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MUSIC AS A FACTOR IN ETIOLOGY OF CRIME: CAN IT MAKE US ACCEPT THE UNACCEPTABLE?

With no intention to present the importance of music for our lives and for the culture, lesser than it truly has, authors are testing the role of music as a potential factor in etiology of crime. More specifically, they are trying to question whether the music lyrics whose content indicates acceptability of actions that are usually not acceptable, moreover that are criminal, might have an influence on individual so that person perpetrates criminal offence. After brief overview of criminological theories that correlate music and crime, authors will present qualitative study on lyrics of one of the most famous rap duos in Bosnia and Herzegovina, with the analysis of the text, and results of survey conducted among student population of Bosnia and Herzegovina, regarding the general and personal influence of the duo's music.

Keywords: etiology of crime, music, criminal offence, factor of crime.

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1. Introduction

Determining whether or not there is an empirical relationship between violent music lyrics and criminal behaviour is a complex endeavour given the many factors and forces that shape criminal behaviour on an individual level. We are all influenced on some level by our daily surroundings. Peer groups, TV shows, music, books, news media, personal experience, hobbies, education, habits, the community and culture in which we live, and the cultural artifacts that populate the culture make their way into our thinking and behaviour (Helfgott, 2008:13).

Media is one of the factors which has the strongest effect on our social life and behaviour. As a mean of communication, media has undergone significant developments which have made easier and cheaper access to information 24 hours a day and seven days a week possible. Such developments made knowledge about crime and criminality more accessible, both in quality and quantity. Nowadays, media is able to inform us about a criminal happening within minutes of the incident. Even though accessibility to such information can be highly beneficial for the society in general, there is always the risk that information will not be transmitted properly, fully or even truthfully. Thus, spread of wrong information, also known as ''fake information'', or even promoting socially undesirable events can negatively impact individuals and the society in general.

Discussions about whether media has a role in the increasing presence of violent crimes in our socio-cultural life are very common. Some argue that, the media whose basic aim is supposed to inform the public has become a tool for promotion of commercial products such as music and music videos – which can be seen as a result of the current capitalist approach. According to Sukru Nar (Sukru Nar, 2014: 57), the media of today has built its structure totally on profit, and it aims to increase its popularity rate in public opinion by means of showing violent crimes quite often. Under these circumstances, the media have become the determinant element at the point of accepting or rejecting a crime and deviant behaviour among the members of society. For example, media presents phenomenon such as corruption, abuse of power or prostitution, which previously provoked strong social reactions, as usual events. Also, songs and related artistic compositions often normalize degrading treatment and violence against women.

This paper aims to question correlation of one of the most influential media channels – music in perpetration of criminal offences. Few criminological theories will be tested in that direction. After given theoretical background, authors will present a case study of two contemporary rappers from Bosnia and Herzegovina – commonly recording their songs as duets - and the analysis of lyrics of their works. Additionally, brief research results on impact on their

music on youth perspective on this will be given. In this paper descriptive and deductive research methods will be used, while case study, content analysis and questionnaire will be used as data collection methods. It is expected that the results of this research will rise the public awareness about the impact of certain music genres in the etiology of crime and may help in understanding the potential harmful consequences that music genres might have in some cases in society, together with other risk factors.

2. Influence of Popular Culture on Crime and Criminal Behaviour

The studies regarding the relation between popular culture and criminal behaviour demonstrate an increasing indifference in society towards such events (Sukru Nar, 2014: 59). According to Sukru Nar (Sukru Nar, 2014: 60), such result makes us to accept violence and crime, a result of violence, as an ordinary and even a necessary component of life. In accordance with this approach, the fact that media frequently emphasizes criminal offences and violence is a supporting factor in terms of creating an indifferent and irresponsible society and for directing individuals to committing criminal offences and engage in violence. By this way, media clearly deviates from its fundamental function which is to inform public and gradually becomes a crime-promoting tool that leads to social acceptance of perpetrators, their actions and consequences of such walks of life. Recent development and innovations enabled Media to penetrate all spheres of our lives and reshape our perception of events, especially those we are taught to perceive as unacceptable and forbidden. Also, Sukru Nar (Sukru Nar, 2014: 64) points out that "individual or groups of people can accept the realities of media world without questioning them and they can't realize exactly the difference between real world and artistic world".

American Psychiatric Association (American Psychiatric Association, 2014: 35), on the effects of media violence reports that ''over the last three decades, the one overriding finding in research on the mass media is that exposure to media portrayals of violence increases aggressive behaviour in children. In addition to increased aggression, countless studies have demonstrated that exposure to depictions of violence causes desensitization and creates a climate of fear.''

2.1. Our Daily Music

Music is part of existence of human kind from its roots, since it is well known that from that time until now, that music is a media of expression of humans'

feelings related to different situations in life. Music of different styles is heard upon birth of a child, within funerals, during celebrations, work, travel, fun. But, perceiving music solely as a media of transferring emotions would be incomplete perception of what it truly is.

Based on Merriam-Webster's Dictionary[1] music is "the science or art of ordering tones or sounds in succession, in combination, and in temporal relationships to produce a composition having unity and continuity".

Cambridge Dictionary[2] defines music as "a pattern of sounds made by musical instruments, voices, or computers, or a combination of these, intended to give pleasure to people listening to it". Britannica Encyclopedia offers definition of art that is the closest to perception about it by average person. According to Britannica Encyclopedia[3], it is "art concerned with combining vocal or instrumental sounds for beauty of form or emotional expression, usually according to cultural standards of rhythm, melody, and, in most Western music, harmony". Finally, another understanding is offered by many others, such is Hollman (Hollman, 2013: 20) who values "music as a form of expression".

No matter which one of these definitions we decide to embrace, fact is that music is present in our everyday actions and it can be said that it enriches our lives. Scientifically, its positive effects on brain and its development are recognized, so it is frequently used in pedagogy, psychology and in many other sciences as an adjunct method. According to Gardstrom (Gardstrom, 1999: 208), music reduces stress and it is favourable for health and in overall it is important for well-being.

Having in mind the importance and enriching effect of music to human kind, it is very sensitive to outline music as a potential *ethio criminalis*. Nevertheless, it is crucial to test what Gardstrom (Gardstrom, 1999: 208) calls "destructive effects of music", so that eventual other side of it can be corrected and in future can be excluded as *ethio criminalis* as such.

2.1.1. Correlation of music and crime in criminological lenses

Criminology, as a science about crime, offers various theories and conceptions which are trying to identify main criminal factors that might cause criminal offence. Few of these theories are involving music as one of those possible factors, but each of them from different point and argumentation.

1 Merriam-Webster's Dictionary, www.merriam-webster.com,

2 Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/music

3 Britannica Encyclopedia, https://www.britannica.com/art/music

One of the theories that indirectly correlates music and crime is *Social learning theory*. According to Adler et al. (Adler et al., 2018: 176) this theories' standing point is in the idea that "delinquent behaviour is learned through same psychological processes as any other behaviour". They add that "we learn behaviour in different ways: through observation, direct experience and differential reinforcement". So, how then music can be found as a possible cause of criminal offence. Main representative of this theory, Albert Bandura explains that people learn behaviour and aggression through behavioural modelling (Adler et al., 2018: 176). A child will learn its behaviour from role models it has: parents, teachers, or other peers they highly estimate. So, if a child idolizes popular singer and finds that person as a role model in the life, that persons' behaviour and message it sends through its songs will be of high importance to that child and might consequently accept it as a model of behaviour. Music played by those idols, whose lyrics approve violence of criminality any kind, encourages drugs consumption and incites crime, sends message that musician share those values and approve those actions, so youngsters learns that behaviour is good and desired, so consequently makes them to perpetrate those actions. In this context, Hollman (Hollman, 2013: 2) points out the importance of social environment for an individual and its future behaviour. According to her (Hollman, 2013: 2) the „process of social behaviour is result of conditioning", so even when one action is being conducted, „based on the positive or negative feedback from the social environment", that action will be understood as desirable or criminal.

Furthermore, Tropeano (Tropeano, 2006: 31) in her paper presents results of scientific research that tested the influence of violent music lyrics and videos on individuals' behaviour. In this psychological research there were three groups of participants: 11 individuals listening to violent music, 11 individuals in the control group and 11 individuals listening to non-violent music. The results showed that "watching the violent music video, containing violent lyrics, aggressive behaviour and degrading behaviours toward women did make an individual feel and react more violently with regards to response to questions about fictional scenarios" (Tropeano, 2006: 32). The conclusion was that "watching violent music videos does negatively affect behaviour" (Tropeano, 2006: 32). The same author refers to similar researches made by St. Lawrence and Joyner in 1991 and Johnson, Jackson and Getto in 1995, together with research of Anderson et al. from 2003, who proved that "exposure to media violence had a statistically significant association with aggression and violence among youth" (Tropeano, 2006: 31).

That brief explanation of social learning and importance of social environment for valorisation of conducted actions, brings us to contiguously related ideas of the *Theory of subcultures.* Based on ideas of Miller, this theory suggests

that „unique subculture might be built within social class or group" (Adler et al., 2018: 125). Music may be a way of one subculture to represent their tradition, ideas and view on reality. It is being accepted and nourished like that, and messages that appear within it might not correspond to the ideas of other subcultures and might even be in conflict.

Sutherland's *Theory of differential association* might be correlated with our question about relation between music and crime, as well. This theory is based on the idea that if an „individual's peers engage and support crime, the individual will develop favourable opinion on crime„ (Hollman, 2013: 5). This theory is one of concepts of interaction (Šeparović, 1981: 25), and it stipulates that association with individuals who cherish crime and distancing from positive, anti-criminal peers might make an individual to embrace criminal behaviour as the principal behaviour. If a music peer suggests through the music ideas about permitability of crime, logical consequence is that the fan will accept it as appropriate type of behaviour.

Hip hop, heavy metal and rap are mostly criticised in the scientific literature and many would say they are „under attack" (Gardstrom, 1999: 210). According to Steinmetz and Henderson, hip hop music „emerged as a voice for a group previously limited in it possibilities" and they in practice create subculture. It is that what Gardstrom (Gardstrom, 1999: 210) calls inner-city expression of the youth subculture. Steinmetz and Henderson (Steinmetz, Henderson, 2016: 115) see hip hop as „a vehicle to ascertain the community's perception about crime causation and motivation" and find that hip hop artists portray and explain crime as a result of „retribution (47,58%), environmental conditioning (24,19%), strain (17,74%), choice (6,4%), social learning (4,84%), oppression (5,6%) and other (4,8%)". Douglas Pond Cummings (Cummings, 2010: 516) states that hip hop critiques punishment being unfair and bias. Even though it tends to correct social issues, it can cause social issues and criminal behaviour, because, through that music, fan might protest existing justice system and by expressing dissatisfaction in different ways, consequently may get into criminal zone (physical attacks, gang violence, destruction of property within protests). When it comes to the heavy metal, according to Gardstrom (Gardstrom, 1999: 208), claims that it causes destructive and self-destructive behaviour usually fail on the basis of the freedom of speech.

3. Rap Music and Criminality

Dunbar (Dunbar, 2017: 177) notes that "rap music was created, in large part, as a response to social marginalization and police oppression, and it has had a

contentious relationship with the legal system – perhaps more than any other music genre". However, we have to distinguish socially conscious rap music from problematic hip-hop music that focuses on violence, crime and "gaining riches" (Cummings, 2010: 523) which represents the majority of what is present on the music scene of today. As Cummings notes about hip-hop: "today it is all about the money and less about the passion behind the music. The more violent the lyrics, the more popular is the song." Unlike in contemporary hip-hop, references to crime and violence present in rap music are aimed at condemning that kind of behaviour and displaying those elements as socially disruptive instead of promoting them. While rap music, especially that from 20th century, mostly emphasizes negative effects of crime and violence, modern hip-hop glorifies their consequences.

3.1. Weitzer & Kubrin Study: Rap Music and Misogyny

According to Merriam-Webster Dictionary[4] misogyny is defined as hatred of, aversion to, or prejudice against women. Even though it is not criminal in strict sense, misogyny, as reference highly present in modern hip-hop music, should be seen as socially undesirable phenomenon. As such, it should not have a place within popular lyrics due to its serious implications for perception of women and their social roles and general expectation.

In 2009, Weitzer and Kubrin (Weitzer, Kubrin, 2009: 24) conducted a research which examined the topic of misogyny in rap music. Particular focus was at the "gansta rap" albums published during the 1990s. As expected, the results of this research have clearly shown the reasonable concern about the misogynistic connotations. Out of 403 songs analysed, misogyny was recorded in 22% of cases.

Weitzer & Kubrin study (Weitzer, Kubrin, 2009: 24) shows that sexual objectification comes in as the most frequent of all misogynistic themes (67%) and "refers to the idea that women are only good for sex''. Such lyrics promote women as exclusively sexual objects designed for male desires which should be expressly used and then discarded afterwards. Lyrics tend to generalize women stripping them off of their human identities and characteristics which go beyond their physical and sexual attributes. Meanwhile, lyrics often point out that men need to have many sexual partners in order to be successful in life. Weitzer &

4 Merriam-Webster Dictionary, www.merriam-webster.com

Table 1. Misogynistic Themes in Rap Songs (Source: Weitzer & Kubrin, 2009)

Theme	Frequency in Songs (%)
Naming and shaming	49
Sexual objectification	67
Distrust of women	47
Legitimating violence	18
Prostitution and pimping	20

Note: Frequency in songs identified as misogynistic, not within the larger sample of rap songs (where 22% of the songs were categorized as misogynistic).

Kubrin Study (Weitzer, Kubrin, 2009: 27) explains how all of these actions are committed in strive peer validation and approval. A pressure is put on men to assert their masculinity by engaging in sexual intercourse with women easily and often. This leads to a conclusion that, aside from misogyny, the ideal of hypermasculinity is highly present in rap music. Such ideals might negatively influence the development of young males who often look up to rap artists and see them as their role models. The research found that "Male sexual bravado and hyper-sexuality was present in 58% of the misogynistic songs."

3.2. Rap Music and Violence

According to Richardson and Scott (Richardson, Scott, 2002: 226), rap music gained notoriety due to its misogynous themes, hyper-materialistic striving, violent lyrics, and the behaviour and attitude of majority of its artists. However, antisocial behaviours, or activities considered reprobate by predominant cultural norms (e.g., killing police officers or participating in street fights) are symptoms of far more complex and multifaceted issues than commonly recognized. Risk factors such as poverty, drug and alcohol abuse, gang participation, and pervasive violence in all forms of media have been blamed for the 10 children and teens that die every day in the United States. Also, many rappers use threat of rape and sexual assault as a response to being turned down by women, either sexually or romantically. In some instances, rap lyrics even incite a feeling of pride and honour in hurting women through differing sexual acts which points once again to the misogynistic character of such media content.

On contrary, some researchers have argued that society in some ways, needs rap music- no matter how seemingly misogynous, hyper-materialistic and hedonistic- to illustrate cultural norms of the urban poor (Richardson, Scott, 2002: 230).

3.3. Rap Music and Drug Use

To anyone who has been even mildly exposed to rap music, and/or the accompanying music videos, it is clear that they are replete with references to drugs and drug use. In addition to "common" marijuana-related references, there's a plethora of allusions to other drugs – also known as "hard drugs" such as cocaine, heroin, speed, etc. - and their beneficial effects on human's performance in life, business and sexual intercourse. Jhawer (Jhawer, 2017: 12) points out that it seems like the more drug references the rappers insert in their lyrics, the more fame they will attain. Somehow, alluding to drugs and their effects has become a guaranteed path to success in the world of contemporary rap and hip-hop music.

According to Jhawer (Jhawer, 2017: 12), the deepest-rooted issue arises from when popular cultures glorifies drug indulgence for others, to the point where individuals start doing drugs and referencing it for the sake of "having done so", improving ''street creed'' or for the purposes of simply being perceived as "cool".

Robert Preidt concludes that rap music is glamorizing drug use, which is clearly confirmed by a study by researchers at the University of California, Berkeley (Preidt, 2019), which found a six-fold increase in drug references in songs in the last 20 years. According to this study: "Positive portrayals of drug use have increased over time and there was an increase in songs featuring positive attitudes toward drugs and the consequences of drug use, and an increase in references of drug use to signify glamour, wealth and sociability. In addition to this conclusion, there was a significant change in the types of drugs mentioned in rap songs."

These developments need to be perceived as alarming since rap artists have become role models for youth all across the world. This is particularly true for urban areas and developing societies where the youth is experiencing significant economic hardships and social challenges, and is, thus, more inclined to resort to criminality more often even without the encouragement from rap music.

4. Crime and Criminal Behaviour in Lyrics of R and P

As previously noted, music and content showcased in its lyrics can have a tremendous impact on our lives – both positive and negative. Constant increase in the crimes and violence references in the rap lyrics is clearly a negative one, and should be raising a particular concern for the perception of crime and attitude towards it of many followers of rap music – especially the youngest parts of population. Lyrics of two rap performers trending in Bosnia and Herzegovina and rest of the Balkans, R and P, are replete with alarming references to drugs, crimes and violence.

4.1. Elements of Crime and Criminal Behaviour in Lyrics

In order to empirically demonstrate the high presence of such references on contemporary music scene in Bosnia and Herzegovina, 20 songs[5] performed jointly by R[6] and P[7] were analyzed. Analysis was focused on detecting misogynistic and derogatory sexist vulgarism, swear words, and references to use of violence, drugs and showcasing crime as a vehicle of acquiring wealth, success and female attention.

Theme	Number of times mentioned	%
a) Misogyny	14/20	70%
b) Violence	12/20	60%
c) Drugs	11/20	55%
d) Sexual acts	10/20	50%
e) Crime	10/20	50%
f) Swear words and curses	14/20	70%

Examination of R and P's lyrics in the table above showcases that there is a justified reason for concern about their listeners' attitude towards crime. Great majority of their songs and lyrics thereof contain problematic representation of misogyny, glorification of violence, drugs and crime and commonly refer to sexual interactions in degrading manner followed by swear words.

Concerning 70 percent of the examined lyrics contain derogation references to women – most commonly attaching women to prostitution and labeling them as purely sexual objects designed for male satisfaction (misogyny).

Mentions of violence, in terms of glorification and promotion, were present in 60 percent of the analyzed songs – which is a particularly relevant information

5 The sources (songs) are not named in order not to correlate them with singers, as their identity is anonymized in order not to affect their personal reputation in any way. They were selected as examples from the referred music genre and are among the most popular interpretators with hundred million of views on social media in Bosnia and Herzegovina. The example used here as an illustration of the author's opinion, is for scientific purposes only, and is not intended to personally or professionally affect their reputation by any means.

6 R is a Bosnian rapper, songwriter and producer. He is best known for collaborating with another Bosnian rapper, P and singer M. Use of R's real name was purposely avoided in order not to affect their personal reputation in any way.

7 P is a Bosnian rapper, songwriter, producer and entrepreneur. Use of P's real name was purposely avoided in order not to affect their personal reputation in any way.

