups | 835440.00 | 835440.00 | 61.837 | .000 |
| | Within Groups | 783600.00 | 13510.34 | | |
| | Total | 1619040.00 | | | |

Figure 1 shows the percentage distribution of respondents of both genders according to the type of PA in their free time.



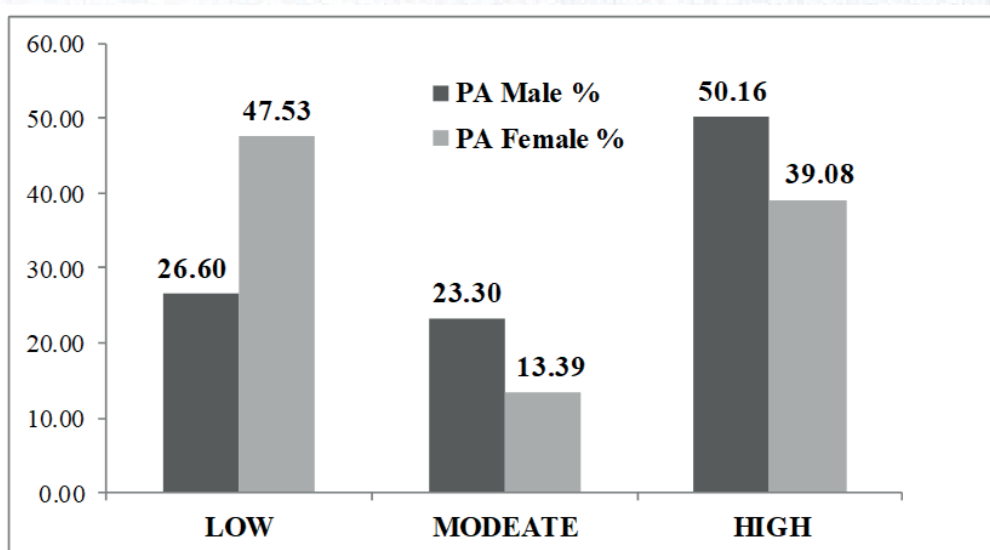


Figure 1. Respondents percentage distribution

DISCUSSION

From the results of descriptive statistics (Table 1) for the sample of male respondents, whose total MET value was 8157.63 ± 3365.00 , it can be concluded that on general level, they belong to the population with a high level of PA. At the partial level, on the basis of descriptive indicators of different levels of PA shown through the percentage distribution in Figure 1, we can conclude that students spend their free time mostly in high (intensive) PA - 50.16%. After high, students most often practice low-intensity PA in 26.60%, while in the lowest percentage they practice medium-intensity PA - 23.30%. In a study conducted on a sample of students from the Faculty of Physical Education and Sports of the Alexandru Ioan University in Romania, it was found that the average PA level was 5993.69 MET (Fagaras, Radu & Vanvu, 2015), while among students from the University of Physical Education in Krakow - Poland average PA level was 6308 MET (Bednarek, Pomykała, Bigosińska & Szyguła, 2016). The results of the research among students of the National University of Lutsk in Ukraine showed that the average PA was 3863 MET (Bergier, Tsos & Bergier, 2014), while among Croatian students it was 2960 MET (Pedišić, 2011). Comparing the results of this research with the results of previous research, it can be concluded that UCIPS students practice PA in accordance with physically active student populations, while their results are better compared to the results of students whose professional orientation is not directly related to physical activities.

In the sample of females, based on the obtained results of descriptive statistics which showed that at the general level the average value of MET was 3793.57 ± 3152.80 (Table 1), it can be concluded that the respondents belong to the group with a high level of PA. Based on the percentage distribution shown in Figure 1, it can be concluded that female students in the highest percentage engage in low-intensity physical activity in 47.53%, then high-intensity PA - 39.08%, while in the lowest percentage - 13.39% exercise medium-intensity PA. The research on physically active student populations found that female students of the Faculty of Physical Education and Sports of Alexandru Ioan University achieved 4303.28 MET (Fagaras et al., 2015), female students of the Faculty of Physical Culture, Palacký University, Olomouc - Czech Republic had 5296 MET (Zhao, Sigmund, Sigmundová & Lu, 2007), while among female students of the Faculty of Kinesiology at Corum Hitit and Samsun On-



dokuz Mayıs University - Turkey, it was 4319.16 MET (Tasmektepligil, Agaoglu, Atan & Cicek, 2013). Results for female students of "other" faculties were 1981 MET at Beijing university in China (Zhao et al., 2007), 2707 MET for female students in Croatia (Pedišić, 2011) and 1386.69 MET for Turkish female students (Tasmektepligil et al., 2013). Comparing the results of this and previous research, it can be concluded that UCIPS students have higher MET values compared to the sample of "ordinary" female students, while their results are slightly lower compared to physically active student populations. Additionally, students enrolled at sports-centric universities may have higher levels of physical activity than students enrolled at traditional universities, where physical education faculties are not the central focus of education (Bednarek et al., 2016). The obtained results at the general level, both for male and female respondents, may be a consequence of the fact that UCIPS students belong to the population of physically active persons. More precisely, UCIPS students were selected, among other things, in relation to the level of basic motor abilities, and due to the subject of SPE, they belong to the physically active population (Vučković & Dimitrijević, 2013). Also, a high level of PA in free time can be associated with the need to maintain and improve the level of basic motor abilities for taking the colloquium on the subject of SPE.