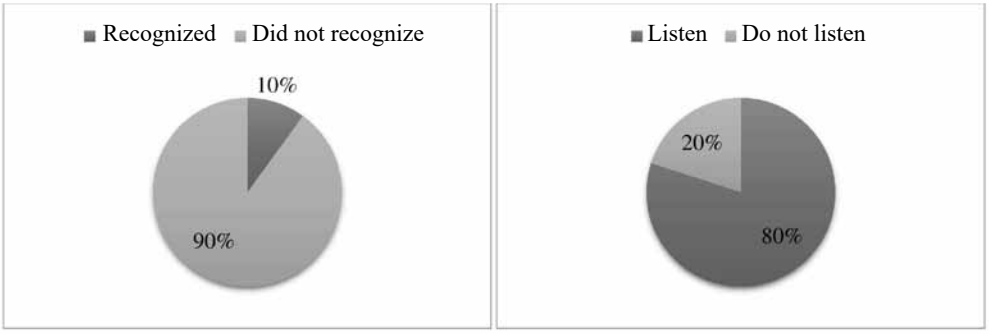
for the Adler's Social learning theory which can be the basis of connecting the violence in music lyrics with the occurrence of violent criminal offences in real life.

Other references, such as drugs, sex, general crime and common swear words were also detected in a great number of lyrics – ranging between 50 and 70 percent. Another point worth noting is the fact that the examined songs are very popular on YouTube and count the number of views in high millions, even up to 100 million views. This leads us to the conclusion that such artwork is successfully and routinely reaching millions of youngsters in Bosnia and Herzegovina and globally, and is (re)shaping their perception of crime and criminality.

4.2. Student Survey on Music Works and Lifestyle of R and P

In order to examine the public opinion about this important topic, 30 survey subjects, random students from Faculty of Law and Faculty of Social Sciences were asked about this topic. Survey pool was limited to 30 participants because those students were enrolled in classes which touched upon the possible connections between media and criminality (i.e. Criminology course). Students were between the age of 18 and 23, with 19 female and 11 male participants in the survey. They were asked the following questions about the quality of music works R and P:

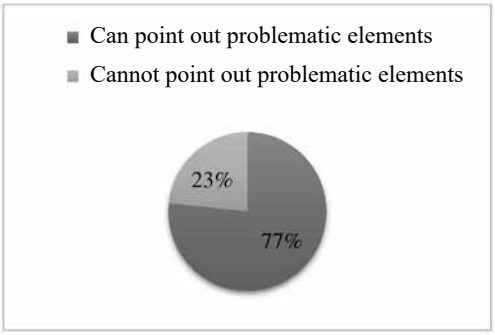
- Are you familiar with works of [R's real name] and [P's real name]?
- Are you familiar with works of R and P?
- Do you enjoy works of R and P?
- Do you think that works of R and P are promoting wrong values, such as drug use, misogyny, violence and crime?
- Do you think that works of R and P negatively influence the youngsters who are listening to such music?

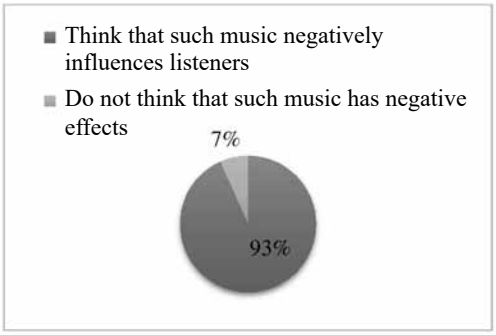


Graph 1 (left): 90% of students did not recognize R and P when presented only with their real names
Graph 2 (right): 80% of students confirmed that they often listen and enjoy R and P's music.

Even though all 30 students said they were familiar with R's and P's music, only three, or 10% of the survey subjects, recognized the artists once presented with their real names instead of the "stage names" they use to sign and advertise their songs.

24 students confirmed that they often listen and enjoy their music. However, 23 of them were able to point out the problematic elements in the lyrics of the music they listen to and have confirmed that such lyrics actively promote values they see as wrong, such as drug use, misogyny, violence and crime. Survey demonstrated that 28 out of 30 students think that works of these artists negatively influence their listeners and followers, especially children, teenagers and young adults.





Graph 3 (left): 76% student were able to point out problematic elements – references to crime, violence, drug use and misogyny – in R and P's lyrics
Graph 4 (right) 93% of students consider such lyrics to have negative influence on their listeners, especially the younger population.

Also, survey subjects have generally agreed on the notion that exposure to such music could contribute to one's acceptance of crime and criminal deviancy and acceptable – and even desirable – behaviour.

5. Discussion

Music has been influencing human life and behaviour for hundreds, even thousands of years. Generally speaking, that influence can be seen as positive for an individual and the society in general, with enriching artistic effects. However, as previously demonstrated music has changed and is still changing by becoming less of a work of art and more of a tool of social influence. Seeing that new purpose of producing and recording music, one would righteously be concerned about plethora of negative ways such tool could be used. It is obvious that R and

P's music, especially their lyrics and music videos, are being used exactly in order to spread and promote their values, lifestyles and vocabulary which can directly be correlated with Adler's theory of Social learning. Listeners, especially those young ones, listen to songs and watch music videos and they learn about the displayed delinquent behaviour just as they learn about sports, history or any other human action. Such listeners see those performers as someone to look up to – they see them as their role models and they even idolize them. Eventually, as Albert Bandura (Adler et al., 2018: 176) noted, music played by those idols, whose lyrics approve violence or criminality of any kind, encourages drug consumption and incites crime, sends message that musician – a role model – shares those values and approves of those actions, so youngsters learn that behaviour is good and socially desired, so consequently makes them to perpetrate those very actions. Also, it is no longer a rare phenomenon that somebody actively consumes such music. Today, majority of population belonging to a certain age group consume music and music videos filled with drugs, crimes and violence which leads us to Sutherland's Theory of differential association. The theory states that if peers of an individual also engage and support such music, he or she will also develop a favourable opinion. This theory then explains why behaviour displayed in the observed content is becoming socially acceptable, and even desirable, within certain groups and why is it so easily absorbed in their patterns of behaviour.

It is true that not every – probably not even the majority of listeners to such music works decides to replicate the actions and criminal offences displayed in that music, but potential reproduction is not the only hazard. Actually, it can be argued that not reacting to situations displayed in the music lyrics and videos once they happen in real life is a consequence of exposure to that content. For example, if a person who is constantly exposed to music whose lyrics do not condemn drug consumption but promotes it instead, he or she will not have a negative reaction once he or she encounters a situation involving drug consumption in real life and might even be eager to take part because his or her favourite rap artists does the same and is enjoying it. Similarly, to lack of condemning reaction – exposure to violent and crime-promoting music can lead to a stronger and more violent reaction in real life. Thus, Tropeano (Tropeano, 2006: 31) presented that ''watching the violent music video, containing violent lyrics, aggressive behaviour and degrading behaviours toward women did make an individual feel and react more violently with regard to response to question about fictional scenarios.''

Therefore, in order to minimize the risk of crime-filled music and music videos influencing our youth, there needs to be a secure mechanism which would discourage them from consummating such materials. Music should be categorized similarly to movies and TV shows and played on TV and radio stations in late

hours instead of being constantly present. Networks such as YouTube, which is the main source and spreading engine of music today, should stop recommending such videos and showing them as trending to their youngest users – unless they specifically type the artists name or song title into the search engine, it should not be popping up to children and teenagers. Most importantly, youngsters need to be educated about this issue in order not to blindly follow riches and the fame of those who call themselves singers and music artists today.

6. Conclusion

Various theories presented in the paper confirm potential correlation between music and violent/criminal behaviour. In 2020, the importance of media for directing social life and human behaviour is uncontested. This is especially true when seen from the standpoint observing the rapid developments in media making it easier and cheaper to access songs, videos and other related art creations from any point around the globe. Media is no longer only used for sharing useful and valuable information and content, but has become a profit-oriented structure without a moral compass which would isolate potentially hazardous media content. By failing to do this, media deviates from its fundamental function and is gradually becoming a tool for promotion of crime.

As an integral part of media, music has been particularly successful in communicating these ill-values causing "destructive effects of music" (Gardstrom, 1999: 208). After examining R's and P's songs, it is clear that their lyrics are abundant with socially "destructive elements" which can influence youngsters to copy those models of behaviour in their own lives. In other words, listening to music whose lyrics approve violence or criminality of any kind, just as scientifically proven, might encourage drug consumption and promote illegal activities as good and might incline the listeners to reproduce what they listen to in real world. That is the reason why the authors are indicating necessity of increased supervision (over the day) in playing critical music genres, especially through the media easily accessible to minors, just as the same supervision exists in movies display.

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REGULATION OF REPRODUCTIVE CLONING AND INHERITABLE GENETIC MODIFICATIONS ON HUMANS - PERILS AND DEFICIENCIES

Harms arising from reproductive cloning or inheritable genetic modifications, for the time being, seem significant. This is supported by the simple fact that the first cloned monkeys were short-lived or by the fact that inheritable genetic modifications still carry a high chance of getting "off-target" results, which could result in serious health problems. Inheritable genetic modifications, in particular, have a high therapeutic potential, and it is suggested that this technology's comprehension is shifting from an absolute ban, to concerns over safety issues. International law can prove to be facilitative when it comes to deciding which new technology should be prohibited, restricted or allowed, having in mind possible consequences and the so-called phenomenon of reproductive tourism. Legally binding regulation of both technologies has proven challenging at the universal level. However, there has been some progress in Europe on that matter. Harms arising from inheritable genetic modifications seem even higher than in the case of reproductive cloning, since they have the potential to affect the whole of humanity, including future generations. The Criminal Code of Serbia and the Constitution of the Republic of Serbia prohibit reproductive cloning. However, the prohibition of inheritable genetic modifications on humans is

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not regulated explicitly in the Criminal Code of Serbia, making this technology seem more acceptable or less harmful.

Keywords: inheritable genetic modifications, reproductive cloning, gene editing, human rights, criminal law.

1. Introduction

The issue of dangers or harms to society arising from reproductive cloning intensified after Dolly the sheep was cloned in 1996. This caused a sudden increase in the subject's importance, especially in relation to the possibility of the first human clone creation. In the years surrounding this event, many states introduced laws that regulate reproductive cloning of humans, although the possibility of the creation of a human clone in practice still seemed distant. The issue of reproductive cloning of human beings became interesting again after Chinese researchers reported in 2018 that they had successfully cloned macaque monkeys using the same technique used for the creation of Dolly the sheep, the technique of somatic cell nuclear transfer https://en.wikipedia.org/wiki/Somatic_cell_nuclear_transfer – SCNT (Zhen L. et al., 2018). This is significant because it is the first time that non-human primates have been cloned successfully, making the possibility of human clone creation much closer in practice.

On the other hand, the application possibilities and usefulness of this technique suggest that reproductive cloning does not offer much in this sense, unlike therapeutic cloning, which is considered ethically much more acceptable and can have significant therapeutic functions. Genetic modifications on humans in general also seem more promising in relation to therapeutic functions and could represent a cure for a large variety of diseases. Genome editing tools that are now available, like clustered regularly interspaced short palindromic repeats (CRISPR), zinc-finger nucleases (ZFN), transcription activator-like effector nucleases (TALEN), mitochondrial replacement techniques (MRT) in the case of mitochondrial diseases, seem more promising and more applicable. This is also the case with non-therapeutic functions. For example, the creation of soldiers with a combination of desired traits at a low cost certainly seems attractive. The opportunities that genetic modifications can offer, as well as the social harms resulting from modifications of the genome of descendants, might even seem higher than the reproductive cloning of human beings. In addition, it seems that genetic engineering home lab kits are available online, and some so-called biohacking celebrities are even performing live "CRISPR stunts" on themselves, on social networks or blogs, like, for example, an attempt to genetically engineer skin colour (Sigal,

2019). This was not an isolated incident, and the United States *Food and Drug Administration did* release a notice stating the sale of DIY gene-editing kits for use on humans is against the law.[1] However, it might still be possible to purchase them online, if they originate from a country that does not regulate or has less strict norms on this issue. Luckily, this version of CRISPR does not produce modifications that could be passed down to future generations, but they do offer valuable insight into the human relationship with genetic modifications as a tool for human enhancement, for curing diseases, or even for easy publicity. They also provide us with the realisation that experimentation of this kind can easily shift from laboratories.

Reproductive cloning implies replication of gene sets so that the clone and the source of material are in a situation that is comparable to identical twins (except for the age difference). The practical significance of human cloning is not as promising as in the case of genetic modifications. However, there is a possibility of using reproductive cloning to resolve infertility, making it possible for some couples or individuals even to have a child to which they are biologically related. However, this is not a simple method for resolving infertility, but also a method for influencing the characteristics of the future child, and therefore, no longer related to therapeutic effects only (Mujović-Zornić, 2007: 62). Reproductive cloning could also be combined with genetic modification to create a child that is genetically related to both parents (Strong, 2005).

Inheritable genetic modifications are also still in the experimental phase in animals. At the moment, they are not safe or effective, and significant technical and epistemic hurdles must be resolved before large-scale human genetic engineering (Powell, 2015: 670). Recent claims about inheritable genetic modifications in humans, through the CRISPR technique, have stirred the scientific public. After Chinese scientists' claim of successfully changing twin embryos so that they have immunity to HIV, scientists are calling for a global moratorium on editing human genes that can be passed down to generations (Kuchler, 2019). However, it has been reported that the scientist who created the world's first known genetically modified babies was sentenced to three years in prison and fined 3 million yuan. It seems that the doctors unknowingly used the gene-edited embryos through assisted reproductive technology, and two persons gave birth to three gene-edited babies as a result of the procedure. The domestic court found that his behavior constituted a criminal offence of illegal medical practice (*Xinhuanet, 2019).*

1 United States *Food and Drug Administration*, Information About Self-Administration of Gene Therapy, 11/21/2017, available at: https://www.fda.gov/vaccines-blood-biologics/cellular-gene-therapy-products/information-about-self-administration-gene-therapy

An argument usually used against inheritable genetic modifications is the possibility of creating unwanted genetic changes or other unforeseen consequences in future generations. The ultimate fear is related to the possibility of "intentional modification of the human genome so as to produce individuals or entire groups endowed with particular characteristics and required qualities".[2] However, commonly, inheritable genetic modifications are justified by the possibility of curing diseases and not as a tool for human enhancement. This is not an advisable solution since there is a high chance of getting "off-target" results. Such 'off-target' cuts could result in serious health problems. For example, a change to a gene that suppresses tumour growth might lead to cancer, or sometimes genes differ among the cells of an individual, and this condition, known as mosaicism, also creates problems for gene editing (Ledford, 2019). However, the debate is slowly shifting from the absolute ban of inheritable genetic modifications on humans to the regulation of gene editing and the question of safety.[3] When the inheritable genetic modifications on humans are deemed to be safe enough, the ban should be lifted, however, the most difficult issue is how to define the term "therapeutic" when deciding on allowing safe inheritable genetic modification, and how much (and which) of the "off-target" effects are acceptable, or where the difference between enhancement and therapy is (Beers, 2020:23-24). In addition, human error is always a factor, especially in the initial safety assessment. In this case, errors can have significant effects on the human species. It should be noted that, for most diseases, pre-implantation genetic diagnosis (PGD) offers the possibility of reproduction without passing a genetic disorder (Beers, 2020:24).

As a sufficient argument against inheritable genetic modifications on humans, the case of genetically modified food, perhaps, can also serve as an example of a technology that has been in broad use since the 1990s, but still with unclear adverse consequences and the great controversy surrounding this issue (Đukanović, 2019:14). This is even more evident in the case of inheritable genetic modification techniques on humans, which are currently underdeveloped, much more complex, and could directly affect humans and alter humanity's future in unforeseen ways. Nevertheless, despite the controversy surrounding genetically modified food, after decades of consumption, genetically modified animals are certainly becoming a reality.

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2 Explanatory Report to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine – Explanatory Report to the Convention on Human Rights and Biomedicine. Oviedo, 4.IV.1997, European Treaty Series - No. 164, par. 89.

3 Recommendation 2115 (2017) The use of new genetic technologies in human beings, Council of Europe, adopted by the Assembly on 12 October 2017 (35th Sitting), par 2.

The use of Mitochondrial replacement technique (MRT) in the case of Mitochondrial disease is also controversial, especially because the popular phrase "three-parent baby" is used to describe the procedure. MRT implies *in vitro* fertilization in which some or the entire future child's mitochondrial DNA derives from a third person. The first baby was born using this technique in Mexico in 2016, but the mother's eggs contained faulty mitochondria, which could lead to very serious diseases (Ghose, 2016). However, by using this technique in order to resolve fertility problems related to poor egg quality (the mother did not have mitochondrial problems), the first child was born in Greece in 2019 (Thomson, 2019). Involved and still unknown risks are certainly more justified in the case of Mitochondrial disease than in the case of poor egg quality, since other, safer techniques are available in this case. Only the United Kingdom explicitly allows MRT. However, it has already been used in countries that do not explicitly legalize it but which have more relaxed laws on genetic modification, like Mexico, Ukraine, and Greece (Ong, 2018). In relation to this issue, it is important to state that currently there is no consensus among scientists on the question of whether this technique represents germline gene modification or it belongs to a slightly different category, like "conditionally inheritable genomic modification" (Newson and Wrigley, 2017: 66-67). Regardless of the accepted categorization, it must be noted that MRT does give significantly less control over an embryo's genes than, for example, the CRISPR technique, because the mitochondria contain only about 0.1 percent of a person's DNA (Viswanathan, 2018). Still, it is too early for reliable data on the long-term safety of this technique, and in the case of the birth of females, genetic modifications are passed to their offspring.

It can be concluded that germline manipulations and unexpected genetic mutations have an irreversible effect on all descendants, while reproductive cloning represents an less intrusive intervention into the genetic heritage of humanity, since the genetic make-up of the cloned offspring would be transmitted from almost exclusively one person (Navratyil, 2013:113).

It must be noted that the issue of reproductive cloning has almost been deserted in literature dealing with ethical and legal dilemmas surrounding the issue in the last fifteen years, after its initial popularity. On the other hand, gene engineering, genetic modification, gene editing (especially in relation to the CRISPR technique), as well as therapeutic cloning or stem cell research, seem very topical.

The issue of the artificial creation of chimeras and hybrids is also thematically related to the issue of reproductive cloning and genetic modifications, although there is still no official reported birth of such organisms. Human-animal hybrids or chimera embryos have been made but never brought to term. This is

also a potentially therapeutically applicable procedure for producing animals with organs made from human cells that could be transplanted.