The results of ANOVA showed that there is a statistically significant difference between genders at the general level ($F = 26.870$, $p = 0.000$), as well as at the partial level for high ($F = 21.229$, $p = 0.000$) and moderate ($F = 31.898$, $p = 0.000$) level of physical activity in favor of males (Table 2). It was also found that females spend statistically significantly more of their free time in lying/sitting (Table 2). From the obtained results, it can be concluded that male students are more physically active in their free time compared to females. This conclusion is consistent with previous studies in which the same or similar results were found (Fagaras et al., 2015; Clemente, Nikolaidis, Lourenco-Martins & Mendes, 2016). The explanation for differences in PA levels between the genders could be different motives for engaging in physical activity (Maltby & Day, 2001). In males, the motives for exercise are internal factors such as challenge and enjoyment, while females are motivated by external factors, which are the improvement of physical appearance and weight reduction (Duncan, Hall, Wilson & Jenny, 2010; Egli, Bland, Melton & Czech, 2011). Regardless of motivational factors, since UCIPS students are trained to perform police tasks that require a high level of motor abilities, it can be concluded that there is a need for additional education/motivation efforts aimed to engage in physical activities, especially with the female population. Confirmation of such conclusion also lies in the fact that compared to males, females are more susceptible to injury due to anthropological specifics (De Loës & Jansson, 2002), in terms of physical abilities have lower indicators of strength (Boyce, Willett, Mullins, Jones & Cottrell, 2014), lower general and specific skills (Birzer & Craig, 1996), and are more often exposed to the risk of professional and social discrimination (Spasić, 2008).

CONCLUSION

The aims of this research were to investigate the students' level of physical activity in free time, as well as to determine the differences in relation to gender. The research was conducted on a sample of 60 students divided in two groups - one group of 30 male and one group of 30 female respondents. The results showed that both groups belong to the population with a high level of physical activity. The results also showed statistically significant differences between groups on the general and on the partial level for high and moderate level of PA in favor of males. It was determined that females spend statistically significantly more time in lying/sitting. The males spend most of their free time in high-intensity physical activity, followed by low-intensity and at least in moderate-intensity physical activity. As for the females, the low-intensity level of physical activity is the most common, followed by high



and moderate-intensity physical activity. Based on these results, there is a need for the new research that will determine the exact reasons for the differences found between the groups. The final goal of further research should be related to the improvement of educational and/or motivational processes in the field of physical activities in UCIPS students' free time.

REFERENCES

1. Alexander, A., Bergman, P., Hagstromer, M. & Sjostrom, M. (2006). IPAQ Environmental Module: Reliability Testing. *Journal of Public Health*. 14(2), 76-80.
2. American College of Sports Medicine (1993). The recommended quantity and quality of exercises for developing and maintaining cardiorespiratory and muscular fitness in healthy adults. *Schweizerische Zeitschrift für Sportmedizin*. 41(3), 127-137.
3. Bednarek, J., Pomykała, S., Bigosińska, M. & Szyguła, Z. (2016). Physical Activity of Polish and Turkish University Students as Assessed by IPAQ. *Central European Journal of Sport Sciences and Medicine*, 4(16), 13-22.
4. Bergier, B., Tsos, A. & Bergier, J. (2014). Factors determining physical activity of Ukrainian students. *Annals of Agricultural and Environmental Medicine*, 21(3), 613-616.
5. Berčić, B. & Donlić, V. (2009). Tjelesno vježbanje u suvremenim uvjetima života. *Filozofska istraživanja*. 29(3), 449-460.
6. Birzer, M. & Craig, D. (1996). Gender differences in police physical ability test performance. *American Journal of Police*, 15(2), 93-108.
7. Blagojević, M., Vučković, G., Koropanovski, N. & Dopsaj, M. (2017). *Specijalno fizičko obrazovanje I*. Beograd: Kriminalističko-policijska akademija.
8. Blair, S.N. (2009). Physical inactivity: the biggest public health problem of the 21st century. *British Journal of Sports Medicine*. 43(1), 1-2.
9. Boyce, R., Willett, T., Mullins, A., Jones, G. & Cottrell, R. (2014). Health promotion strategies derived from a Metropolitan Police weight loss comparisons by gender and BMI category. *Internet Journal of Allied Health Sciences and Practice*, 12(3), Article 10.
10. Caspersen, C.J., Powell, K.E. & Christensen, G.M. (1985). Physical activity exercise and physical fitness: Definitions and distinctions for health-related research. *Public Health Reports*. 100(2), 126-131.
11. Clemente, F.M., Nikolaidis, T.P., Lourenco-Martins, F.M. & Mendes, R.S. (2016). Physical activity patterns in University students: Do they follow the public health guidelines? *PLOS One*, 11(3), e0152516. <https://doi.org/10.1371/journal.pone.0152516>
12. Cocca, A., Liukkonen, J., Mayorga-Vega, D. & Viciano-Ramírez, J. (2014). Health-related physical activity levels in Spanish youth and young adults. *Perceptual and Motor Skills*. 118(1), 247-260.
13. Craig, C.L., Marshall, A.L., Sjostrom, M., Bauman, A.E., Booth, M.L., Ainsworth, B.E., Pratt, M., Ekelund, U., Yngve, A., Sallis, J.F. & Oja, P. (2003). International physical activity questionnaire: 12-country reliability and validity. *Medicine and Science in Sports and Exercise*. 35(8), 1381-1395.
14. Cvetković, M. (2012). *Aktivnosti u prirodi*. Novi Sad: Fakultet sporta i fizičkog vaspitanja.