2. The notion of reproductive cloning and inheritable genetic modifications

Reproductive cloning can be defined as the deliberate production of genetically identical individuals. Clones contain identical sets of genetic material in the nucleus (that contains the chromosomes) of every cell in their bodies. Thus, cells from two clones have the same DNA and the same genes in their nuclei (National Research Council, 2002: 24). Therefore, reproductive cloning is a method used to make a clone or an identical copy of an entire organism. Reproductive cloning is also a form of artificial human reproduction. On the other hand, non-reproductive cloning implies the cloning of cells and tissues or the use of embryonic cells in cloning techniques. These two situations do not imply the creation of an entire organism and can have significant therapeutic functions. The two recognized methods used for reproductive cloning are cloning using somatic cell nuclear transfer (SCNT) and cloning by embryo splitting. It must be noted that the SCNT technique does not create "genetically identical" humans, which is a formulation used in many statutes or international instruments, since the embryo created via SCNT is not totally genetically identical to the ancestor because of the very low mitochondrial DNA remaining in the cytoplasm of the enucleated egg (Navratyil, 2013:109).

When it comes to genetic modifications of humans, it must be noted that different terms are widely used. Germline genetic modification changes the genes in eggs, sperm, or early embryos, and it is also referred to as "inheritable genetic modification" or "gene editing for reproduction". These alterations would appear in every cell of the person who developed from that gamete or embryo, and in all subsequent generations (Center for Genetics and Society). Somatic cell gene therapy aims to treat a disorder only in the diseased person, and not in their descendants. This is a method of introducing nucleic acids (RNA or DNA) into somatic cells (gene transfer) in order to change their genetic material and primarily treat genetically caused diseases, and sometimes even the treatment of diseases acquired during life, such as cancer and infectious diseases (German Reference Centre for Ethics in the Life Sciences, 2019). Therefore, it offers significant therapeutic functions without causing consequences which could be passed down to future generations. There are currently a number of techniques available for achieving human genetic modifications in general.

However, it seems that the term genetic modification is being abandoned in favour of the term of gene editing. It is stated that it represents a more inclusive term. It involves the modification of the genome through targeted adding, replacing, or removing one or more DNA base pairs in the genome, regardless of whether the modifications occur in a particular gene or a non-coding region of the genome, and involves more precise, novel techniques (European Group on Ethics in Science and New Technologies, 2021: 12). In the United States, genetic engineering is widely accepted (European Group on Ethics in Science and New Technologies, 2021: 13). In EU regulations, the term genetic modification is still used.[4]

For the purpose of this work, we will use the term inheritable genetic modification, but with the realisation that different terms are in use. However, legal definitions of both reproductive cloning and inheritable genetic modifications must be determined by the result since there is always a possibility of developing novel techniques for achieving the same goal. This is the case especially in relation to inheritable genetic modification, since it is anticipated that existing genome editing techniques will continue to develop and that new techniques will emerge (Nuffield Council on Bioethics, 2016:4).

In addition, human-animal hybrids and chimeras are also related to human reproductive cloning and inheritable genetic modifications since they also involve the use of biotechnology in ethically sensitive issues. Hybrids result from the fusion of an egg and a sperm of different species into a single zygote from which all other cells of the hybrid organism originate, while in chimeras, the mixture takes place at the cell level, resulting in an organism whose cells keep their disparate genetic identity (Huther, 2009: 4).

3. Reproductive cloning and inheritable genetic modifications in international instruments

A general, legally binding provision of international human rights law that could be relevant in the case of reproductive cloning or genetic modifications could be found in Article 7 of the International Covenant on Civil and Political Rights (ICCPR).[5] The provision is directed at the prohibition of torture and other

4 Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC - Commission Declaration, *Official Journal L 106 , 17/04/2001 P. 0001 – 0039*, Article 2:

5 International Covenant on Civil and Political Rights, UN General Assembly, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

cruel, inhuman, and degrading treatment or punishment. However, it contains a unique sentence that is aimed directly at experiments on human beings: "In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation" (Article 7 of the ICCPR). There is no doubt that free consent represents the basis of medical law in modern societies, and that experiments on humans without the free consent of the person in question do represent a violation of the prohibition of cruel, inhuman, or degrading treatment or punishment. This sentence was included in order to draw attention to this issue and prevent the recurrence of atrocities committed in concentration camps during the Second World War.[6] However, this provision is not directed at experiments where free consent was obtained.

At the international level, the possibility of reaching a consensus is of particular importance in relation to new technologies. The dangers of the lack of regulation of controversial technologies are significant. States and international organisations must unite and participate in the debate about what technologies should be prohibited, restricted or allowed since the consequences could affect the entire human species. In addition, a well-known phenomenon is the so-called reproductive tourism, which mostly refers to individuals traveling to countries with more permissive laws in relation to *in vitro* fertilization. For example, sex selection for non-medical reasons is in most European countries forbidden, but in the US it is a legal possibility. It is not impossible to imagine offering the choice of desired traits of the future child in some jurisdictions. After all, this is a financially lucrative industry, which supports the possibility of other forms of selection in the future. Cloning might be commercially attractive to those who wish to have a clone of a decided person or a replica of themselves in case of infertility issues.

The UN failed to adopt a legally binding document directed at the issue of reproductive cloning. The Universal Declaration on the Human Genome and Human Rights, adopted by UNESCO in 1997, prohibits practices that are contrary to human dignity, such as reproductive cloning of human beings.[7] The UN recognized the need to adopt a legally binding document devoted to the prohibition of reproductive cloning. However, in 2005, the legally non-binding Declaration on Human Cloning was adopted, with an even more vague provision on reproductive cloning. States are called to adopt the necessary measures to adequately protect human life, to prohibit all forms of human cloning inasmuch as they are incompatible

6 Annotations on the text of the draft International Covenants on Human Rights, U.N. Doc. A/2929 (1955), Agenda item 28 (Part II) Annexes, United Nations General Assembly Official Records, New York, 1955.

7 **Universal Declaration on the Human Genome and Human Rights,** UNESCO's 29th General Conference, 11 November 1997, Article 11.

with human dignity and the protection of human life, and to "adopt the measures necessary to prohibit the application of genetic engineering techniques that may be contrary to human dignity".[8] Therefore, the Declaration on Human Cloning ambiguous wording did not explicitly prohibit either reproductive or therapeutic cloning due to a lack of consensus on the introduction of the absolute prohibition of cloning or just the prohibition of reproductive cloning (Clados, 2012: pp. 90-91). States inclined to an absolute ban on cloning (including therapeutic cloning) could interpret the Declaration on Human Cloning as if it bans all forms of cloning, while states that are inclined to the prohibition of reproductive cloning could find that the prohibition is directed only at this cloning technique, which is "incompatible with human dignity and the protection of human life". In the latter case, for example, the United Kingdom permitted the technique of therapeutic cloning, believing that it offered the hope of new treatments, and therefore protection of human life and human dignity (Arsanjani, 2006:176). Theoretically, if some state is interested in allowing reproductive cloning, it can even find some creative arguments in favour of reproductive cloning being compatible with human dignity and the protection of human life. This is, above all, a result of the ambiguous term of "human dignity", usually used as a common bridge for achieving consensus in international instruments dealing with biomedicine matters. This would not be an issue if the Declaration on Human Cloning addressed relevant definitions adequately, like the term human cloning. The Declaration on Human Cloning's biggest success lies only in drawing attention to the issue of human cloning and the need for regulation, whatever the content of this regulation may be. Based on moral and ethical concerns, the United Nations should adopt a binding document that prohibits all forms of reproductive cloning and includes guidelines for states choosing to allow therapeutic cloning (Jarrel*,* 2006: 229). The Declaration on Human Cloning also addresses genetic engineering, although its title does not suggest so. Of course, the definition of genetic engineering is not present in the Declaration on Human Cloning, therefore it is not clear whether genetic engineering is contrary to human dignity in all cases, or just in the case of inheritable genetic modifications. Surprisingly, this issue did not attract the same attention as human cloning. Another attempt to reach universal consensus on genetic modifications is present in the Universal Declaration on the Human Genome and Human Rights. Article 5 a) of the Universal Declaration on the Human Genome and Human Rights states that "research, treatment or diagnosis affecting an individual's genome shall be undertaken only after rigorous and prior assessment

8 United Nations Declaration on Human Cloning, United Nations, A/RES/59/280, 23 March 2005. Point a-c.

of the potential risks and benefits pertaining thereto and in accordance with any other requirement of national law". Therefore, there is no prohibition of inheritable genetic modifications, just the obligation of rigorous prior assessment of risks and benefits in relation to research, treatment, or diagnosis affecting an *individual's* genome.

At the regional level, the most relevant document is the 1997 Council of Europe Convention on Human Rights and Biomedicine (hereinafter: the Biomedicine Convention).[9] The Biomedicine Convention is legally binding. Currently, 29 Council of Europe member states have ratified the Biomedicine Convention, and the Republic of Serbia ratified the Biomedicine Convention in 2011 (Chart of signatures and ratifications of Treaty 164, 2021).[10] The Biomedicine Convention contains the prohibition of inheritable genetic modifications. Article 13 of the Biomedicine Convention provides that "an intervention seeking to modify the human genome may only be undertaken for preventive, diagnostic or therapeutic purposes and only if its aim is not to introduce any modification into the genome of any descendants". The basis for the prohibition of inheritable genetic modification can be found in the Explanatory Report to the Biomedicine Convention: "whilst developments in this field may lead to great benefits for humanity, misuse of these developments may endanger not only the individual but the species itself".[11] Article 18 (2) of the Biomedicine Convention is also relevant in relation to cloning and genetic modification since it prohibits the creation of human embryos exclusively for research purposes. Gene editing of the embryo through the CRISPR technique is most efficient before the first cell division, directly or after fertilization, since the later-stage embryos are prone to mosaicism, which implies a developing embryo that has both edited and unedited cells (Winblad et al., 2017: p. 399). Therefore, extra embryos left from the *in vitro* fertilization procedure (IVF) do not represent the best choice for gene editing.

The Biomedicine Convention does not contain provisions related to the prohibition of reproductive cloning. Just one year later, the Council of Europe adopted the Additional Protocol to the *Biomedicine Convention* on the Prohibition

9 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Oviedo, 4.IV.1997, European Treaty Series - No. 164.

10 Chart of signatures and ratifications of Treaty 164, Council of Europe Treaty Office, Status as of 14/07/2021, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164/signatures?module=signatures-by-treaty&treatynum=164. Accessed on 14.07.2021.

11 Explanatory Report to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine – Explanatory Report to the Convention on Human Rights and Biomedicine. Oviedo, 4.IV.1997, European Treaty Series - No. 164, par. 89.

of Cloning Human Beings, especially devoted to this issue (hereinafter: Protocol on Cloning).[12] The Protocol on Cloning has been ratified by 24 Council of Europe member states at the moment, and the Republic of Serbia is not among them (Chart of signatures and ratifications of Treaty 168, 2021).[13] The Protocol on Cloning prohibits any intervention seeking to create a human being genetically identical to another human being, whether living or dead. The term human being "genetically identical" to another human being is defined as a human being sharing with another the same nuclear gene set. Therefore, the term cloning is not used, making the provision determined by the result, regardless of the used technique. The Protocol on Cloning is directed exclusively at reproductive cloning. In this regard, it is also necessary to distinguish two relevant situations, namely cloning of cells and tissue, which is considered an ethically more acceptable and valuable technique, and cloning of undifferentiated cells of embryonic origin. In the case of cloning of undifferentiated cells, their creation for research purposes exclusively is prohibited by Article 18 of the Biomedicine Convention. The use of embryonic cells is left for regulation in the future protocol on embryo protection.[14] However, this protocol was never adopted. Therapeutic cloning is considered to be an ethically sensitive issue since the cloning of undifferentiated cells implies the destruction of embryos. On the other hand, extra embryos created in the course of IVF which are not implanted, are destined for destruction, although not a deliberate one.

At the EU level, the EU Charter of Fundamental Rights of 2000 (hereinafter: the EU Charter) contains a unique provision devoted to the prohibition of reproductive cloning of human beings in Article 3, Paragraph 2.[15] The EU Charter prohibits only reproductive cloning. It neither authorises nor prohibits other forms of cloning. Reproductive cloning is prohibited within the right to the integrity of the person. It may be argued that the connection between the ban on cloning and the protection of physical and mental integrity is not entirely clear. Namely, if a person's genetic material uniqueness was endangered by cloning, this issue could

12 Council of Europe (1998). Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings. European Treaty Series. No. 168. Paris, 12.I.1998.

13 Chart of signatures and ratifications of Treaty 168, Council of Europe Treaty Office, Status as of 14/07/2021, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/168/signatures?module=signatures-by-treaty&treatynum=168, accessed on 14.07.2021.

14 Explanatory Report to the Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, Paris, 12.I.1998, European Treaty Series - No. 168, par. 2.

15 Charter of Fundamental Rights of the European Union. Official Journal of the European Union. C 83/391, 30.3.2010.

be easily resolved with the consent of that person. If the ban concerns the protection of the integrity of a future child, it is not clear how the clone can be reduced to serving other people's purposes (which is often stated as an argument), instead of being valued as a human being with his or her own value (S. Michalowski, 2004: 306). There is also the view that reproductive cloning does not offend the dignity of the clone, but the very act of creating such a human being would be contrary to human dignity (Labrou, 2012: 67-68). In any case, it should be borne in mind that the integrity of the clone is questionable in relation to its physical health, given that it is well-known that clones can suffer from various disorders. A recent experiment on monkeys supports this fact, since the cloned monkeys were short-lived. Here, the integrity of the clone is protected in advance by preventing the creation of the clone. This would, however, mean that if technology advances, making cloning safe for the clone, the prohibition would be unnecessary. Reproductive cloning of humans is difficult to encompass within existing human rights. The Explanatory Report to the Protocol on Cloning states that intentional cloning of people "poses a threat to human identity".[16] A person who is the owner of genetic material ("original") could exclude the right to his or her unique genetic identity by the autonomy of the will, agreeing to create a clone from his or her genetic material. However, the clone would not have this possibility since its will is unknown, and respect for this right of the clone was possible only before clone creation. The prohibition of reproductive cloning might be situated somewhere between the right to human identity and the right to human integrity.

A paternalistic approach in this area is certainly present since it is also assumed that reproductive cloning represents an insult to the broad notion of human dignity (which is also used in order to achieve greater consensus) and not concretely to individual rights. Recourse to paternalism in the case of unknown consequences of a technology is completely understandable, having in mind that the prohibition on cloning is not firmly situated in any of the well-established human rights.

It seems that the EU Charter might also deal with genetic modifications within the right to the integrity of the person. Although the meaning of this provision is puzzling, Article 3 of the EU charter states that "in the fields of medicine and biology, the following must be respected, in particular:…the prohibition of eugenic practices, in particular, those aiming at the selection of persons". The words "in particular" are used two times. Therefore, it is possible that some other prohibited practices in the fields of medicine and biology are also included

16 Explanatory Report to the Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, par 3.

(other than the practices explicitly stated), and that some eugenic practices not aimed at the selection of persons might also be included by the provision. In addition, there is no uniform definition of eugenic practices. Judging by the Explanations relating to the EU Charter, it seems that the provision does not have any special, new purpose in relation to biology and medicine. It states that the reference to eugenic practices "relates to possible situations in which selection programmes are organised and implemented, involving campaigns for sterilisation, forced pregnancy, compulsory ethnic marriage among others, all acts deemed to be international crimes in the Statute of the International Criminal Court adopted in Rome on 17 July 1998 (see its Article 7(1)(g))."[17] This kind of eugenic practice is probably closer to the prohibition of torture and other cruel, inhuman, and degrading treatment or punishment. However, if the provision is also aimed at the prohibition of inheritable genetic modifications as a form of "not particular" eugenic practice, it could be tied to the prohibition of the integrity of the human species as such, as a collective right, or the physical or mental integrity of the future person or persons affected by the modification. In addition, the creation of chimeras and hybrids is not mentioned in Article 3 of the EU Charter, although they are also strongly related to the fields of medicine and biology.

The Directive on the legal protection of biotechnological inventions states that interventions into the human germline and cloning of human beings offend the *ordre public* and morality.[18] Cloning of human beings, processes for modifying the germline genetic identity of human beings, and processes for modifying the genetic identity of animals that are likely to cause them suffering without any substantial medical benefit, and animals resulting from such processes as well, are considered to be unpatentable.[19] In addition, the rules that govern clinical trials reflect a negative attitude toward inheritable genetic modifications, since "no gene therapy clinical trials may be carried out which results in modifications to the subject's germline genetic identity."[20] However, all the relevant provisions did not stop MRT in Greece, for example, and this issue did not attract any official response from the EU.

17 Explanations Relating to the Charter of Fundamental Rights, Official Journal of the European Union, C 303/18, 14.12.2007, p. 18.

18 Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, *Official Journal of the European Communities*, 30.7.1998, L 213/13, Preamble, par. 40.

19 Ibid., Article 6 (2).

20 Regulation EU No 536/2014 of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC, Official Journal of the European Union, L 158/1, 27.5.2014, Article 90.

4. Serbian criminal law

In countries where reproductive cloning of humans is prohibited, this prohibition is sometimes explicitly guaranteed by the constitution, but usually, it represents a criminal offence, with criminal sanctions ranging from fines to imprisonment for up to 30 years (Škorić, 2007:1247). Some countries explicitly forbid the creation of clonal embryos, while others allow the creation of such embryos for research purposes, although the implantation of such embryos is forbidden. In the United States, for example, there is no federal law prohibiting reproductive cloning of humans. Federal laws and regulations only address funding. However, at the state level, some laws directly prohibit reproductive cloning for any purpose, some prevent cloned embryo implantation for childbirth (therefore allowing research on cloned embryos), and some expressly prohibit state funding of human cloning for any purpose (Jardine, 2018).

The Constitution of the Republic of Serbia prohibits cloning of human beings within the right to life in Article 24 (3).[21] However, the link between the right to life and the prohibition of cloning is not clear. The prohibition of reproductive cloning might even represent the prohibition of the right to life of the future cloned human being. Therefore, this prohibition would be better situated within Article 25, which protects the physical and mental integrity of the person and prohibits medical and other experiments without free consent since, for the time being, the health of the cloned person would be significantly affected. Alternatively, the best solution would be the placement of the prohibition within the right to dignity and free development of individuals in Article 23 of the Constitution of the Republic of Serbia (Simović, 2008:332). Of course, there is also an issue of c*onstitutionalization* of this particular practice, and not inheritable genetic modifications, which can cause consequences for the entire human species, or the creation of chimeras or hybrids (or a wide range of other specific practices from non-related fields).