15. De Loës, M. & Jansson, B. (2002). Work-related acute injuries from mandatory fitness training in the Swedish police force. *International Journal of Sports Medicine*, 23, 212-217.
16. De Vahl, J., King, R. & Williamson, J.W. (2005). Academic Incentives for Students Can Increase Participation in and Effectiveness of a Physical Activity Program. *Journal of American College Health*. 53(6), 295-298.
17. Dinger, M.K., Behrens, T.K. & Han, J.L. (2006). Validity and Reliability of the International Physical Activity Questionnaire in College Students. *American Journal of Health Education*. 37(6), 337-343.
18. Duncan, L.R., Hall, C.R., Wilson, P.M. & Jenny, O. (2010). Exercise motivation: a cross-sectional analysis examining its relationships with frequency, intensity and duration of exercise. *International Journal of Behavioral Nutrition and Physical Activity*, 7(7), 1-9.
19. Egli, T., Bland, H.W., Melton, B.F. & Czech, D.R. (2011). Influence of age, sex, and race on college students' exercise motivation of physical activity. *Journal of American College Health*, 59(5), 399-406.
20. Fagaras, S.P., Radu, L.E. & Vanvu, G. (2015). The level of physical activity of university students. 7th World Conference on Educational Sciences, (WCES-2015), 05-07 February 2015, Novotel Athens Convention Center, Athens, Greece, Procedia-Social and Behavioral Sciences, 197, 1454-1457.
21. Greaney, M.L., Less, F.D., White, A.A., Dayton, S.F., Riebe, D., Blissmer, B., Shoff, S., Walsh, J.R. & Greene, G.W. (2009). College Students' barriers and enablers for healthful weight management: a qualitative study. *Journal of Nutrition and Education Behavior*. 41(4), 281-286.
22. Hagströmer, M., Oja, P. & Sjöström, M. (2006). The International Physical Activity Questionnaire (IPAQ): A Study of Concurrent and Construct Validity. *Public Health Nutrition*. 9(6), 755-762.
23. Hagströmer, M., Oja, P. & Sjöström, M. (2007). Physical activity and inactivity in an adult population assessed by accelerometry. *Medicine and Science in Sports and Exercise*. 39(9), 1502-1508.
24. Hair, J., Anderson, R., Tatham, R. & Black, W. (1998). *Multivariate Data Analysis (Fifth Ed.)*. Prentice – Hall. Inc. USA.
25. Hass, C., Feigenbaum, M. & Franklin, B. (2001). Perception of resistance training for healthy populations. *Sports Medicine*. 31(14), 953-964.
26. Howley, E. (2000). You asked for it: question authority. *American College of Sport Medicine. Health and Fitness Journal*. 4(2), 6.
27. International Physical Activity Questionnaire-IPAQ. (2005). Nov Guidelines for Data Processing and Analysis of the International Physical Activity Questionnaire. Available from: (www.ipaq.ki.se/scoring.pdf).
28. Maltby, J. & Day, L. (2001). The relationship between exercise motives and psychological well-being. *Journal of Psychology*, 135(6), 651-660.
29. Mitić, D. (2001). *Rekreacija*. Beograd: Studio plus.
30. Nelson, M.C., Neumark-Stzainer, D., Hannan, P.J., Sirard, J.R. & Story, M. (2006). Longitudinal and secular trends in physical activity and sedentary behavior during adolescence. *Pediatrics*. 118(6), 1627-1634.
31. Papathanasiou, G., Georgoudis, G., Papandreou, M., Spyropoulos, P., Georgakopoulos, D. & Kalfakakou, V. (2009). Reliability Measures of the Short International Physical Activity Questionnaire (IPAQ) in Greek Young Adults. *Hellenic Journal of Cardiology*. 50(4), 283-94.



32. Pate, R., Pratt, M., Blair, S., Haskell, W., Macera, C. & Bouchard, C. (1995). Physical activity and public health: a recommendation from the Centers for Disease Control and Prevention and the American College of Sports Medicine. *Journal of the American Medical Association*. 273, 402-407.
33. Pedišić, Ž. (2011). Tjelesna aktivnost i njena povezanost sa zdravljem i kvalitetom života u studentskoj populaciji. Doktorska disertacija, Kinaziološki fakultet, Sveučilište u Zagrebu. Zagreb, Hrvatska.
34. Rakić, D. (2017). *Rizično ponašanje i zdravstveni rizici adolescenata*. Novi Sad.
35. Small, M., Bailey-Davis, L., Morgan, N. & Maggs, J. (2012). Changes in eating and physical activity behaviors across seven semesters of college: living on or off campus matters. *Health Education & Behavior*. 40(4), 435-441.
36. Spasić, D. (2008). Žene u sistemu policijskog obrazovanja: stanje i perspektive ženskih ljudskih prava. *Temida*, 11(3), 41-61.
37. Tasmektepligil, M.Y., Agaoglu, S.A., Atan, T. & Cicek, G. (2013). The contrastive study of physical activity Levels of physical education students and the other department students. *International Journal of Academic Research*, 5(6), 90-95.
38. Vračan, D., Pisačić, T. & Slaćanac, K. (2009.). Stavovi prema vježbanju i interesi prema pojedinim sportskim aktivnostima studenata Arhitektonskog i Geodetskog fakulteta Sveučilišta u Zagrebu. U B. Neljak (ur.). Zbornik radova 18. Ljetne škole kineziologa Republike Hrvatske (522-527), Zagreb: Hrvatski Kineziološki Savez.
39. Vučković, G. & Dimitrijević, R. (2013). Razlike u pokazateljima sile mišića ekstenzora nogu kod selektovane populacije devojaka. U: Dikić, S. (Ur.) VI Međunarodni kongres Ekologija, zdravlje, rad, sport (283-287), Banja Luka: Ministarstvo Zdravlja RS.
40. Warren, J.M., Ekelund, U., Besson, H., Mezzani, A., Geladas, N., Vanhees, L. & Panel, E. (2010). Assessment of physical activity - a review of methodologies with reference to epidemiological research: a report of the exercise physiology section of the European Association of Cardiovascular Prevention and Rehabilitation. *European Journal of Cardiovascular Prevention and Rehabilitation*, 17(2), 127-39.
41. World Health Organization (2018). *Physical Activity and Adults Recommended levels of physical activity for adults aged 18-64 years*. WHO Technical Report. Geneva.
42. Zenić, N. & Petrić, S. (2002). O nekim problemima obuke djece neplivača. *Sport za sve*, 31, 24-25.
43. Zhao, Y., Sigmund, E., Sigmundová, D. & Lu, Y. (2007). Comparison of physical activity between Olomouc and Beijing university students using an International Physical Activity Questionnaire. *Acta Universitatis Palackianae Olomucensis Gymnica*, 37(4), 107-114.





THE INFLUENCE OF THE VARIOUS SPECIALIZED PHYSICAL EDUCATION TEACHING PROGRAMS ON STUDENTS' AEROBIC ENDURANCE

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Abstract: Aerobic endurance (AE) is considered as one of the physical abilities that determines success on job-related physical tests for police officers. Therefore, AE is one of the criteria in selection process, during the education and through working career. At the University of Criminal Investigation and Police Studies (UCIPS) the development of the level of AE takes place within the course of Specialized Physical Education (SPE). In the school year 2020/2021, due to the COVID-19 pandemic measures, SPE classes were organized in two models: regular (the first-year students) and online (the second, third- and fourth-year students). The aim of this study was to determine the influence of these different modules of SPE studying on AE of the UCIPS students. The sample of the respondents included 46 students of the first year (19 women and 27 men) and 45 students of the third year (21 women and 24 men). AE was estimated by using Cooper's running test at the start and at the end of the observed studying year. The difference between initial and final testing was defined by using a pair sample t-test. It was determined that AE increased by 5.5% ($t = -3.353$, $p = 0.004$) with women and for 4% ($t = -3.139$, $p = 0.004$) with men for the first-year students. In contrast, the third-year students had the reduction of AE by 3.6% ($t = 2.415$, $p = 0.025$) with women and by 6.2% ($t = 3.354$, $p = 0.003$) with men.

Keywords: physical abilities, aerobic endurance, police, students

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INTRODUCTION

The specific nature of police work entails resolving incidents such as arresting criminals, crowd control, separating individuals engaged in a physical altercation, as well as providing assistance after traffic accidents, or during natural disasters. In such cases, police officers are not only exposed to great physical exertion, but also to significant amounts of mental and physical stress. Therefore, a sufficient level of physical abilities is one of the key requirements for a successful resolution of critical incidents (Anderson & Plecas, 2000; Soroka & Sawicki, 2014; Marins et al., 2019). A high level of physical abilities, apart from enhancing work efficiency, is considered one of the crucial factors for the prevention of cardiovascular diseases and diabetes, as well as for decreasing injury risk (Arden et al., 2003; Strauss et al., 2021). Due to the above-mentioned reasons, one of the parameters in the police selection system is physical ability assessment, whereas one of the key objectives of police education is to develop relevant physical abilities and skills required for successful performance in this section of police work (Dimitrijević et al., 2014; Lockie et al., 2021).