The Criminal Code of Serbia (CC) regulates the prohibition of cloning in Article 252(2), within the chapter directed at criminal offences against human health.[22] This is a better-suited placement than, for example, within the chapter directed at criminal offences against life and limb. Integrity of the person from which the genetic material derives from, is significantly less affected for the time being, than the general health of the clone. The criminal offence of illegal con-

21 Constitution of the Republic of Serbia ("Official Gazette of the RS", No. 98/06).

22 Criminal Code, Official Gazette of the Republic of Serbia, no. 85/05, 88/05 - corrected, 107/05 - corrected, 72/09, 111/09, 121/09, 104/13, 108/14, 94/16 and 35/19.

ducting of medical experiments and testing of drugs from Article 252 of the CC contains three related criminal offences: conduct of medical or similar experiments on humans contrary to regulations, cloning of human beings and clinical testing of drugs contrary to regulations (Stojanović, 2021:853). Article 252 (1) of the CC states: "whoever contrary to regulations conducts medical or similar experiments on humans, shall be punished by imprisonment of three months to five years", and in Article 252 (2) "the penalty specified in paragraph 1 of this Article shall be imposed also on whoever clones human beings or conducts experiments to that purpose". Therefore, besides the prohibition of reproductive cloning, the act of commission is also directed at the preparation of the act. Given this formulation, it appears that there is no clear distinction between reproductive and therapeutic cloning and that therapeutic cloning could also be considered prohibited (Kostić, Ranaldi, 2019: 327). The Law on biomedically assisted reproduction is also relevant. In the process of biomedically assisted fertilisation, it is prohibited to enable the creation of embryos with a same-sex hereditary basis or embryos that have an identical hereditary basis as another living or dead person (cloning)".[23] This provision also seems to be directed at therapeutic cloning, since the term of creation is used, and not the term of implantation.

The Law on biomedically assisted reproduction also prohibits the creation of embryos for any other purpose than biomedically assisted reproduction, which is in line with the Biomedicine Convention.[24] Extra embryos created in the course of biomedically assisted reproduction can be used for research purposes only with the consent of both partners.[25] Extra embryos left from the *in vitro* fertilization procedure (IVF) are not best suited for gene editing. However, it is possible that partners use "enhanced" embryos primarily for the purpose of biomedically assisted reproduction.

When it comes to inheritable genetic modifications, the CC does not regulate this particular practice. However, Article 252 (1) of the CC might encompass it. A medical experiment understood in the broadest sense involves the use of a drug or procedure that has not been broadly accepted or has not been used by a significant number of physicians (Radišić, 2008: 255). The Law on biomedically assisted reproduction prohibits different practices which can relate to the term inheritable genetic modifications (including MRT), as well as the creation of hybrids and chimeras.[26] However, the Law on biomedically assisted reproduction does not recognize these practices as a criminal offence. There is only the possibility of fines

23 Law on biomedically assisted reproduction, no. 40/2017 and 113/2017-other law, Article 49 (5).

24 Ibid., Article 49 (13).

25 Ibid., Article 53.

26 Ibid., Article 49 (6-11, 14, 19).

in the case of the creation of embryos for other purposes than biomedically assisted reproduction, and the possibility of revoking the licence for undertaking activities related to biomedically assisted reproduction.[27] The Law on Medicines and Medical Devices also prohibits clinical trials, which might result in modifications to the subject's germline genetic identity.[28] In addition, the Law on patents, in line with EU regulations, declares unpatentable: cloning of human beings, processes for modifying the germline genetic identity of human beings, and for modifying the genetic identity of animals that are likely to cause them suffering without any substantial medical benefit, and animals resulting from such processes.[29]

Many European countries do not have a specific prohibition on germline alterations in humans. However, EU law prohibits patents for germline alteration processes and no gene therapy clinical trials that result in modifications to the subject's germline genetic identity may be carried out. In some countries, however, they do represent criminal offences, but with significant variations. For example, besides the prohibition of cloning and the prohibition related to mixing human sex cells with animal sex cells, Article 108 of the Criminal Code of the Republic of Croatia prohibits human genome changes (within the chapter of crimes against humanity and human dignity).[30] The imposed sanction is milder than in the case of cloning and mixing human sex cells with animal sex cells (imprisonment from one to ten years). Namely, "whoever carries out an intervention seeking to modify the human genome for purposes other than preventive, diagnostic or therapeutic, or does so for preventive, diagnostic or therapeutic purposes, but with the aim of introducing modifications into the genome of a patient's descendent shall be punished by imprisonment from six months to five years". In Slovenian Criminal Code, reproductive cloning of human beings, along with the prohibition of creation of human embryos for research, industrial or commercial purposes, is prohibited in the group of crimes against humanity, with the prescribed penalty of imprisonment between ten and fifteen years.[31] However, modification of the human genome is regulated within the chapter devoted to criminal offences against public health, with the prescribed penalty of imprisonment for not

27 Ibid., Article 67 and 16.

28 Law on medicines and medical devices, Official Gazette of the Republic of Serbia, no. 30/2010; 107/2012-other law and 113/2017-other law).

29 Patent Law, Official Gazette of the Republic of Serbia, no. 99/11, 113/2017-other law 95/2018, 66/2019., Article 9.

30 Criminal Code of the Republic of Croatia, Official Gazette of the *Republic* of *Croatia,* no. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017 and 118/2018

31 Kaznenski zakonik, „Uradni list RS", broj 50-2012-prečišćen tekst, 6/2016, 54/2012, 38/2016 i 27/2017., Article 114 (2).

more than five years.[32] The Criminal Code of Finland also regulates all three situations, prescribing significantly lenient penalties.[33] The French Criminal Code regulates "crimes in relation to eugenics and reproductive cloning", and cloning is defined as a procedure designed to cause the birth of a child genetically identical to another person, whether living or deceased, and is punishable by thirty years of criminal imprisonment and a fine of €7,500,000.[34] The same penalty is prescribed for "implementing any eugenic practice aimed at organising the selection of persons".[35] However, this offence seems more related to crimes against humanity than to the prohibition of inheritable genetic modifications.[36] The German Embryo Protection Act prohibits the use of a human germ cell with artificially altered genetic information for fertilisation, but also artificial altering of the genetic information of a human germline cell (therefore, without fertilisation), with the prescribed penalty of imprisonment of up to five years or a fine.[37] The same penalty is prescribed for cloning, as well as for the creation of chimeras and hybrids.[38] Some countries allow inheritable genetic modifications in the case of MRT, like the United Kingdom (Vogel, 2016). For example, in the United States, there is no law prohibiting inheritable genetic modifications, but, like in the case of cloning, it imposes limits on funding for research involving embryos in general and genome editing of embryos in particular (Yotova, 2017:45).

5. Concluding observations

Unlike interventions on the human genome, reproductive cloning is not that promising in relation to possible therapeutic functions. A possible therapeutic

32 Ibid., Article 181 (5).

33 Criminal Code of Finland, 39/1889 amendments up to 766/2015 included, translation from Finnish, available at: https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf, 15.07.2021.

34 Criminal Code of the French Republic (as of 2005), translation from French, available at: https://www.legislationline.org/download/id/3316/file/France_Criminal%20Code%20updated%20on%2012-10-2005.pdf , 14.07.2021, Article 214 (2).

35 Ibid., Article 214 (1).

36 Imposed penalty appears severe for both crimes, however French law gives judges large discretion in sentencing, Article 132 (17-20) of the Criminal Code of the French Republic.

37 The Embryo Protection Act, Federal Law Gazette, Part I, No. 69, Bonn, 19th December 1990, page 2746, (Gesetz zum Schutz von Embryonen of 13th December 1990), translation from German, available at: https://www.rki.de/SharedDocs/Gesetzestexte/Embryonenschutzgesetz_englisch.pdf?__blob=publicationFile, 14.07.2021, Section 5 (1-2).

38 The Embryo Protection Act also regulates improper use of reproduction technology, improper use of human embryos, forbidden sex selection and unauthorized fertilization, embryo transfer and artificial fertilization after death, prescribing more lenient penalties.

function of reproductive cloning would be to allow some couples, or even individuals, to have a child to which they are genetically related. Inheritable genetic modifications, however, can represent a cure for a very wide range of diseases and can be an instrument of human enhancement. Most importantly, the social dangers or harms arising from inheritable genetic modifications seem even greater than in the case of reproductive cloning. Inheritable genetic modifications of humans have the potential to affect the whole of humanity, including future generations. For the time being, they are not safe, and off-targeted mutations can have pathogenic consequences. Even if they eventually become completely safe, the issue of the distinction between enhancement and therapy will be difficult to draw, and the effects on future generations will still be uncertain. International regulation of inheritable genetic modifications at the universal level is not likely to happen, having in mind the failed attempt on legally binding prohibition of reproductive cloning. However, at the European level, the legally binding Biomedicine Convention succeeded in prohibiting inheritable genetic modifications, while reproductive cloning is regulated by the Protocol on Cloning. The EU Charter seems rather confusing on the matter. It prohibits reproductive cloning, but when it comes to inheritable genetic modifications, the situation is less clear. International law can prove to be suitable when it comes to deciding on which new technologies should be prohibited, restricted or allowed since the consequences can affect the entire human species, and having in mind the so-called phenomenon of reproductive tourism. However, there are always countries that might wish to accommodate potential commercial benefits.

The prohibition of cloning found its place in the Constitution of the Republic of Serbia and in the CC as well. However, inheritable genetic modifications, as well as the artificial creation of chimeras and hybrids, could represent criminal offences only within the prohibition of medical or similar experiments on humans in Article 252 (1) of the CC. The explicit prohibition of reproductive cloning might lead to the conclusion that this technique is more dangerous than inheritable genetic modifications of humans.

A possible solution involves encompassing the prohibition of inheritable genetic modifications, as well as the artificial creation of chimeras and hybrids within the CC. Alternatively, the Law on biomedically assisted reproduction can prescribe all three as criminal offences, while the general prohibition of medical or similar experiments on humans will remain in the CC. However, this would not be the best solution, considering the c*onstitutionalization* of the prohibition of reproductive cloning. When it comes to penalties, heavier penalties in the case of reproductive cloning and the creation of chimeras and hybrids than in the case of inheritable genetic modifications do not seem justified (Criminal Code of the

Republic of Croatia). Although these two might seem less publicly acceptable at first glance, inheritable genetic modifications are equally, if not even more dangerous. The penalty prescribed for the criminal offence of medical or similar experiments on humans for all three potential criminal offences seems more suitable for the time being.

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INTERNATIONAL LAW STANDARDS REGARDING SUBSTANTIVE PETTY OFFENCES LAW**

This article attempts to identify and analyse, in the light of the provisions of the acts of international law, the following issues belonging to the substantive part of the law on petty offences: the general problem of criminalization in petty offenses law and; the question of the criminal nature of the law of petty offenses, and thus the application of individual provisions to it and the resulting guarantees appropriate to that law; the application of the principle of guilt on the basis of the analysed regulations as a premise for assigning liability; the principle of ne bis in idem; the principle of nullum crimen nulla poena sine lege, especially in so far as it derives from the principle of lex mitior retro agit.

Keywords: criminal law, petty offences law, human rights

1. Introduction

The purpose of this study is to assess whether the international law acts affect the directions and depth of possible reform of substantive petty offences law adopted in Poland. However, the result of presented analysis is much more general, as it can become an important guidance on the direction of amendments for national legislator in every State-party of analysed international law acts.

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Apart from the crimes, regulated by the *Penal Code of 1997*, petty offences function in polish legal system, as the prohibited acts of less severe nature, punishable with penalties of less intensity, regulated by the *Petty Offences Code of 1971*. According to the Article 1 § 1 of the Petty Offences Code, petty offences liability shall be incurred only by a person who commits an act of social harmfulness, prohibited under penalty by a law in force at the time of its commission. The penalties under the petty offences code are arrest, fine and reprimand.

The aim of presented paper is to identify international-law petty offences standards and, if possible, to point out these of them which has to be adopted in domestic law to make it fully in line with international law. The scope of given remarks is limited to the 1) *European Convention on Human Rights* (ECHR); 2) *The Charter of Fundamental Rights of the European Union* (the Charter); 3) *The International Covenant on Civil and Political Rights* (the Covenant).

2. Petty offences law as a criminal law

The ECHR proclaims such fundamental principles as *inter alia* the presumption of innocence ("Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law" – Article 6 section 2). Furthermore, in the Article 7 section 1 expresses *the nullum crimen sine lege* principle, which applies to "any criminal offence" ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed"). Likewise, in the Article 4 section 1 of the Protocol No 7. ("No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State"), the double-punishment ban (*ne bis in idem*) is connected with "criminal proceedings" and an "offence".

Pursuant to the Article 6 section 1 of the ECHR, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. It is obvious, that due to its character and functions the petty offenses law and its proceedings cannot be treated as regarding to the civil rights (however, the imposed sanctions may affect civil rights as well e.g., property).

It is therefore crucial to examine whether the above-mentioned principles must be applied to the petty offences law. The answer to that question depends on how the terms of "criminal charges" and "criminal case", "criminal offence" is defined under the ECHR.

It needs to be emphasized that the phrase "criminal" is autonomous under the Article 6 of the ECHR. The ECtHR judges *a casu ad casum*, if the sanction is criminal by its nature. The applicability of the criminal aspect of Article 6 of the ECHR is based on the criteria outlined in the case of *Engel and Others v. the Netherland*s (as well as in subsequent judgments). These criteria are as follows: 1) classification in domestic law; 2) nature of the offence; 3) severity of the penalty that the person concerned risks incurring[1].

According to the ECtHR it is enough to satisfy at least one of two last criteria. In other words, the second and third criteria are alternative, however the cumulative approach may be adopted where separate analysis of each one of them does not make it possible to reach a clear conclusion as to the existence of a criminal charge[2]. It needs to be pointed out that the ECtHR's case-law is not clear as regards the third criteria. As a rule, the sanction of imprisonment determines the criminal nature of case. With regard to the financial sanctions the ECtHR noticed that it should be considered, if it is acceptable or requested to convert uncollected fines into a term of imprisonment[3].

For Article 6 of the ECHR to apply by virtue of the words "criminal charge", it suffices that the offence in question should by its nature be "criminal" from the point of view of the ECHR, or should have made the person concerned liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere[4]. However criminal offence referred to in the ECHR does not imply a certain degree of seriousness. As the ECtHR pointed out, it would be contrary to the object and purpose of Article 6, if the State were allowed to remove from the scope of this Article a whole category of offences merely on the ground of regarding them as petty[5].

In assessing the nature of an offence, it is also important to ascertain, whether the sanctions were designed to ensure that the members of particular

1 See i.a. *Engel and Others v. Netherlands*, (1976, no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72), *Putz v. Austria*, ECtHR (1996, no. 18892/91), *A. P., M. P. i T. P. v. Switzerland*, ECtHR (1997, no. 19958/92); *Ezeh and Connors v. The United Kingdom, ECtHR (1997, no.* 39665/98, 40086/98).

2 See *Lutz v. Germany*, ECtHR (1987, no. 9912/82), , *Bendenoun v. France*, ECtHR (1994, no. 12547/86); *Grande Stevens and Others v. Italy*, ECtHR (2014, no. 8640/10).

3 See *Ravnsborg v. Sweden,* ECtHR (1994, no. 14220/88).

4 See *Janosevic v. Sweden,* ECtHR (2002, no. 34619/97).

5 See *Ozturk v. Germany*, ECtHR (1984, no. 8544/79).

groups comply with the specific rules governing their conduct or whether these rules are of general character[6]. In criminal cases sanctions should be imposed for the purpose that is deterrent and punitive[7]. It needs to be underlined that according to the ECtHR, even the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character[8].

The Article 14 of the Covenant is interpreted in a similar way. It is assumed that the term "criminal case" covers all acts that are punishable under domestic criminal law. In addition, the term also refers to acts that are criminal in nature and for which sanctions are punishable, which must be considered criminal because of their purpose, nature or degree of severity, irrespective of their classification in the domestic legal order[9].

Also, the CJEU refers to the jurisprudence of the ECtHR on the criteria for qualifying cases as criminal. In other words, the CJEU has not developed its own rules for assigning liability to the discussed category. According to the CJEU, three criteria are relevant for the purpose of assessing whether sanction is criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (Błachnio-Parzych, 2016:. 79).[10]

In light of the above remarks, it has to be stated that, as a rule, the responsibility for petty offences has to be considered as a criminal responsibility. In other words, the case of petty offence is a criminal case. Therefore, the guarantees regarding criminal liability must be applied to all proceedings in which abovementioned criteria are satisfied.

3. Criminalization

The ECHR does not directly define the way in which the contracting-states should secure the rights expressed therein. Thus, it is impossible to deduce from the ECHR the extent to which the national legislator is obliged and at the same time entitled to use instruments of widely understood criminal law, including the law of petty offenses.

6 *Weber v. Switzerland,* ECtHR, (1990, no.11034/84).

7 See *Lutz v. Germany,* ECtHR, (1987, *no.*9912/82); *Lauko v. Slovakia,* ECtHR (1998, no. 26138/95); *Malige v. France*, ECtHR, (1998, no. 7812/95), *Zolotukhin v. Russia,* ECtHR (2009, no. 14939/03).

8 See *Ozturk v. Germany*, ECtHR (1984, no. 8544/79).

9 See. Wieruszewski et. al, 2012: 293.

10 See C-17/10, *Toshiba Corporation et al v. Úřad pro ochranu hospodářské soutěže,* CJEU; (2012, no. C-17/10) *Bonda*, CJEU, (2012, no. C-489/10).

The fundamental and most general directive is expressed in the Preamble to the ECHR, pursuant to which the contracting-states decided to take the first steps for the collective enforcement of certain of the rights Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948. The Universal Declaration stipulates such rights and freedoms as: right to life, liberty and security of person (Article 3), ban on torture, cruel, inhuman or degrading treatment or punishment (Article 5), right to privacy (Article 12). Although the provisions of the ECHR expressing individual rights and freedoms do not directly refer to substantive criminal law, it is rightly pointed out that they may refer to it (van Kempen, Bemelmans, 2018: 252). It needs to be emphasized, that there is a close and obvious relationship between human rights and criminal law. The nature of such relationship should not, however, obscure its complex and paradoxical character. Abovementioned paradox lies in the fact that the criminal law appears to be both a protection and a threat for fundamental human rights and freedoms (Tulkens, 2011: 578).

It needs to be emphasized that pursuant to the ECHR nothing in it may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the ECHR (Article 17). The restrictions permitted under this ECHR to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed (Article 18). Similar provisions can be found in the Covenant (see i.e., Article 18, Article 21, Article 22).

Under the Charter, any limitation on the exercise of the rights and freedoms recognized by Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others (Article 52 section 1).

Article 1 of the ECHR, read together with its subsequent provisions expressing individual rights and freedoms, has to be considered as the source of negative and positive obligations of contracting-states, The fulfilment of these obligations by the state guarantees and secures the values of the ECHR. Negative obligations consist in refraining from certain actions by the state that could violate human rights and freedoms, for example by respecting the ban on torture. Positive obligations, on the other hand, consist in taking specific actions to protect rights and freedoms. Some positive obligations are expressed directly in the ECHR, such as the obligation to protect life (Article 2). As to the rights and freedoms the ECHR does not provide with the aforementioned reservation, such

obligations are derived from the jurisprudence of the ECtHR (*See* e.g., Harris et. al, 2009: 94).

Boundaries between the State's positive and negative obligations under the ECHR do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty of the state or in terms of interference by a public authority which needs to be justified, the criteria to be applied do not differ in substance. In both contexts one has to weigh up the fair balance between the competing interests at stake[11]. The limits of the fair weighing process are inter alia the essence of the right or freedom, which the legislator cannot infringe, and human dignity derived from the Article 3 of the ECHR.

In its numerous judgments, the ECtHR referred to criminal law as an effective tool to secure the observance of ECHR rights and freedoms. The ECtHR pointed out that the first sentence of Article 2 section 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction, including the effective prevention and fight against crime [12]. In regard to criminalization of some behaviours as a positive duty of the state, it is also worth to notice the according to the ECtHR, the procedural obligation of Article 2 in the context of health care requires state to set up an effective and independent judicial system so that the cause of death of patients in the care of the medical profession. It means that in some exceptional situations, where the fault attributable to the health-care providers went beyond a mere error or medical negligence, the compliance with the procedural obligation must include recourse to criminal law. In all other cases where the infringement of the right to life or to personal integrity is not caused intentionally however, the procedural obligation imposed by Article 2 to set up an effective and independent judicial system does not necessarily require the provision of a criminal law remedy[13].

The next area in which ECtHR requires a recourse to criminal law is cruel and inhuman treatment, especially when children are the victims of such actions[14]. Serious acts such as rape and sexual abuse of children, where fundamental values and essential aspects of private life are at stake, it falls upon the states to ensure

11 See e.g. *Verein gegen Tierfabriken Schweiz (VGT) v. Switzerland,* ECtHR, (2009, no. 32772/02).

12 See *inter alia L.C.B. v. The United Kingdom,* ECtHR, (1998, no. 23413/94); *Osman v. The United Kingdom,* ECtHR, (1998, no. 23452/94).

13 See *Lopes de Sousa Fernandes v. Portugal,* ECtHR (2017, no. 56080/13).

14 See *A. v. The United Kingdom,* 23 September 1998, (ECtHR, 1998, no. 25599/94); *Z and Others v. The United Kingdom*, ECtHR, (2001 no. 29392/95).

that efficient criminal-law provisions are in place. Such need for was emphasized by the ECtHR in the context of the sexual exploitation of minors, where the ECtHR pointed out, that the lack of criminalization of sexual offers made to a mentally handicapped minor meant that the state failed to fulfil its positive obligation to protect the rights of victims under Article 8 of the ECHR[15]. According to the ECtHR, the measures applied by the state to protect children against acts of violence should be effective and include reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge and effective deterrence against such serious breaches of personal integrity.

It needs to be emphasized that the ECtHR does not consider it appropriate to assess what specific types of offences the states-parties should define in their legal systems. In respect of less serious acts between individuals, which may violate psychological integrity, the obligation of the State under Article 8 to maintain and apply in practice an adequate legal framework affording protection does not always require that an efficient criminal-law provision be in place. In one of the cases heard by the ECtHR, domestic law did not provide for criminal liability for filming a naked child for pornographic purposes. Despite this, the ECtHR pointed out, that recourse to the criminal law was not necessarily the only way that the respondent State could fulfil its obligations under Article 8 of the ECHR. The violation of the ECHR was *in casu* determined by the lack of adequate parallel civil law remedies.

The requirement of effective protection (Article 3 and Article of the 8 ECHR), by criminal law measures, was also highlighted by the ECtHR in the case of preventing rape and sexual abuse. The ECtHR pointed out that the positive obligations of the member states must be seen as requiring punishment and effective prosecution of any sexual act that takes place without the consent of the party, including cases where the victim has not physically resisted[16]. Thus, instruments of criminal law can also serve to protect freedom and private life[17].

Another example of positive obligation realized by the means of criminal law is the act of servitude, examined by the ECtHR in the case Silidian v. France[18]. In that judgment the Court pointed out that France violated Article 4 of the ECHR due to the lack of criminalization of behaviour consisting in servitude.

Therefore, it can be said that the obligation to recourse to criminal law measures applies to the most serious violations of human dignity or fundamental

15 See *X and Y v. Netherlands*, ECtHR, (1985 no. 8978/80); cf. *O'Keeffe v. Ireland*, ECtHR, (2014, no. 35810/09).

16 See *M.C. v. Bulgaria,* ECtHR (2003, no. 39272/98).

17 See *Phinikaridou v. Cyprus*, ECtHR (2007, no. 23890/02).

18 See *Siliadin v. France,* ECtHR, (2005, no. 73316/01).

values. In other words, the role of criminal law in relation to ECHR guarantees is to ensure that they are respected in cases of drastic violations of individual rights. In addition, the ECtHR identified situations in which the use of criminal law instruments should be assessed as disproportionate, and thus interfering with the rights and freedoms guaranteed by the ECHR to an unacceptable extent. The ECtHR did so in a case concerning the criminalization of behaviour defined in domestic law as "promotion of homosexuality and non-traditional sexual relations among minors"[19].

As it was mentioned above, the principle of proportionality must be taken into consideration when it comes to transform previously legal human behaviours into crimes. The immanent relation between principle of proportionality and criminalization is pointed out under the ECHR, as well as under the Charter. In relation to EU law, it is however, the relatively "soft" principles such as the so-called ultimum remedium notion are underlined. It is noticed, that the principle of proportionality despite its importance for the public debate, is not able to provide unambiguous answer to the question of the limits of criminalization in the scope of EU law (van Kempen, Bemelmans, 2018: 251).

Taking the above into account, it should be stated that the analysed acts of international law do not express a uniform principle for criminalization. The margin of appreciation is left to the states. However, this margin not identical in each case but will vary according to the context. Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned[20]. As a rule, it is the national legislator who decides whether a given behaviour should be sanctioned as serious offences (crimes), lesser offences (delicts) and petty offences (contraventions), administrative delicts, or whether it will be sufficient to recourse to measures granted by the civil law. It is worth emphasizing that the ECtHR accepts the possibility of transforming serious offences into petty offenses or to remove offences from the criminal sphere and classify them as "regulatory" offences (administrative delicts).

4. The principle of guilt

Pursuant to the Article 1 § 3 of the polish Penal Code from 1997 the perpetrator does not commit a crime if they cannot be ascribed guilt during the act. The same principle is stated in the Article 1 § 2 of the polish Petty Offences Code.

19 See *Bayev and Others v. Russia*, ECtHR, (2017, no. 67667/09, 44092/12, 56717/12).

20 See *Laskey, Jaggard and Brown v. the United Kingdom*, ECtHR, (1997, no. 21627/93; 21628/93; 21974/93).

Above mentioned acts constitute a clear declaration of recognizing guilt as a necessary condition of an offence and petty offence. It is pointed out that he occurrence of the principle of guilt in penal law is connected with two functions performed by guilt. These are, above all, the legitimating function which gives the basis for the state's reaction in the form of punishment for a prohibited act as well as the limiting function – in the form of establishing the punishment on the basis of the degree of guilt (Komandowska, 2014-2015: 115).

The analysed acts of international law do not express directly the principle of guilt in a way the polish legislator does it. Therefore, it is correct to conclude that the ECHR does not stipulate the principle of guilt as the basis of criminal liability.

The above mentioned does not mean, however, that the issue of attributing guilt to the perpetrator of a prohibited act is not raised in complaints about violation of the ECHR and thus remains beyond the scope of the ECtHR's interest. The normative grounds for the decisions of the ECtHR in the discussed scope are Art. 6 section 2 and art. 7 section 1 of the ECHR. The first of these provisions expresses the principle of the presumption of innocence, stipulating that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The second provision expresses the so-called nullum crimen, nulla poena sine lege principle, according to which no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Despite the fact that both provisions cited above use the concept of guilt, the principle of guilt as the basis of criminal liability, cannot be directly inferred from either. Although the Article 6 ECHR expresses a procedural guarantee and the Article 7 of the relates to the validity of criminal law provisions, ECtHR formulates on their basis general postulates that can be considered as regarding the principle of guilt. It needs to be emphasized however, that in analysed case we are not dealing with a coherent model. The views of the ECtHR concern rather individual issues, which makes them hard to synthetize.

For example, in the case of A.P., M.P. and T.P. v. Switzerland tax authorities-initiated proceedings against the applicants – heirs of the late company owner – for recovery of the unpaid taxes and at the same time-imposed fines for tax evasion. The applicants resisted the imposition of the fines, claiming that they were innocent of the tax offence committed by the late owner. In the opinion of ECtHR inheritance of the guilt of the dead is not compatible with the standards of criminal justice in a society governed by the rule of law[21]. Such rule is required by the presumption of innocence stipulated in the Article 6 section 2 of the ECHR.

21 See *A.P, M.P. and T.P. v. Switzerland*, ECtHR (1997 no. 19958/92).

It is worth to notice that despite the assess of a cited judgment as a right attempt to fill the gap in the substantive regulation of guilt in the ECHR, some Authors raises serious concerns about referring to the Article 6 of the ECHR as a source of such principle (See Ruggeri ed., 2015: 55 with the references cited therein).

On the other hand, in the case of *Varvara v. Italy* the ECtHR referred to the Article 7 of the ECHR and principle of legality. According to the Court, prohibition of punishing a person for an offence committed by another is a consequence of cardinal importance that flows from the principle of legality in criminal law[22]. Also, this view is criticized by some Authors (van Kempen, Bemelmans, 2018: 254).

Third group of remarks worth mentioning regards the so-called strict liability principle. According to the ECtHR states remain free to apply the criminal law to any act which is not carried out in the normal exercise of one of the rights protected under the ECHR and, accordingly, to define the constituent elements of the resulting offence. The ECtHR does not conceive it as its role under Article 6 section 1 or 2 to dictate the content of domestic criminal law, including whether or not a blameworthy state of mind should be one of the elements of the offence or whether there should be any particular defence available to the accused[23]. In the case cited above, the justification for the wide margin of freedom recognized by the ECtHR in defining the limits and principles of criminal liability was the importance of the protected good, e.g., protection of sexual freedom; protection of minors from abuse. A similar view is expressed in the legal doctrine, where it is pointed that strict liability does not violate a limine the ECHR (See Sullivan, 2005: 217-218). However, it has to be noted that according to science of law the concept of strict liability is not the same as an absolute liability. It is pointed out that strict liability means responsibility despite the perpetrator's lack of awareness of that he is committing the prohibited act in the circumstances when perpetrator was not deprived of the possibility of making arrangements to exclude committing a prohibited act, or that it could not be expected of him. The above-mentioned places the strict liability close to a crime committed as a result of negligence (*See* Hryniewicz-Lach, 2015: 210; cf Duff, 2005: 125). Some Authors, however, states that the concept of strict liability is incompatible with the principle of guilt and adequate liberal standards (Vanacore, 2015: 844).

The principle of guilt leads to subjectivization of penal law, reducing the responsibility of the perpetrator to the consequences that the former has been able to foreseen (See Komandowska, 2015: 115). Despite the lack of such direct

22 See *Varvara v. Italy*, ECtHR, (2013, no. 17475/09).

23 See *G. v. the United Kingdom*, ECtHR, (2011 no. 37334/08).

provision in the ECHR, the foreseeability of committing prohibited act is taken by into consideration the ECtHR when analysing the criminal liability. According to the ECtHR, imposing penalties within the meaning of Article 7 of the ECHR, requires that these consequences have to be foreseeable. A measure can only be regarded as a penalty within the meaning of Article 7, where an element of personal liability on the part of the offender has been proven. In other words, imposing criminal measures in the absence of a mental link disclosing an element of liability in the conduct of perpetrator is prohibited[24].

It also has to be mentioned about the relation between principle of guilt and idea of accountability in criminal law. As the ECtHR points out, presumptions of fact or of law operate in every legal system. It raises a question about admissibility of such presumptions in the scope of ECHR. In the case of Salabiaku v. France man accused of possession of drugs defended himself that he was unaware of the presence of drugs in the parcel he has collected earlier. According to the ECtHR, the ECHR does not prohibit such presumptions in principle. Article 6 section 2 of the ECHR does require however states to confine such presumptions within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence[25].

Also under the EU law, it is difficult to speak of the absolute application of the principle of guilt, since such principle is not expressed in the acts of EU law. However, the Charter stipulates the presumption of innocence (Article 48 section 1) and the principle of proportionality (Article 49 section 1). According to the science of law, the assess of the proportionality of the sanctions should comply three indicators: the importance of the protected interest (good), the amount of the damage and the degree of guilt (Wróbel, 2013: 1279-1281). The last of these criteria is recognized and applied by the EU courts. The former Court of First Instance pointed out that, according to the guilt principle (*nulla poena sine culpa*), recognized by the criminal law systems of the Member States, by Article 6 section 2 of the ECHR and by the Article 49 section 3 of the Charter, the penalty imposed must be proportionate to the guilt of the undertaking to which it applies[26].

It is also pointed out that the principle of guilt enjoys the status of a fundamental right which is common to the constitutional traditions of the EU Member States. Although this principle is not expressly mentioned in the Charter it is the

24 See *G.I.E.M. S.r.l. and Others v. Italy,* ECtHR (2018, no. 1828/06, 34163/07 and 19029/11); cf. *Sud Fondi S.r.l. and Others v. Italy,* ECtHR, (2012, no. 75909/01); *Varvara v. Italy,* ECtHR (2013, no. 17475/09).

25 See *Salabiaku v. France,* ECtHR, (1998, no. 10519/83).

26 See T-279/02 *Degussa AG v Commission of the European Communities*, 5 April 2006 r., CFI.

necessary precondition for the presumption of innocence. The principle of *nulla poena sine culpa* may therefore be considered to be contained implicitly in Article 48 section 1 of the Charter[27].

In its judgements the CJEU accepts also the use of administrative sanctions imposed on the basis of objective liability. According to the case-law of the CJEU, system of strict liability is not, in itself, disproportionate to the objectives pursued, if that system is such as to encourage the persons concerned to comply with the provisions of a regulation and where the objective pursued is a matter of public interest which may justify the introduction of such a system[28]. However, in such cases the penalty must not be disproportionate to the gravity of the infringement (Klip, 2016: 221).[29]

The analysed case law does makes it hard to point out general conclusions in regard to the principle of guilt. On the other hand, there are certain guidelines concerning guilt that the national legislator must follow.

Firstly, it is unacceptable under the ECHR to adopt provisions allowing for the imposition of criminal liability for act perpetrator did not commit.

Secondly, state has to ensure that when recognition of the actual content of a criminal prohibition and adapting one's own actions to it is impossible due to justified and unavoidable circumstances not attributable to the addressee of the prohibition, no criminal liability will be imposed.

Thirdly, as the CJEU points out, even if administrative fines are imposed on the basis of objective liability, the legislator is obliged to respect the principle of proportionality and allow the court to take the degree of guilt into account when imposing a sanction.

5. The ne bis in idem principle

The principle of ne bis in idem is one of the guiding principles of criminal law and, in the wide sense, means the prohibition of instituting and conducting criminal proceedings concerning the same person and the same criminal offence (procedural aspect) and the prohibition of double (multiple) punishment in criminal cases concerning the same person and the same offense.

Analysed principle is stipulated in both, the ECHR and the Charter, as well as it is proclaimed by the Covenant. Pursuant to the Article 4 section 1 to the

27 Opinion of Advocate General *Kokott*, 28 February 2013, Case C−681/11.

28 See C-443/13 *Ute Reindl v Bezirkshauptmannschaft Innsbruck*, 2014, CJEU.

29 See C-262/99 *Paraskevas Louloudakis v Elliniko Dimosio*, 2001 CJEU.

Protocol 7 to the ECHR, no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State[30].

Article 50 of the Charter stated that, no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law. It has to be also mentioned that, pursuant to the Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (CISA), a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

It is then clear that under the CISA the *ne bis in idem* principle is limited to the cases when the penalty has been imposed, it has been enforced, is actually in the process of being enforced, while the Charter does not require such condition to be fulfilled. According to the explanations to Charter, the very limited exceptions in the CISA permitting the Member States to derogate from the *non bis in idem* rule are covered by the horizontal clause in Article 52 section 1 of the Charter concerning limitations. CJEU confirmed the accordance of the Article 54 of CISA with Article 50 of the Charter and pointed out that the execution condition laid down in Article 54 CISA does not call into question the *ne bis in idem* principle as such. That condition is intended, *inter alia*, to avoid a situation in which a person definitively convicted and sentenced in one Contracting State can no longer be prosecuted for the same acts in another Contracting State and therefore ultimately remains unpunished if the first State did not execute the sentence imposed[31].

Article 14 section 7 of the Covenant stipulates that, no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The jurisprudence of ECtHR presented different views on fundamental elements of the *ne bis in idem* principle until the case of *Zolotukhin v. Russia*, where

30 Cf. Article 7 of the *Convention on the Protection of the European Communities' Financial Interests*, OJ C 316, 27.11.1995, p. 49-57 and Article 10 section 1 of the *Convention on the fight against corruption involving EU officials or officials of EU countries*, OJ C 195, 25.6.1997, p. 2-11.

31 See C-129/14 *Zoran Spasic*, 2014, CJEU.

the ECtHR harmonized its previous views and pointed out what does *idem* in analysed rule mean. According to the ECtHR, the Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same[32]..

With regard to the relation between administrative and criminal proceedings the case of the ECtHR summarized and harmonized its views in the case of A.B. v. Norway. The ECtHR pointed out that the surest manner of ensuring compliance with Article 4 of Protocol No. 7 is the provision, at some appropriate stage, of a single-track procedure enabling the parallel strands of legal regulation of the activity concerned to be brought together, so that the different needs of society in responding to the offence can be addressed within the framework of a single process. Nonetheless, Article 4 of Protocol No. 7 does not exclude the conduct of dual proceedings, even to their term, provided that certain conditions are fulfilled. In particular that there is no duplication of trial or punishment (*bis*) as proscribed by Article 4 of Protocol No. 7, the respondent State must demonstrate convincingly that the dual proceedings in question have been "sufficiently closely connected in substance and in time". In other words, it must be shown that they have been combined in an integrated manner so as to form a coherent whole. This implies not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organizing the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected[33]. The abovementioned view is also supported by CJEU[34].

With regard to the CJEU jurisprudence, it is worth to mention that in its case-law CJEU adopted special criterion that arguably delimit the scope of the principle of *ne bis in idem* in the context of competition law[35]. As a matter of EU law, the sameness of an offence is generally to be determined on the basis of a two-fold criterion: the facts and the offender must be the same. However, in the competition law also the legal interest protected matters. In other words, the CJEU set out the principle that the principle of *ne bis in idem* may only be relied upon where there is identity of facts, offender and the legal interest protected.