Aerobic endurance (AE) in police officers is identified as a significant physical ability related to the general health condition and possibly predicting performance in job-related fitness tests (Jamnik et al., 2010; Orr et al., 2018). At the University of Criminal Investigation and Police Studies in Serbia (UCIPS), within the scope of Specialized Physical Education (SPE), the Cooper 12-minute run test (RUN) is used in order to assess AE in the process of selection, as well as throughout the education (Janković & Dimitrijević, 2012). Incontrovertibly, not only is AE one of the determining factors for the success at the UCIPS entrance exam, but to a certain extent it can also affect studying efficiency from the aspect of time required in order to graduate (Koropanovski et al., 2020; Janković et al., 2021). Furthermore, a lower level of AE has been found in cadets who quit studies, possibly leading to the conclusion that physical ability could be a relatively precise indicator of successful performance throughout police education (Lockie et al., 2019).

One of SPE goals is to develop AE, while after the course, students are expected to fulfill certain predefined norms, conditioned by gender and the year of studies. This is achieved by means of educational training programs designed to enhance physical abilities of the selected candidates leading them to the appropriate professional level (Dopsaj et al., 2007; Janković & Dimitrijević, 2012). However, since the foundation of UCIPS, the SPE program has been modified several times, with the tendency of decreasing the number of classes. Similarly, the programs such as aerobic running training, swimming, skiing training, and practical field training have also undergone a decline. By comparing the impact of various programs, it has been found that this reduction of classes has negatively affected physical abilities, particularly AE (Dimitrijević et al., 2014). In addition, the SPE curriculum containing only the elements of martial arts in the forms of defensive tactics and the use of force is far from sufficient to improve AE in UCIPS students. However, by introducing two additional weekly aerobic training workouts in a semester (one within the curriculum, and the other where students train on their own following the instructions), it is possible to improve AE (Kukić et al., 2019). The results of the aforementioned study show the possibility for SPE professors to positively affect the betterment of their students' physical abilities, at least to a certain extent. This could be achieved not only through the training process itself, but also by improving students' theoretical knowledge, thus enabling them to conduct aerobic training independently.

Declaring COVID-19 a pandemic has led to numerous changes in many spheres of life, such as the social, economic, political, as well as technical-technological. One of the restrictive prevention measures pertained to shutting down educational institutions and included transitioning to network teaching. Distance learning has become an alternative to traditional one, with the majority of higher ed-



ucation institutions migrating to online teaching based on information communication technology (Batez, 2021; Kovačević et al., 2021). During the COVID-19 pandemic in the academic year 2020/21 at UCIPS, teaching was approached in two different manners. The first-year students were accommodated in a campus within UCIPC, following all prevention measures, and attended regular offline lessons. Conversely, sophomores and senior students attended online lessons at home. The aim was to determine the influence of different teaching models (traditional teaching versus the one based on information communication technology) on UCIPS students' AE.

METHODS

Participants

The sample of respondents consisted of 101 UCIPS students divided into two basic groups according to the teaching model. The first group comprised 46 first-year students (19 female students, whose average age was 19.7 ± 0.5 , BH 170.6 ± 5.8 cm, BM 63.5 ± 5.2 kg, BMI 21.9 ± 1.8 kg/m², and 27 male students, with an average age of 19.7 ± 0.5 , BH 181.3 ± 4.5 cm, BM 80.3 ± 9.1 kg, BMI 24.4 ± 2.1 kg/m²). The second group included 45 third-year students (21 females – average age: 21.6 ± 0.9 , BH: 170.3 ± 3.9 cm, BM: 63.8 ± 6.6 kg, BMI: 22.0 ± 2.2 kg/m², and 24 males – average age: 21.6 ± 1.0 , BH: 181.9 ± 6.6 cm, BM: 84.3 ± 7.9 kg, BMI: 25.4 ± 1.8 kg/m²).

Education teaching process

Due to the COVID-19 pandemic, studying unfolded in accordance with two separate models in the academic year 2020/21. The first-year students were accommodated in a dormitory within UCIPS and attended traditional lessons. SPE classes were held in the second semester, according to an accredited teaching curriculum, where students had three exercise classes and one lecture a week. Apart from SPE classes, the first-year students also had 60-minute swimming lessons once a week, as well as a daily 30-minute morning workout. What is more, in the second half of the spring semester, in April and May, physical abilities were assessed from the aspect of anaerobic and aerobic endurance with different load intensity. On the other hand, the third-year students attended online lessons exclusively, wherein they could obtain information regarding AE development programs, together with recommendations for training realization.

Aerobic Endurance Assessment Procedures

General aerobic endurance was estimated by means of the Cooper 12-minute run test (RUN), where students' objective was to cover as much distance as possible in 12 minutes. The assessment was conducted on a 230-meter circular running track marked after every five meters (Koropanovski et al., 2020). In order to determine the effect of SPE teaching process on AE, the respondents were tested twice, at the beginning (initial testing), and at the end of the particular year of studies (final testing).



Statistics

All data were analyzed by means of descriptive statistics in order to display basic parameters such as mean value, standard deviation, as well as minimum and maximum testing values. In the later analysis, the paired sample t-test was used to determine the difference between the initial and final measurements. Statistical significance was defined at the probability level of 95%, i.e. $p < 0.05$ (Hair et al., 1998). Statistical Package SPSS Statistics for Windows, Version 20.0 was used for statistical data processing.

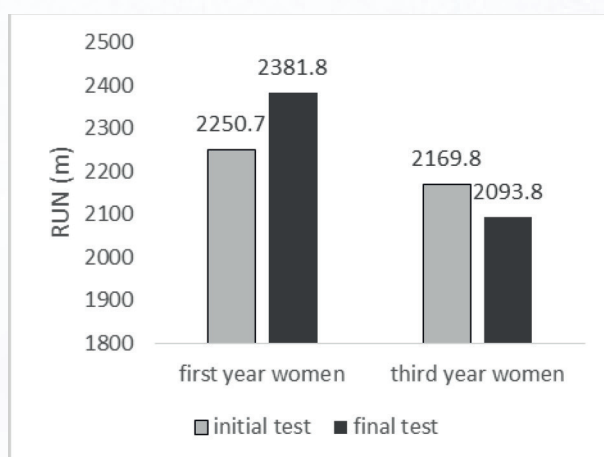
RESULTS

Table 1 - Basic descriptive parameters of the Cooper test results

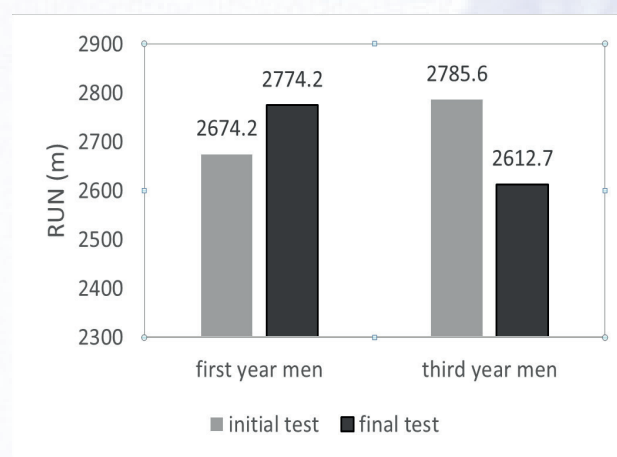
| Females | Initial | | | Final | | |
|------------|--------------------|------|------|--------------------|------|------|
| | Mean \pm SD | Min. | Max. | Mean \pm SD | Min. | Max. |
| First year | 2250.7 \pm 188.9 | 1930 | 2685 | 2381.8 \pm 131.3 | 2140 | 2575 |
| Third year | 2169.8 \pm 121.5 | 1840 | 2450 | 2093.8 \pm 171.2 | 1680 | 2350 |
| Males | Initial | | | Final | | |
| | Mean \pm SD | Min. | Max. | Mean \pm SD | Min. | Max. |
| First year | 2674.2 \pm 230.7 | 2090 | 3200 | 2785.6 \pm 166.8 | 2370 | 3240 |
| Third year | 2774.2 \pm 113.4 | 2500 | 3080 | 2612.7 \pm 249.3 | 2070 | 3160 |

Table 2 - Paired sample t-test results

| Variable | Absolute difference (m) | Relative difference (%) | t | p |
|--------------------|-------------------------|-------------------------|--------|-------|
| First-year females | 131.1 | 5.5 | -3.353 | 0.004 |
| First-year males | 111.3 | 4 | -3.139 | 0.004 |
| Third-year females | 75.9 | 3.6 | 2.415 | 0.025 |
| Third-year males | 161.4 | 6.2 | 3.354 | 0.003 |



Picture 1 - RUN results changes in female UCIPS students



Picture 2 - RUN results changes in male UCIPS students



DISCUSSION

Due to the COVID-19 pandemic, throughout the 2020/21 academic year, lessons at UCIPS were conducted in two models – traditional and network teaching. Correspondingly, the study aimed at ascertaining the impact that divergent SPE lesson arrangements would have on students' aerobic abilities. It transpired that traditional teaching, which involved direct contact between the professor and the students, as well as the realization of all teaching contents and additional activities, positively affected AE. Female students statistically significantly improved their RUN results by 5.5%, whereas males improved their results by 4%. Conversely, online SPE lessons failed to achieve the expected results with regard to AE development. Moreover, throughout the year a statistically significant decrease in RUN results occurred – by 3.6% in females, and 6.2% in male students.