The presented view cannot be accepted. I agree with the opinion that the principle of *ne bis in idem*, as enshrined in Article 50 of the Charter, should be

32 See *Zolotukhin v. Russia*, ECtHR (2009, no. 14939/03).

33 See *A and B v. Norway*, ECtHR, (2016, no. 24130/11 and 29758/11).

34 See C-524/15 *Luca Menci,* 20 March 2018 r., CJEU.

35 See C 204/00 P, C 205/00 P, C 211/00 P, C 213/00 P, C 217/00 P and C 219/00 *Aalborg Portland et al v. EC*, , 7 January 2004, CJEU; C 17/10 *Toshiba Corporation et al*, 14 February 2012, CJEU.

interpreted uniformly in all areas of EU law, having due regard to the requirements of the case-law of the ECtHR. The special features of completion law do not constitute sufficient reasons to limit the protection afforded by the Charter in the field of competition law[36].

6. The principle of legality (*nullum crimen sine lege, nulla poena sine lege*)

Article 7 section 1 of the ECHR stipulates that, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed".

From these principles it follows that an offence must be precisely defined by the law. This requirement is satisfied if the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable[37].

Similar rules are derived from the provisions of the Charter and the Covenant, since the principle of legality and proportionality is provided by the Article 49 section 1 of the Charter. The principle of the legality of criminal offences and penalties (*nullum crimen, nullum poena sine lege*), as enshrined in particular in Article 49 section 1 of the Charter, requires that European Union rules define offences and penalties clearly. Moreover, the principle of legal certainty requires that such rules enable those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly[38].

The wording of Article 7 section 1 of the ECHR, indicates that the starting-point in any assessment of the existence of a "penalty" is whether the measure in question is imposed following a decision that a person is guilty of a criminal offence. The "criminal offence" concept has an autonomous meaning, like "criminal charge" in Article 6 of the ECHR. The three criteria set out in the case of Engel

36 Opinion of Advocate General *Wahl*, 29 November 2018, Case C-617/17.

37 See *inter alia S.W. v. The United Kingdom,* ECtHR, (1995, no. 20166/92); *C.R. v. The United Kingdom*, 22 November 1995, ECtHR, No. 20190/92; *Vasiliauskas v. Lithuania*, ECtHR, (2015, no. 35343/05).

38 See C 352/09 P *ThyssenKrupp Nirosta GmbH v European Commission*, 29 March 2011, CJEU; Wieruszewski ed., 2012: 340.

and Others v. the Netherlands for assessing whether a charge is "criminal" within the meaning of Article 6 must also be applied to Article 7[39].

The term "law" under the Article 7 alludes to the very same concept as that to which the ECHR refers elsewhere when using that term, a concept which comprises written as well as unwritten law. It means that the word "law" covers not only statutory but also common law[40]. What is important, the ECtHR understands the term "law" in its "substantive" sense, not its "formal" one. The above-mentioned means "written law", encompassing enactments of lower rank than and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by parliament and unwritten law (including judge-made "law"). Concluding, it has to be emphasized that according to ECtHR, the "law" is the provision in force as the competent courts have interpreted it[41].

Article 7 of the ECHR and the concept of "law" used therein implies qualitative requirements, notably those of accessibility (whether the criminal "law" on which the impugned conviction was based was sufficiently accessible to the applicant, had been made public) and foreseeability. Though in any law system there is an inevitable element of judicial interpretation, Article 7 of the ECHR cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation *a casu ad casum*, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen[42].

Article 7 of the ECHT express directly only the *lex severior retro non agit* principle. However according to the ECtHR Article 7 § 1 of the ECHR guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law (the *lex mitior agit* principle). That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant[43].

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39 Guide on Article 7 of the European Convention on Human Rights, updated on 31 December 2020, https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf, s. 6.

40 See e.g. *Tolstoy Miloslavsky v. The United Kingdom*, ECtHR, (1995, no. 18139/91); *Streletz, Kessler and Krenz v. Germany*, ECtHR, (2001, no. 34044/96, 35532/97, 44801/98); *Kafkaris v. Cyprus*, ECtHR, (2008, no. 21906/04); *Navalnyye v. Russia*, ECtHR, (2017, no. 101/15).

41 See *Şahin v. Turkey*, ECtHR, (2004, no. 44774/98).

42 See e.g. *Kokkinakis v. Greece*, ECtHR,(1993, No. 14307/88); *Del Río Prada v. Spain*, ECtHR, (2013, no. 42750/09).

43 See *Scoppola v. Italy No. 2*, ECtHR, (2009, no.10249/03).

The principle of retrospectiveness of the more lenient criminal law is directly expressed in the third sentence of the Article 49 section 1 of the Charter and in the third sentence of the Article 15 section 1 of the Covenant.

7. The non-binding regulations concerning petty offences law

It is also worth to mention that recommendations in regard to analysed issue were presented in non-binding legal documents. The Resolution of the Congresses of the International Association of Penal Law adopted on the Fourteenth International Congress of Penal Law (Vienna, 2-7 October 1989) focused on the legal and practical problems posed by the difference between criminal law and administrative penal law[44]. According to the Resolution administrative penal law resembles criminal law in that it provides for the imposition of retributive sanctions. This similarity requires application of the basic principles of criminal law and of due process to the field of administrative penal law. The Congress proposed following principles concerning substantive law.

Firstly, the definitions of administrative penal infractions as well as of administrative penal sanctions should be fixed in accordance with the principle of legality and the lines between criminal offenses and administrative penal infractions should be drawn, with sufficient clarity.

Secondly, Administrative penal responsibility of physical persons should be based on personal fault (intent or negligence).

Thirdly, corporate liability should be imposed as an administrative liability.

Fourthly, the defenses of justification and excuse recognized in criminal law, including unavoidable mistake of law and extenuating circumstances, should likewise be available in administrative penal law.

Administrative sanctions, understood as penalties (fine or any punitive measures) imposed on persons on account of conduct contrary to the applicable rules, were also the subject of Recommendation No. R (91)1 of the Council of Europe Committee of Ministers[45]. As for the substantive law, the Committee suggests to adopt following guarantees: 1) sanctions and the rules of their imposition should be laid down by the law; 2) no administrative sanction may be imposed an account of an act which, at time when it was committed did not constitute conduct contrary to

44 See http://www.penal.org/sites/default/files/RIDP86%201-2%202015%20EN.pdf, pp. 351 ff.

45 Adopted by the Committee of Ministers on 13 February 1991 at the 452nd meeting of the Ministers' Deputies.

applicable rules – the principles of lex mitior retro agit and lex beningior agit should apply; 3) a person may not be administratively penalized twice for the same act, on the basis of rules of law or rules protecting the same interest.

8. Summary

In authors opinion there is no precise model of substantive petty offences law in international law. However, some standards can be deduced from analysed legal acts and judgments.

Firstly, it has to be pointed out, that, in principle national, legislator is entitled to choose the form of reaction he considers best from the point of view of protecting human rights and social interest, the gravity of endangerment or harm, degree of guilt etc. Petty offences can be therefore replaced in the legal system with crimes (as well as crimes can be converted into petty offences) or administrative (regulatory) delicts. However, in some cases the character of chosen measure should imply further regulations. For example, the view is presented, that "sanctions for administrative penal infractions should be reasonable and proportionate to the gravity of the infraction and the personal circumstances of the offender. Deprivation and restriction of personal liberty should not be available as a primary sanction or as an enforcement measure"[46].

Secondly there are some rules common to all of abovementioned sanctions. However, the ECtHR allows lowering of some procedural standards (e.g., dispensing an oral hearing) in cases not belonging to the traditional categories of criminal law such as proceedings concerning traffic offences where the issues at stake were of a rather technical nature, or even relating to a factual matter, and where the accused had been given an adequate opportunity to put forward his case in writing and to challenge the evidence against him[47]. When assessing the scope of application of guarantees under Article 6 of the ECHR to administrative sanctions, the ECtHR indicated that the differences between criminal law *sensu stricto* and administrative law may not exempt from the obligation to apply the guarantees provided for in this provision. However, such differences may justify the different scope of these guarantees[48].

The crucial issue is whether the discussed differentiation should relate to both procedural guarantees and those that can be located in the sphere of substantive

46 See http://www.penal.org/sites/default/files/RIDP86%201-2%202015%20EN.pdf, pp. 351 ff.

47 See *Marčan v. Croatia*, ECtHR (2014, no. 40820/12).

48 See *A. Menarini Diagnostics S.R.L. v Italy,* ECtHR (2101, no. 43509/08)

law. It seems that it cannot be ruled out that also with regard to the substantive law of offenses, it would be permissible to vary the level of implementation of the conventional guarantees. Although the Article 6 of the ECHR sets out the principles of a fair trial, it should be noted that in the previously mentioned case of *Salabiaku v. France*, the ECtHR resolved issues related to the principles of assigning guilt.

Considering the lack of clear declarations of the ECtHR with regard to substantive law guarantees, it should be concluded that the type of liability with which the imposition of a "criminal" sanction is connected should not affect the level of compliance with the convention standards. Such conclusion is supported by the guarantee function of criminal law, which should be implemented in all cases where the legislator considers introducing a type of prohibited act and providing it with an appropriate sanction.

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THE ALTERNATIVE SANCTIONS SYSTEMS IN SERBIA AND THE NETHERLANDS: COMPARATIVE ANALYSIS WITH EXAMPLES FROM CASE LAW

Alternative sanctions are a deviation from the traditional system of imprisonment and their advantage certainly lies in a more humane and less repressive treatment of convicted persons. Alternative sanctions need to be present in the criminal sanctions system of every country in order to make this system more effective, primarily having in mind the goals of special prevention. This paper aims to present the alternative sanctions systems in Serbia and the Netherlands, respectively, with reference to case law examples, as well as to perform a comparative analysis of the two systems and indicate their advantages and disadvantages, as well as methods of their improvement.

Keywords: alternative sanctions, comparative law, criminal law, probation, rehabilitation

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1. Introductory remarks

When one looks at alternative sanctions and their application around the world, one cannot help but notice that over the past decades their application to lesser offences has been running parallel to increasingly stricter sanctioning of graver forms of crime and very harsh criminal justice policies. In fact, this is about what is called a *dual-track strategy*, which paradoxically leads to simultaneous strengthening of both leniency and strictness of punishment and brings a wider circle of people into the social control system (Soković, 2011: 217).[1] This hypertrophy of criminal law and a creation of an oversized and hardly implementable system (*see* Ignjatović, 2011:142), with ever so stricter criminal justice policies as a global trend, have led to a significant increase in the number of convicted persons and overcrowding of the majority of penitentiary systems, which, in turn, have significantly increased the costs of criminal justice. On the other hand, with a view to reducing overmultiplied prison population and the costs, there has been an increasingly widespread use of alternative sanctions and measures, which should be aimed at rehabilitation of offenders, but in the light of contemporary trends in criminal law, they are a necessity and constitute one of the elements of the crime control policy after the concept of crime suppression has evidently been abandoned (Soković, 2011: 221).[2]

Compared to imprisonment, alternative sanctions undoubtedly have multiple benefits:

- *Prison population reduction* in cases where short-term imprisonment is imposed. Namely, for quite a while, scientific literature has been pointing to the existence of negative effects of imprisonment, mainly the inefficiency of short-term imprisonment in terms of resocialization of offenders, high recidivism rate and its harmful effects on the convicted person's personality due to isolation and contact with other inmates. It is also pointed out in literature that short-term imprisonment

1 The author stresses that the above is the effect of the 'security orientation' in criminal law, so constant introduction of new criminal offences, particularly criminal offences with no consequences or those of endangering; prohibition of risky actions without concretization of risks; penalties envisaged for a finished criminal offence for those actions which, in fact, constituted remote preparatory actions; deviation from some basic principles; weakening of the *ultima ratio* principle; multiplication of incriminations in those areas where not even the existing incriminations are used (organized crime, terrorism, corruption, international crimes); advocating harsher measures and longer sentences; broadening of the scope of powers of law enforcement agencies at the expense of citizens' fundamental rights, all of this is a contemporary criminal law response to the so-called 'security challenge'.

2 It is stated in theory that the central point is no longer rehabilitation that used to be the main concept in the 1970s, but risk assessment and risk management, which, serving as signposts in the circumstances of growing crime, high recidivism rate and reduced investments, promise realistic performance and a measurable result.

is an expensive type of criminal sanction, coupled with stigmatization of convicted persons and very often poor conditions in which they are serving their sentences due to prison overcrowding in some countries. There are increasing efforts in legal theory, as well as through reform of legislation, towards finding an adequate substitute for short-term imprisonment, and the solution is most often sought in alternative sanctions;

- *Cost reduction,* because the use of alternative sanctions saves money as the enforcement of non-custodial sanctions is considerably cheaper than imprisonment. This is particularly true amidst a constant growth of the prison population on the global level, including in Serbia, which requires huge allocations of public funds. Therefore, a solution in the form of alternative sanctions, which entail considerably lower costs (*see* Mrvić-Petrović, 2010:158),[3] appears to be rational and necessary. Alternative sanctions are more often applied in the Netherlands than in Serbia. Therefore, a comparison will be made between both countries in this article;

- *More opportunities for individualization of* sanctions, with a view to better tailoring the sanction to the individual offender and the circumstances in which the criminal offence was committed, as compared to the traditional prison sentence. In terms of quality, the alternatives to imprisonment are considerably more flexible to apply as they are primarily aimed at the offender's rehabilitation and social integration. Thus, when selecting the type and measure of a criminal sanction in lieu of a prison sentence, as well as when the sanction is combined with another, most effective alternative in order to achieve the best effect in a particular case, the court needs to obtain more detailed information on the defendant, his/her family circumstances and social situation. In this respect, social welfare centre reports, as well as reports drafted by the probation service upon the request of the prosecutor's office or the court, would be particularly helpful and would facilitate assessment of the most effective sanction in a particular case costs (Mrvić-Petrović, 2010:155)[4];

- *More humane and less repressive treatment* of convicted persons. Nonetheless, this does not mean that alternative sanctions are essentially not repressive, but that the degree of suffering and retribution against the offender is significantly lower than that of imprisonment, which implies isolation and deprivation. When it comes to imprisonment as such, convicted persons are treated in such a way that a certain

3 According to the data collected in various European countries, the costs of execution of alternatives to imprisonment are considerably lower than those of imprisonment. For example, in Estonia, supervision of one convicted person costs 30 euros per month, while imprisonment costs about 300 euros per month. In Romania, probation services per one supervised offender cost about 143 euros per year, while imprisonment of one offender costs 1,685 euros per year.

4 For the purpose of more tailored sanctions, pre-sentence reports by the probation service are particularly relevant as they provide expert guidance to the court, i.e. they offer an assessment of the defendant's personality and eligibility for application of a particular alternative sanction.

degree of suffering is inflicted upon them and, therefore, this retributive component of the sanction is significantly more prominent. On the other hand, the aim of alternative sanctions is less repressive, as they are primarily focused on helping facilitate the offender's social reintegration after serving the sentence. Therefore, their emphasis is on treatment and rehabilitation rather than retribution. The use of alternative sanctions is considerably more humane than imprisonment because it does not lead to the convicted person's isolation or loss of family and social contacts, or loss of job, but, quite the contrary, alternative sanctions ensure support from the offender's family and, in some cases, they may even lead to the offender's employment or vocational training;

- *Broader community engagement* during enforcement of alternative sanctions. Unlike imprisonment, which is executed in a closed, isolated establishment, enforcement of the majority of alternative sanctions calls for an active engagement of not only the offender and the department in charge of supervising the enforcement of his/her sanction, but also of various segments of society, such as non-governmental organizations, charity associations and volunteers, whose role is to assist with supervision of enforcement of alternative sanctions. What is important in alternative sanctions is active civic engagement in programs of assistance and support to the offender through various forms of activities of civic associations. That way, the offender will not feel rejected from society nor would he/she feel the stigma of the crime, as opposed to what he/she would be feeling while serving a prison sentence.

Given the above benefits that non-custodial sanctions and measures undoubtedly provide, alternative sanctions and the probation system in general enjoy a special place in the majority of contemporary criminal legislations. Thus, in the further course of this paper we shall present the respective alternative sanctions systems in Serbia and the Netherlands as the home countries of the two co-authors of this paper where they are professionally based. The paper will also provide some examples from the jurisprudence of the two countries and will finally offer a comparative analysis between the two systems, while singling out some *de lege ferenda* proposals, aimed at boosting the efficiency in this domain.

2. The system of alternative sanctions in the criminal law of the Republic of Serbia

It was only with the adoption of the Criminal Code of 2006[5] that alternative sanctions became more significantly regulated in the Republic of Serbia. At that

5 Criminal Code of the Republic of Serbia – CC ("Official Gazette of the 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), which came into force on 1 January 2006.

time, this trend, which had been present in European legislations for decades already, was embraced quite belatedly, in terms of the efforts towards finding a solution in non-custodial sanctions and measures to address lesser criminal offences or those of medium severity (*see* Albrecht, 2005: 6-7).[6] Thus, the sanctions such as community service and seizure of driver's licence, and the concept of settlement between the offender and the victim were regulated for the first time, whereas, in a certain sense, suspended sentence with protective supervision had already been stipulated in more detail in earlier provisions of the law, as referred to in Articles 3-5 of the Criminal Code (CC) of the Republic of Serbia[7] and Article 58 of the Basic Criminal Code of the Federal Republic of Yugoslavia[8], but they have seldom been applied in practice. House arrest was introduced to the Criminal Code under the amendments to the CC of 3 September 2009[9] as a method of enforcing a sentence of up to one year of imprisonment, rather than as a standalone sanction.

It should be noted that what differentiates alternative sanctions from all other criminal sanctions are in fact the following two elements: firstly, they are aimed at *substituting imprisonment*, and secondly, its enforcement is accompanied by *supervision by a competent authority*. Hence, the crux of this sanction is its purpose of substituting short-term imprisonment, in a bid to use a more flexible and tailored sanction to achieve a more efficient impact on the offender's resocialization. The very term ‚alternative' denotes something different, i.e. different from the standard practice, and when translated to the domain of criminal law and criminal sanctions, it denotes a different sanction than the basic one, i.e. imprisonment, according to modern criminal law (*see* Škulić, 2009: 32).

Having in mind these two key features, the aforementioned sanctions - house arrest, community service and seizure of driver's licence undoubtedly have the character of an alternative sanction in the criminal law of the Republic of Serbia, including the warning measures, such as the suspended sentence with

6 As early as in 1960s, Western European countries were faced with growing crime rates on the one hand and prison population growth on the other, which raised a question of expanding the system of existing criminal sanctions towards introducing alternative sanctions, i.e..community sanctions (*intermediate, community* and *alternative criminal penalties*, as they are most often called in literature). At that time, some serious discussions were launched on what conditions should be met in order to apply these sanctions and make them truly effective.

7 Criminal Code of the Republic of Serbia – CC of the RS ("Official Gazette of the Socialist Republic of Serbia", nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89 and 21/90; "Official Gazette of the RS", nos. 16/90, 49/92, 23/93, 67/93, 47/94, 17/95, 44/98, 11/2002, 39/2003 and 67/2003).