Developing and maintaining physical fitness as one of SPE goals could be attained by means of adapting to appropriate continuous educational training programs (Blagojević et al., 2019). The decrease of SPE lessons, courses lasting one instead of two semesters, the disruption of lesson continuity, together with the suspension of additional physical education content, negatively affected UCIPS students' physical abilities in comparison with the previous generations (Dimitrijević et al., 2014). Consequently, as far as AE is concerned, a statistically significant decrease in RUN results was found throughout the 3-year studies (Janković et al., 2010; Janković et al., 2018). Contrariwise, the students who apart from the regular SPE lessons also attended a special aerobic abilities enhancement program improved their RUN results by 7.9%. Presumably, the improvement in results could be a corollary of the additional AE development training held five times a week in the duration of 20 minutes with the intensity of 60-75% of the maximum (Milošević et al., 1995).

The SPE curriculum itself without additional training did not have a positive effect on AE development in UCIPS students of both sexes throughout the duration of the one-semester course. However, a relatively straightforward additional training program conducted twice a week was found to have a beneficial impact on AE, together with SPE classes. One training was conducted within SPE lessons with the professor present and giving instructions, whereas the second training was performed by students on their own. Taking that into consideration leads to a conclusion that theoretical education can enable students to organize and conduct physical training independently (Kukić et al. 2019). Having said that, theoretical education based solely on online teaching accompanied with the instructions on how to conduct AE development training was shown to be insufficient when working with UCIPS students. In other words, with regard to UCIPS students' physical ability development, it is essential for both practical and theoretical SPE lessons to be conducted together with additional AE development programs.

The distinctiveness of the observed generation's studying is COVID-19 pandemic, which caused regular offline teaching to be replaced with online lessons. On the one hand, this teaching model could be said to have an advantage over the traditional one, being more economical in terms of both time and money. On the other hand, what it lacks is a direct contact between students and a professor, particularly regarding practical application and training (Batez, 2021; Kovačević et al., 2021). Apart from the alterations in the teaching model at universities, epidemic counter-measures pertaining to various restrictions of cultural events including social distancing, as well as affecting physical culture and sports, caused a significant decline in physical activity eventually leading to an inactive lifestyle (Mozolev i sar., 2021). Not only do the pernicious effects of such a lifestyle impact physical abilities, but also morphological characteristics, health condition viewed from the aspect of cardiovascular diseases, as well as mental health by increasing anxiety and depression (Sokić et al., 2021; Strauss et al., 2021). Presumably, it is precisely the inactive lifestyle caused not only by network teaching, but also by other restrictive measures that led to the decrease of AE in UCIPS students who exclusively attended online lessons.



CONCLUSIONS

Owing to the COVID-19 pandemic, the work of educational institutions had to be modified. At UCIPS, the first-year students attended traditional classes, whereas all higher-year students took on-line lessons. The goal of this paper was to determine the impact that these different teaching models would have on AE. The conclusion based on the study results is that a statistically significant decline of AE occurred in students of both genders after they attended online lessons. The factors leading to this result could be found in the lack of practical work with students, as well as in different social restrictions with a negative impact on students' otherwise active lifestyle. On the other hand, the students who attended traditional SPE lessons accompanied with additional physical activities, such as swimming, morning workout, as well as aerobic and anaerobic ability testing, managed to improve their AE, thus accomplishing one of the SPE objectives. The displayed results lead to a conclusion that in order to improve UCIPS students' physical abilities it is essential to organize a mixed teaching model which would not disregard health regulations, but would include both network teaching, and traditional exercise lessons as well. Thus, in direct contact with a professor, students would also have an opportunity to obtain sufficient theoretical knowledge enabling them to organize and conduct additional aerobic training independently. In the studies to come, it appears necessary to determine the impact of network teaching during the COVID-19 pandemic on other students' physical abilities, as well as on other factors that could be significant for the success in studying and the development of professional skills of the future Ministry of Internal Affairs employees.

REFERENCES

1. Anderson, S.G., Plecas, D. (2000). Predicting shooting scores from physical performance data. *An International Journal of Police Strategies & Management*, 23(4), 525–537
2. Ardern, C. I., Katzmarzyk, P. T., Janssen, I., & Ross, R. (2003). Discrimination of health risk by combined body mass index and waist circumference. *Obesity*, 11(1), 135–142.
3. Batez, M. (2021). ICT Skills of University Students from the Faculty of Sport and Physical Education during the COVID-19 Pandemic. *Sustainability*, 13, 1711.
4. Blagojević, M., Koropanovski N., Vučković, G., Dopsaj, M. (2019). *Specijalno fizičko obrazovanje 1 – osnovni nivo*. Kriminalističko-policijski univerzitet. Beograd.
5. Dimitrijević, R., Koropanovski, N., Dopsaj, M., Vucković, G., Janković, R. (2014). The influence of different physical education programs on police students' physical abilities. *Policing: An International Journal of Police Strategies & Management*. 37(4), 794–808.
6. Dopsaj, M., Vučković, G., Blagojević, M. (2007). Normativno-selekcioni kriterijum za procenu bazično motoričkog statusa kandidata za prijem na studije Kriminalističko-policijske akademije u Beogradu. *Bezbednost*, Beograd, 49(4), 166–183.
7. Hair, J., Anderson, R., Tatham, R., Black, W. (1998). *Multivariate Data Analysis* (Fifth Ed.). USA, Prentice – Hall, Inc.
8. Jamnik V.K., Thomas S.G., Shaw J.A., Gledhill N. (2010). Identification and Characterization of the Critical Physically Demanding Tasks Encountered by Correctional Officers. *Applied Physiology, Nutrition, and Metabolism*, 35(1), 45–58.