8 Basic Criminal Code - BCC ("Official Gazette of the SFRY", nos. 44/76, 46/76, 34/84, 37/84, 74/87, 57/89, 3/90, 45/90 and 54/90; "Official Journal of the FRY", nos. 35/92, 16/93, 31/93, 37/93, 24/94 and 61/01; "Official Gazette of the RS", no. 39/03)

9 Law on the Amendments to the Criminal Code ("Official Gazette of the RS", no. 72/2009)

protective supervision and a specific concept of criminal law, i.e. a quasi-sanction - the settlement between the offender and the victim.

However, the main characteristic of all the alternative sanctions mentioned above is the fact that these normative solutions have turned out to be quite inefficient in practice, while their application significantly lacks uniformity and is negligible in comparison to other criminal sanctions. In a huge number of cases in practice, only a classical type of suspended sentence is imposed for lesser crimes, while there is a low percentage of cases in which suspended sentence with protective supervision or other alternative sanctions which are provided for in the law are imposed.[10] The main reason for this is a decades-long practice of imposing prison sentences for more serious criminal offences on the one hand, and classical type of suspended sentences for lesser offences, on the other, while fines do not even have the same role in the criminal justice policy as the one in the Western European criminal practice, where they are imposed to a more significant extent. Furthermore, a stricter criminal justice policy or the existence of a prominently punitive attitude of the public is not conducive to creating a more favourable environment for a more comprehensive application of alternatives to imprisonment.

Likewise, normative solutions provided by each alternative sanction are very often too vague and too broad and they are not even aligned to the statutory provisions governing their enforcement. Namely, the provisions of Article 45, paragraphs 3-5 of the CC govern what is called *house arrest* or what is termed in the law as home incarceration, which may be imposed if the offender was sentenced to up to one year in prison. Given the above, a question is raised whether this is a good solution in the law as it limits the use of home incarceration only in terms of the length of the sentence, and particularly bearing in mind a potential danger that even in cases of very serious criminal offences, the court may use a sanction which, by its nature, is an alternative response to lesser forms of crime (Đorđević, 2015: 104).[11] A solution to this problem could probably be found in limiting the application of this alternative sanction not only in terms of the length of the prison sentence, but also in terms of the length of a prison sentence that an

10 According to the data of the Statistical Office of the Republic of Serbia on convicted adults by criminal sanction imposed in the period between 2015 and 2019, the total share of suspended sentences relative to other criminal sanctions was 58.1% in 2015, 53.9% in 2016, 56.5%, in 2017, 56.7% in 2018 and 57.2% in 2019, while the share of community service in the same period was declining from 1.1% to 0.7,%, and seizure of driver's licence was 0% throughout the same period. Available at: https://publikacije.stat.gov.rs/G2020/Pdf/G20201202.pdf (accessed on 25 July 2021)

11 It is stated in domestic theory that such a broad and vague option of imposing home incarceration leaves excessive room for the court and may lead to a strong lack of uniformity in the policy of imposing this sanction.

offence is punishable by, which would significantly narrow down the group of criminal offences to which this sanction could be applied[12].

On the other hand, the provisions governing house arrest do not include any special circumstances or criteria that the court could use as a guidance when selecting this type of penalty (*see* Đorđević, 2012: 126-127).[13] The only special rule is that in cases of criminal offences against marriage and family, i.e. domestic violence, in a situation where the offender is living in the same household as the victim(s), house arrest may not be imposed, which makes sense given the type of criminal offence and the method of execution of the sanction concerned. The question is whether the above should have been specified in a separate paragraph of the relevant provision of the law, having in mind that the purpose of punishment could not be achieved if home incarceration was imposed in the above circumstances.[14]

Furthermore, in regard to home incarceration, the law does not even envisage a possibility of combining this non-custodial sanction with other forms of alternative sanctioning despite the fact that it is often stressed in international literature that this sanction is quite compatible with other non-custodial sanctions and measures, like restitution or education measures, as well as with various kinds of treatment and therapy measures and other community sanctions (Ball, Lilly, 1986: 23).

The above solution on home incarceration is just a modality of execution of a prison sentence, rather than a true alternative sanction, without any special criteria for application, and, as such, it is not in line with most of the comparative law solutions to this issue (*see* Ratković, 2008: 81).[15] Therefore, the legislation

12 Given the current solution in the law, we are in a situation where through application of the provision on commutation of sentence (Articles 56 and 57, paragraph 1, subparagraph 3 of the CC), it is possible to apply this form of alternative sanctioning, which is primarily intended for lesser offences, also to very serious criminal offences, such as rape committed under the circumstances stipulated in Article 178, paragraph 2 of the CC, or, for instance, to the gravest form of tax evasion, as stipulated in the provisions of Article 225, paragraph 3 of the CC, where the amount of the liability whose payment is avoided exceeds fifteen million dinars.

13 Such a solution in the law is not advisable because the theory related to home incarceration often raises a question of fairness of this sanction, stressing that this alternative sanction is far easier for wealthier offenders with better living conditions, etc. than for underprivileged offenders living in very poor conditions or those living alone, etc. Therefore, unless special circumstances are provided for with respect to the specific characteristics of this type of sanction, home incarceration might easily turn into a privilege for the wealthy.

14 Unlike the above solution in the Serbian law, which does not even remotely contain a list of special circumstances that would justify home incarceration, comparative law offers numerous examples of legal specification. In common law, especially in the United States, where this sanction originates from, the circumstances under which home incarceration is imposed are related to the personal characteristics of the offender and it is deemed particularly suitable for first-time offenders, the elderly, offenders suffering from chronic illnesses, the disabled, pregnant women and mothers with small children.

15 Thus, for example, in the Criminal Code of the Republic of Macedonia, house arrest is prescribed as a special criminal sanction that may be imposed if the perpetrator of a criminal offence punishable

should be amended towards a more detailed and careful regulation of house arrest as a separate criminal sanction where treatment and protective supervision could be applied[16] in order to impact the offender's rehabilitation, which is something that this sanction is obviously lacking right now.

Community service is an alternative sanction governed by Article 52 of the CC as a type of work for the benefit of the community, which shall not offend human dignity and shall not be performed for the purpose of generating profit. This sanction may only be pronounced upon the offender's express consent and for criminal offences punishable by a fine or up to three years of imprisonment. Thus, one may infer that this alternative sanction is designed only for perpetrators of lighter criminal offences, and that a large number of relatively minor criminal offences or those of medium gravity have remained outside its scope.

First of all, if this is viewed from the perspective of the United Nations Tokyo Rules[17] and the Council of Europe's European Rules[18], whereby respective member states of these organizations are recommended to enrich their existing systems with alternative measures and sanctions, including also community service that has a special place among them, the aforementioned legal solution offers no possibility of any major use of community service, particularly due to a generally negative trend of envisaging stricter punishment for an increasing number of criminal offences. Hence, the group of criminal offences for which this alternative to imprisonment could be imposed is getting increasingly narrow and it boils down to a small number of offences provided for in the CC, so the actual reach of this penalty in the Serbian law is relatively modest. Therefore, an option of expanding the application of this sanction to criminal offences punishable by up to five years of imprisonment should be considered.[19]

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by a fine or up to five years of imprisonment is old and infirm, seriously ill, or is a pregnant woman and the court sentenced the offender to up to three years in prison (Article 59a of the Criminal Code of the Republic of Macedonia, while, for instance, according to Italian regulations, this type of penalty may be imposed if the offender is sentenced to up to four years in prison or if this is the remaining length of his/her sentence, as well as for certain categories of convicted persons, such as pregnant women, mothers with children under ten years of age who are living with them, single fathers living with children under ten years of age , persons above 60 years of age, and persons under 21 years of age who are still in school, have their own family or suffer from health problems.

16 A possibility of applying house arrest with protective supervision would bring the Serbian system of alternative sanctions closer to modern probation systems and offer a possibility of combining alternative measures against a single offender.

17 UN Standard Minimum Rules for Non-custodial Measures, Tokyo Rules, 1990

18 Council of Europe Recommendation No. R(92)16 on the European Rules on Community Sanctions and Measures, 1992

19 Such a solution is provided for in the Montenegrin law (which regulates community service in the same manner as the Serbian Criminal Code), in Article 41 of the Criminal Code of the Republic of

A similar conclusion may also apply to *seizure of driver's licence*, as provided for in Article 53 of the CC, which may be imposed on the perpetrator of a criminal offence in relation to which a motor vehicle was used in its commission or preparation, but the requirement is that it must be a criminal offence punishable by up to two years of imprisonment. Hence, when considering the seizure of driver's license as a principal sanction, it is evident that this option is practically reserved for the lightest criminal offences, so the same remarks as the ones on community service may be offered here. Namely, if there is a true intention to apply this sanction in practice, and with the official statistics clearly showing that the use of this sanction is negligible, the threshold for its application as a principal sanction needs to be raised.

As for community service, under the Amendments to the CC of 2009, this sanction may be imposed not only as the principal sanction, but also as an ancillary sanction. One could easily imagine a situation where a fine or even a seizure of driver's license is imposed as a principal sanction, but may wonder whether community service can be imposed as an ancillary sanction to imprisonment? The answer to this question could hardly be 'yes'[20] because the very purpose of community service is to substitute imprisonment and allow the offender to do some work free of charge for the benefit of the community outside a closed penitentiary institution and upon his/her own consent.

Settlement between the offender and the victim is governed by Article 59 of the CC, whereby the court may remit from punishing the perpetrator of a criminal offence, punishable by up to three years of imprisonment or a fine, if the offender has fulfilled all his obligations from an agreement reached with the victim (Platek, 2005: 169).[21] Content-wise, this concept is closely linked with alternative sanctions, but the above provision of substantive law is formulated in a general manner, without specifying what the agreement between the offender and the

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Montenegro, i.e. in the Amended Criminal Code of 2010 (under the Criminal Code of 2003, application of community service, just like in Serbia, was originally provided only for criminal offences punishable by a fine or up to three years of imprisonment).

20 From the comparative law perspective, as community service is a typical alternative sanction, i.e. the one that was designed as an alternative to incarceration, this would contradict its legal nature, because it is a substitute for imprisonment. Thus, the legislator should consider whether it is really necessary to regulate community service also as an ancillary sanction, i.e. it should at least be specified which principal sanctions it could be ancillary to and what its purpose as an ancillary sanction would be.

21 It is about a mediation procedure within the criminal proceedings and reaching an agreement between the offender and the victim who should see a criminal law consequence in terms of sanctioning of the offender. In fact, thereby the rights of victims of crime are taken more seriously, mediation instruments are available to victims of lesser offences and the conflict between the offender and the victim can thus be actually resolved.

victim shall consist of, what mandatory elements thereof shall be or what deadline within which the obligations from the agreement must be fulfilled shall be, all of which raises numerous questions and dilemmas (Ćorović, 2011: 39). Neither does the Criminal Procedure Code envisage any special provisions on the procedure of reaching the above settlement before the court or the deadline within which the defendant shall act upon it, or how the court shall proceed in relation to this agreement in order to render a decision on whether to remit the defendant from punishment or maybe apply a more lenient criminal sanction. For this reason, clear legal norms need to be in place in this area, including procedural safeguards for practical implementation of the settlement between the offender and the victim.

Finally, also included in the system of alternative sanctions is of course the *suspended sentence with protective supervision* stipulated in Articles 71-76 of the CC. According to this solution, protective supervision is just one of the additional measures accompanying a suspended sentence. It reduces the risk of re-offence in case of certain categories of offenders who received a suspended sentence (Stojanović, 2014: 345). The very content of protective supervision is governed by Article 73 of the CC through the following ten obligations that may be imposed on the convicted person:

1) reporting to competent authority for enforcement of protective supervision within periods set by such authority;
2) training of the offender for a particular profession;
3) accepting employment consistent with the offender's abilities;
4) fulfilment of the obligation to support family, care and raising of children and other family duties;
5) refraining from visiting particular places, establishment or events if that may present an opportunity or incentive to re-commit criminal offences;
6) timely notification of the change of residence, address or place of work;
7) refraining from drug and alcohol abuse;
8) treatment in a competent medical institution;
9) visiting particular professional and other counselling centres or institutions and adhering to their instructions;
10) eliminating or mitigating the damage caused by the offence, particularly reconciliation with the victim of the offence.

On a side note, suspended sentence with protective supervision should be a key non-custodial sanction, as a product of a merger between the European law and common law types of suspended sentence. However, it is far from being the main alternative sanction in the criminal law of the Republic of Serbia primarily since it is not stipulated in the CC in a careful and detailed manner. For instance,

some of the obligations listed above lack precision, like the obligation referred to in item 5) – "refraining from visiting particular places, establishment or events", or item 7) – "refraining from drug and alcohol abuse". These obligations should be formulated as prohibitions, with a possibility of periodic verification of compliance to facilitate monitoring by probation officers, i.e. commissioners.

Likewise, there is a need for a more complete formulation of the remaining provisions governing protective supervision, review the further need for their existence (like the obligation of accepting employment consistent with the offender's abilities, which, in the light of chronically high unemployment rate in Serbian society and constant economic uncertainty, seems like an unrealistic idea, i.e. the ability to find not just any employment but adequate employment for a person who was found guilty of a criminal offence (*see* Mrvić-Petrović, 2010: 246; Stojanović, 2014:346)) and possibly add some other obligations that already exist in comparative legislation, which have proven to be efficient in practice. The content of this sanction should be regulated in more detail in the substantive legislation for each of the obligations separately covered by protective supervision, with a possibility of combining them with other alternative sanctions (it turns out that community service is particularly suitable to that effect), and embracing positive solutions in comparative law (for instance, a successful practice in common law countries, of what is called therapeutic jurisprudence, i.e. the 'drug courts', with respect to offenders who committed criminal offences under the influence of drugs or alcohol where a less formal approach is used before the court with constant supervision and therapeutic assistance provided to the offenders by a multi-disciplinary team of experts).

As for the method of enforcement of alternative sanctions, an important novelty was the passing of a separate Law on Enforcement of Non-Custodial Sanctions and Measures in 2014[22], as a result of the legislator's attempt to establish a service that would be acceptable for this scope of activities according to international standards, particularly the ones established under the Tokyo Rules and the Council of Europe's European Rules on Community Sanctions and Measures. The new law also emphasizes and regulates in more detail the role of the Commissioner's Service within the Department for Treatment and Enforcement of Non-Custodial Sanctions and Measures, but it also retained an earlier solution according to which this service is just one of the organizational units of the Prison Administration within the Serbian Ministry of Justice, which is certainly not an efficient or a broadly accepted solution when comparing it with other countries,

22 The Law on Enforcement of Non-Custodial Sanctions and Measures ("Official Gazette of the RS", nos. 55/2014 and 87/2018)

at least not in the countries that boast a successful track record of using this type of sanctioning with offenders.

Quite the contrary, the probation service should have the autonomy required for quality application of alternative sanctions and measures, where professional probation officers could offer adequate and versatile assistance and cooperation to persons on whom non-custodial sanctions are imposed. Serbia has retained a solution that is certainly not efficient in practice because such a method of enforcement of alternative sanctions is plagued by numerous administrative burdens and obstacles which hinder the necessary speed of the proceedings especially because all the key decisions concerning all the convicted persons in the territory of Serbia are taken by a single person sitting at the top of the pyramid, and that is the director of the Prison Administration. One can assume how much waiting time and uncertainty is involved in practice simply because the Commisioner's Service is organized in this way (Ilić, Maljković, 2015:133)[23], as well as due to the fact that the Prison Administration and its director are in charge of all the essential decisions in the area of alternative sanctions (*see* Ignjatović, 2013:170).[24]

3. Examples from Serbian case law

Of all the alternative sanctions that are provided for in the Republic of Serbia, house arrest is the only sanction that has been somewhat on the rise year after year, and the most common examples from case law refer to its application to a large number of different criminal offences. Thus, house arrest is prevalent in traffic offences, followed by criminal offences against property, against human health, and professional misconduct, etc.[25] In the case law, however, a position has long since been voiced that this modality of a prison sentence should not be imposed for more serious criminal offences or if the defendant has prior convictions.

23 Autonomy of regional probation officers is necessary in decision-making and forwarding relevant reports because the practice so far has been such that there could be no direct decisions or administrative procedures, but all of them have to go only through the Prison Administration headquartered in Belgrade, which significantly affects commissioner's efficiency and their reputation in the eyes of the clients and the local community alike.

24 The Prison Administration whose predominant responsibility is execution of prison sentences cannot be an organization that will be enthusiastic about applying a novel approach to offenders. Without an autonomous organization within the Ministry of Justice and ahead of the organization who will be making both strategic and tactical decisions and taking ownership, it is impossible to imagine that a significant headway will ever be made in this domain.

25 See the statistical reports of the Statistical Office of the Republic of Serbia for 2015–2019 concerning this type of sanction, showing a wide range of different criminal offences to which it was applied.

3.1 Case 1

To illustrate this position, there is a case in Kraljevo where defendant V. Đ. was found guilty of the criminal offence of extortion as referred to in Article 214, paragraph 1 of the CC by final judgment of the Municipal Court in Kraljevo no. K 451/06 of 24 July 2009 and sentenced to eight months in prison. The convicted person's application for the sanction to be executed in the form of prohibition of leaving his dwelling, i.e. home incarceration, was denied by the then-acting president of the Basic Court because the court found that the severity of the criminal offence, as well as his prior convictions, rendered his application groundless. The defence counsel for V. Đ. appealed to this decision, stating that the reasons for denying the application were unacceptable because they had already been assessed during the sentencing phase of the proceedings.

However, the acting president of the High Court in Kraljevo reviewed the case file and found the defence counsel's appeal to be ill-founded. Namely, under former Article 45, paragraph 5 of the CC (current Article 45, paragraph 3 of the CC), the court may decide that a prison sentence of up to one year to be executed in the form of a prohibition of leaving a dwelling, i.e. home incarceration, except in cases stipulated in the law. The court held that this was not some kind of a special prison sentence, i.e. deprivation of liberty (the CC recognizes only one kind of a prison sentence as stipulated in Article 45), but that this was only about the method of execution of the prison sentence. Namely, the provision on house arrest is thus a technical provision, meaning that it is a norm of criminal executive law, which in fact prescribes that in certain situations it may be executed in the premises where the convicted person lives. Which cases this provision shall apply to shall be decided by the court in each particular case, under Article 42 of the CC. This is a general provision which refers to all the penalties provided for by the CC and which stipulates that the primary purpose of punishment is to prevent the offender from re-offending, secondly to deter others from committing crimes and, finally, for society to condemn the offence that was committed, as well as to strengthen the moral and reinforce the obligation to respect the law.