9. Jankovic, R., Mitrovic, B., Vuckovic, G., Koropanovski, N. (2018). Aerobic and morphological changes in the Academy of criminalistic and police studies female students - three years follow-up studies. *Proceeding book of: International Scientific Conference: Effects of Physical Activity Application to Anthropological Status with Children, Youth and Adults*, (pp. 178-183). Belgrade, Faculty of Sport and Physical Education.
10. Janković, R., Dimitrijević, R. (2012). Stanje i mogućnosti unapređenja načina procene motoričkih sposobnosti u sistemu Ministarstva unutrašnjih poslova Republike Srbije. *Kultura polisa*, 9(1), 419-435.
11. Janković, R., Dimitrijević, R., Koropanovski, N. (2010). Changes of students' aerobic ability on Academy of criminalistic and police studies during first three years of education. *International Scientific Conference: Physical activity for everyone*. Beograd. 87-95.
12. Janković, R., Kukić, F., Koropanovski, N. (2021). Razlike bazično-motoričkih sposobnosti u odnosu na uspeh postignut na prijemnom ispitu i efikasnost studiranja. *Bezbednost*. 63 (1): 44-64.
13. Koropanovski, N., Kukić, F., Janković, R., Dimitrijević, R., Dawes, J., Lockie, R., Dopsaj, M. (2020). Impact of physical fitness on recruitment and its association to study outcomes of police students. *South African Journal for Research in Sport, Physical Education and Recreation*, 42(1): 23 – 34.
14. Kovačević, J., Radovanović, V., Radojević, T., Kovačević, J. (2021). Efekti online nastave na visokoškolskim ustanovama za vreme pandemije COVID-19. *XXVII Skup Trendovi razvoja: On-line nastava na univerzitetima*, (pp. 35-38), Novi Sad.
15. Kukić, F., Koropanovski, N., Janković, R., Dopsaj, M. (2019). Effects of specialized physical education and additional aerobic training on aerobic endurance of police students. *Human. Sport. Medicine*, 19 (2), 58-64.
16. Lockie, R., Moreno, M., Rodas, K., Dulla, J., Robin M Orr, R., Dawes, J. (2021). With great power comes great ability: Extending research on fitness characteristics that influence work sample test battery performance in law enforcement recruits. *Work*, 68(4), 1069-1080.
17. Lockie, R.G.; Balfany, K.; Bloodgood, A.M.; Moreno, M.R.; Cesario, K.A.; Dulla, J.M.; Dawes, J.J., Orr, R.M. (2019). The influence of physical fitness on reasons for academy separation in law enforcement recruits. *International Journal of Environmental Research and Public Health*, 16(3), 372.
18. Marins, E., Barreto, G., Del Vecchio, F. (2019). Characterization of the Physical Fitness of Police Officers: A Systematic Review. *The Journal of Strength and Conditioning Research*, 33(10), 1 – 15.
19. Milošević, M., Arlov, D., Blagojević, M., Stojičić, R., Dopsaj, M., Milić, Z. (1995). Analiza uticaj jednogodišnjeg aerobnog tretmana na studente Policijske akademije, *Bezbednost*, Beograd, 37(6): 830-836.
20. Mozolev, O., Polishchuk, O., Shorobura, I., Miroschnichenko, V., Tushko, K., Voloshyn, V., Tomkiv, I., Binkovskiy, O. (2021). Motor Activity and Physical Abilities of Students in the Conditions of Restrictions of COVID-19. *International Journal of Human Movement and Sports Sciences*, 9(3), 428-435.
21. Orr R., Dawes J.J., Pope R., Terry J. (2018). Assessing Differences in Anthropometric and Fitness Characteristics between Police Academy Cadets and Incumbent Officers. *Journal of Strength and Conditioning Research*, 32(9), 2632-2641.
22. Sokić, J., Popov, S., Dinić, B.M., Rastović, J. (2021). Effects of Physical Activity and Training Routine on Mental Health during the COVID-19 Pandemic and Curfew. *Frontiers in Psychology*, 12:624035.



23. Soroka, A., Sawicki, B. (2014). Physical activity levels as a quantifier in police officers and cadets. *International Journal of Occupational Medicine and Environmental Health*, 27(3), 498 – 505.
24. Strauss, M., Foshag, P., Brzek, A., Vollenberg, R., Jehn, U., Littwitz, H., Leischik, R. (2021). Cardiorespiratory Fitness Is Associated with a Reduced Cardiovascular Risk in Occupational Groups with Different Working Conditions: A Cross-Sectional Study among Police Officers and Office Workers. *Journal of Clinical Medicine*, 10(9), 2025.