Offender V. Đ. had three prior convictions and his current sentence of imprisonment, for which home incarceration is sought, is his fourth conviction. As for his prior convictions, one was for illegal possession of arms and two for violent behaviour, i.e. violent crimes. For the above criminal offences, he was twice sentenced to suspended sentences, while for his last conviction he received a four months' actual prison sentence. As stated in the rationale of the judgment, his prior convictions, in which he had either been warned that he would be sent to prison if he violated his suspended sentence or had actually been sentenced to

short-term imprisonment, obviously had no impact on him, i.e. the purpose of punishment had not been achieved.[26]

Hence, as stated in the ruling of the High Court in Kraljevo no. Su VIII 43/11-3 of 4 February 2011, when deciding whether a sentence of up to one year of imprisonment is to be executed in the form of house arrest, the court must pay heed to the purpose of punishment; will the purpose of punishment be achieved and prevent him from re-offending (special prevention), will this deter others from committing crimes (general prevention), and, finally, will it result in condemnation by society of the crime he was found guilty of, and will it strengthen the moral and reinforce the obligation to respect the law. Therefore, from the case law perspective, a defendant's multiple prior convictions would hamper this alternative sanction from being pronounced.

On the other hand, leaving house arrest aside, other alternative sanctions are imposed in a symbolically low number of cases in practice. As for community service as a typical non-custodial sanction, case law is virtually uniform. Almost as a rule, this sanction is pronounced when a defendant confesses to having committed the crime. An additional reason for this almost uniform practice is that consent of the defendant is required in order for the court to sentence him/her to community service. This mostly occurs in those situations where the defendant agrees with the charges either in full or in part. On the other hand, a statutory limitation that this sanction should only be imposed for criminal offences punishable by up to three years of imprisonment has significantly limited the group of criminal offences for which it can be pronounced, particularly in comparison to house arrest.[27]

3.2 Case 2

In some decisions whereby community service was imposed, the courts stated their positions as to when it was necessary and appropriate to apply this alternative to imprisonment. A relevant example from case law is a case from Belgrade when the District Court of Belgrade in its judgment no. K 2402/05 of 17 January 2006, held that "when the defendant is found guilty of a criminal offence

26 Available at: http://pn2.propisi.net/?di=sp35021&dt=sp&dl=35021 (accessed on 8 August 2021).

27 According to the statistical data of the Statistical Office of the Republic of Serbia for the period between 2015 and 2019, community service was most often imposed for criminal offences against property (mainly theft), criminal offences against traffic safety (solely for the criminal offence of endangering road traffic) and criminal offences against human health (solely for the criminal offences of illegal possession of narcotic drugs and unlawful production and circulation of narcotics).

punishable by up to three years of imprisonment, the conditions for imposing community service are met, given the fact that the defendant has no prior convictions, he is 23 years old and has confessed to having committed the crime." (Simić, Trešnjev, 2008: 72).

Namely, in that case, as stated in the rationale of the judgment: „the defendant was found guilty of the criminal offence of illegal possession of narcotic drugs as referred to in Article 246, paragraph 3 of the CC and was sentenced 120 hours of community service to be performed during the period of two months. When deciding on the type and length of the criminal sanction to be applied to the defendant, the court assessed all the circumstances referred to in Article 54 of the CC that may be of relevance. As for the mitigating circumstances, the court found that the defendant had no prior convictions, that he was a young man and that he had fully confessed to having committed the crime. There were no aggravating circumstances. Taking all the above circumstances into consideration, including the defendant's readiness to perform community service, the court imposed this sanction on him pursuant to Article 52, paragraph 1 of the CC, trusting that this sanction would best achieve the general purpose of enforcement of criminal sanctions as referred to in Article 4, paragraph 2 of the CC".

4. The alternative sanction system in the criminal law of the Netherlands

4.1 Introduction

Dutch criminal law knows three types of punishment: a fine, community service and imprisonment. A judge can impose these sanctions conditionally as well. This can be done either for the entire conviction or in part. Dutch law makes it possible to combine these punishments; for example, community service combined with conditional imprisonment and a probation period. When imposing a (partly) conditional sentence, judges may attach specific terms to the verdict. For example, they may add mandatory supervision of the probation services, counselling and/or require the convicted person to participate in a behavioural training programme. Without a (partly) conditional verdict, a judge is not able to impose such conditions. The penalty imposed by the judge depends on the weight of the criminal case. Dutch criminal law does not know a minimum penalty. This makes it possible for the judge to render a sentence that not only considers the circumstances of the case, but also the personal circumstances of the accused person and the possibilities of combatting recidivism. It is at this point in the Dutch judicial system that the probation service plays an important role.

Probation in the Netherlands has a long history of almost two hundred years. It started in 1823 with the focus on the circumstances in prisons and the well-being of prisoners. When unpaid work for the common good was introduced in the seventies of the 20th century, the probation service played an important role. In 1989.unpaid work for the common good was included in the general section of the Dutch Criminal Code (*Wetboek van Strafrecht).* In 2001 community service became a principal punishment.[28] The objective was to reduce the number of short unconditional prison sentences and also to contribute to the humanisation of the criminal justice system and reduce recidivism. The probation service was made responsible for the execution of community service.

The Dutch probation service comprises three private organisations, each having its own Supervisory Board. The core of the work of the probation service is the prevention of recidivism of known offenders. The Ministry of Justice and Security is politically responsible for probation and the three probation organisations are funded by the Ministry for almost 100%. The Dutch probation service is active in all stages of the criminal justice process, from the pre-trial stage up to and including the enforcement stage and often in the stage after the end of the sentence as well. It is therefore a continuous and stable factor in the whole criminal justice process, not only for the justice system (public prosecutors, courts, prisons etc.), but also for the offenders (De Kok, Tigges, Van Kalmthout, 2021: 4).

The key tasks of the Dutch probation service are: preparing pre-sentence and other advisory reports for the judicial authorities, providing supervision of penalties, measures or special conditions imposed by the court or the public prosecutor (including supporting the offenders in their desistance processes), executing behavioural training programmes and the executing or supervision of community service. Advisory reports and probation supervision are carried out in the pre-trial phase as well as in the enforcement phase (De Kok, Tigges, Van Kalmthout, 2021: 4).

4.2 Legal basis

Since the '80 there was growing belief that probation should be an integral part of the justice system. The current legislative basis for the probation service is laid down in the 1995 Probation and After-Care Regulation (further on in short: 'Probation Regulation'; 'Reclasseringsregeling'), as well as in a number of articles

28 Article 9, 1, a CC.https://www.navigator.nl/document/openCitation/id8cb2010d27e13509d364436256e972c0

in the Criminal Code and Code of Criminal Procedure. The Probation Regulation specifies that the probation organisations recognised by the Ministry of Justice and Security are responsible for the execution of some of the sentences. It also specifies who may perform probation activities, what the statutory probation tasks are, the arrangements for funding of the Probation Service, the complaints procedure and the supervision of probation (by the Inspectorate of Justice and Security) (De Kok, Tigges, Van Kalmthout, 2021: 7).

Since 2008, the Public Prosecution Service (*Openbaar Ministerie* (OM)) also has the option to impose community service on individuals via penalty orders. [29] A court may impose a maximum of 240 hours. The OM may impose a maximum number of 180 hours. Until April 1, 2012, community service involved the completion of a work order and/or a training order. Today, community service consists solely of the performance of unpaid work In 2012, the scope of application of the suspended sentence and conditional release was considerably extended, which strengthened the position of the probation system.[30] For instance, the general condition that the convicted person must cooperate with probation supervision is included in that Act. Also, the duration of the operational period was extended. The special conditions that can be attached to a conditional penalty or measure, as well as electronic tagging, have been embedded in law (De Kok, Tigges, Van Kalmthout, 2021: 8).

4.3 Figures

In 2019, the three probation organisations prepared 42,141 reports to support judicial decisions across the entire criminal justice system. In 2019, 31,562 separate offenders were implemented under supervision by the probation service and 25,313 community punishment orders were completed (De Kok, Tigges, Van Kalmthout, 2021: 4). The probation service forms part of the criminal justice system: it cooperates intensively with the police, Public Prosecution Service, prison system, Child Care and Protection Board, Victim Support and forensic psychiatry. There is cooperation over both strategy and individual cases. In the last 25 years, the probation service has gained prominence and respect in the justice system and society. The concept of probation is strong and has proven its value. The Dutch probation service is widely supported by both the public and the legal professionals. There is growing evidence about the effectiveness of

29 Wet OM afdoening (Law Penalty Orders Prosecution Office)

30 The Conditional Penalties Act (Wet voorwaardelijke sancties) entered into effect in that year.

probation. Research has shown that community service leads to a reduction in recidivism of 46.8% compared to recidivism after a short-term prison sentence (Wermink, Blokland, Nieuwbeerta, Nagin, Tollenaar, 2010: 325-349).

4.4 Supervision

If supervision is imposed on an offender, automatically the general condition applies in all cases that he/she should refrain from committing crimes.[31] On top of that, special conditions, like a location ban or order, a contact ban, a duty to report, admission to a care institution, participation in behavioural training programmes, etcetera, can be imposed in the Dutch legal system.[32] What occurs most frequently is that supervision is imposed by the court on the basis of a fully or partially suspended prison sentence (De Kok, Tigges, Van Kalmthout, 2021: 13-21). Another non-custodial sentence that can be imposed on an offender is community service. This is an independent principal sentence and can be imposed on individuals who have been found guilty of committing crimes, provided this is not precluded by law[33], which is discussed below. Community service may always be imposed on individuals found guilty of committing minor offences unless the minor offence in question is not punishable by a custodial sentence. Community service may also be imposed in economic offences.

Community service may be imposed conditionally and may be combined with other punishments. Community service may only be combined with a custodial sentence if the unconditional part of the sentence to be enforced does not exceed six months[34]. The time spent in pre-trial detention must be deducted from the length of community service. One day of detention means a deduction of two hours of community service.

4.5 Figures community service

The average duration of community service in 2019 was 65 hours. After the fine, community service is the most frequently applied principal sentence. In 2019 a total 29.642 people in the Netherlands had community service imposed.

31 Article 14c, 1, a CC.

32 Article 14c, 2 CC.

33 Article 22b CC. https://www.navigator.nl/document/openCitation/id8cb2010d27e13509d364436256e972c0

34 Article 9, 4 CC.

Of the persons sentenced to community service, 74% (27,034) completed their community service, 15% (5.593) of those sentenced to community service stopped while performing their community service and did not complete their service. 11% (3,913) of the community service sentences could not be started (De Kok, Tigges, Van Kalmthout, 2021: 19). If community service is not started or completed, the person is sent back to the justice authorities and in most cases, he will go to prison: one day imprisonment for every two hours that have not been carried out. The figures show that community service of offenders with no problems are completed successfully (De Kok, Tigges, Van Kalmthout, 2021: 32).

4.6 Content of community service

Community service solely imposes the performance of unpaid work. As such, it is actually a work order. The Dutch Criminal Code does not elaborate on the content of community service. A judge may determine the content of community service but is not required to do so. It will be sufficient to state that community service will involve a work order for a certain period of time. Although it is not compulsory for a judge to specify the nature of the work involved, Dutch legislation expressly provides the option to do so. It is conceivable that a judge will stipulate that the community service chosen must reflect the offence in question. A training order may only be imposed as a special condition to be met as part of a suspended sentence; in practice, these orders are only imposed on juveniles. The judge or public prosecutor is required to explicitly state the number of hours of community service to be imposed in their judgment or penalty order.

Community service may vary from heavy physical work to administrative work. It will often involve cleaning and maintenance work. It is not unusual for an offender to carry out a community service in groups with other convicted offenders. If the work is carried out as part of a project ('for the common good'), it must meet the following conditions, among others:

- the work must be supplementary;
- the work must not be work that would otherwise be available to individuals in the regular labour market;
- the work must serve a public purpose;
- the work must be meaningful, and there must be enough of it.

The probation service is responsible for ensuring that places are available on projects. All proposals for places in new projects must be submitted to and approved by the Minister of Justice and Security.

4.7 Imposing community service

To a great extent, judges are free to impose community service as a punishment for any offence. The only exclusions are for individuals who have committed serious offences that involve a serious violation of the physical integrity of a victim or certain offences specified in legislation. Community service may also not be exclusively imposed (without the imposition of another punishment) in the event of recidivism or if the defendant has already had community service imposed for a similar, previous offence[35].

In practice however, there are several circumstances that can be deemed to constitute complications for imposing community service: previous community service, recidivism, addiction, a violent crime, a convicted offender for whom it is difficult to find a suitable place, convicted offenders who deny their guilt or a convicted offender with no fixed abode in the Netherlands. Instructions from the Public Prosecution Service specify under what circumstances it will not be appropriate to order community service in situations other than those mentioned above:

- in the case of defendants who refuse to pay for the damage or loss caused by them or refuse to cooperate in loss or damage mediation;
- in the case of defendants who would not be able to complete community service properly due to psychological or psychiatric problems;
- in the case of defendants who would not be able to complete community service sufficiently due to serious addiction problems;
- in the case of defendants who do not agree to the imposition of community service;
- in the case of illegal foreign nationals;
- in the case of suspects who do not have a fixed abode in the Netherlands.

However, the Dutch Supreme Court has ruled that the consideration ‚that a foreign national who is residing in the Netherlands illegally would not be eligible for an order of this nature' is incorrect.

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35 Article 22b CC:
Community service will not be imposed if an individual is convicted of:
a. a serious offence that carries a statutory term of improvement of six years or more and resulted in a serious violation of the physical integrity of the victim;
b. any of the offences described in Sections 181, 240b, 248a, 248b, 248c and 250.
Community service will also not be imposed if an individual is convicted of a serious offence and:
1° the convicted offender has had community service imposed on them for a similar serious offence in the last five years; and
2° the convicted offender completed the community service, or the enforcement of default detention was ordered under Section 6:3 of Book 6 of the Code of Criminal Procedure (*Wetboek van Strafvordering*).
The provisions of the first and second paragraphs may be derogated from if an unconditional custodial sentence or a measure involving the deprivation of liberty is imposed alongside community service.

4.8 Offer and agreement

Legislation does not stipulate that the imposition of community service will only be possible if a defendant makes an offer or agrees to it. Therefore, community service may also be imposed in default of appearance of the defendant at the court hearing. The failure of a defendant to agree to community service, however, is a contraindication for the prosecution to demand the imposition of this sanction.[36] Personal appearance is preferred because the successful completion of community service requires a certain amount of self-discipline on the part of a convicted offender. Judges will often want to see the defendant for themselves to make sure that he is willing enough to fulfil the community service so as to not saddle up the probation service with a resisting offender.

It is not actually possible to enforce the performance of community service physically or otherwise. The convicted offender is given the possibility to decide whether or not to actually start the work in question. This means an order of this nature does not conflict with the prohibition on forced labour within international legislation.

Even if a defendant wants to do community service (and agrees to do so), the judge is not obliged to impose an order of this nature on him. However, legislation does stipulate that a judge must give detailed reasons if he imposes a prison sentence instead of asked for community service[37].

4.9 Duration of community service

Community service may be imposed for a period of up to 240 hours, based on the assumption that the number of failures increases disproportionately if a

36 In instructions (see the Instructions for community services (*Aanwijzing taakstraffen*; 2011A027) of 29 November 2011, Government Gazette 2011, 22857, which came into effect on 3 January 2012), the Board of Procurators General (*College van Procureurs-Generaal*) indicates under what circumstances it will not be possible to demand the imposition of community service, in addition to the situations formulated in Section 22b:
- in the case of defendants who refuse to pay for the damage or loss caused by them or refuse to cooperate in damage or loss mediation;
- in the case of defendants who would not be able to complete community service properly due to psychological or psychiatric problems;
- in the case of defendants who would not be able to complete community service properly due to serious addiction problems;
- in the case of defendants who do not agree to the imposition of community service;
- in the case of illegal aliens;
- in the case of suspects who do not have a fixed abode in the Netherlands.

37 Article 359, 2 Code of Criminal Procedure

work order is for more than 240 hours. According to the Dutch Supreme Court[38] the concurrence provisions set out in legislation[39] do not stipulate any other upper limits for community service. The upper limits referred to above apply per offence declared proved, irrespective of whether related offences fall under difference charges or different offences have resulted in one charge[40]. Therefore, it is possible for a convicted person to have to work for more than 240 hours.

The community service can be performed "externally" as an individual placement, and "internally" as a group placement with the probation service. The individual placements are handled by organisations other than the probation service, for example in hospitals and care homes where the offender works in the kitchen or does jobs in the garden. Daily management is the responsibility of the staff of those organisations. The probation service has resorted increasingly to creating and managing projects itself where offenders can be placed who would not be able to work for individual work providers. A fulltime probation officer (with no other tasks than community service) has 100-110 offenders in caseload (De Kok, Tigges, Van Kalmthout, 2021: 32).

5. Examples from the Dutch case law

Two cases will be presented of suspects on which the probation service advised to impose community service in their reports. In both cases, the judge followed the advice of the probation service, but this is of course not a guarantee. Two completely different suspects and offences have been chosen to indicate that, subject to legal restrictions, the possibility of imposing community service is not limited to a certain type of offence and a certain type of suspect.

5.1 Case 1

This case is about a 20-year-old first offender who is suspected of sedition. He is said to have called for a demonstration against the curfew (note: instituted

38 Supreme Court 28 November 2006, ECLI:NL:HR:2006:AY8324.

39 Article 57 CC: A single sentence will be imposed in the event of a series of offences regarded as isolated acts involving more than one offence that is punishable by the same principal punishment. The maximum punishment will be the total of the highest punishments that can be imposed in respect of an offence but never any more than one-third higher than the highest punishment where imprisonment or detention is concerned.

40 This text is based on the statutory provisions applicable in the Netherlands, Section 22b et seq. of the Criminal Code, its explanatory notes and the text of and commentary on the Criminal Code (Schuyt, Tekst & Commentaar art 22 e.v. Wetboek van Strafrecht Kluwer 2021)

due to the Corona pandemic), which he partly confesses. The person concerned seems to have his life in order. Housing, finances, work and family are seen as protective factors and therefore his social network seems to be in place. The probation service does not see sufficient starting points here to focus on supervision, but advice that if the person concerned is found guilty, to impose a community service.

How did the Dutch probation service come to this conclusion? First of all, based on the risk assessment tool that is used by the Dutch prosecution service, it estimates that the risk of recidivism with this particular offender is low. The risk of recidivism is based on statical data. This shows that the suspect belongs to the norm group of which 27% reoffends within two years. According to the instrument, this percentage indicates a low risk of general recidivism. The risk of violent recidivism is estimated to be low as well. These assessments relate to the situation in which the person concerned is actually convicted of the charge and therefore applies subject to a guilty verdict. Secondly, an analysis of the offence is then presented. The suspect says he came into contact with „people" through his work who added him to a WhatsApp group. In this group app there was talk of a demonstration against the curfew. Someone from the group app is said to have shown the messages to the police. The suspect is said to have made most of the statements and he was arrested before the date that the demonstration was supposed to take place. He states that it was not yet certain that they would start demonstrating, so there would have been no question of violating the curfew. Thirdly, the probation service pays attention to the personal and living conditions. The suspect is a first offender and there are the following protective factors:

– housing: the suspect is living with his parents;
– work: the suspect has been working for an installation company for two years;
– finance: there seems to be sufficient income to cover the fixed costs, there would be no question of debts;
– relationship with partner and family: the suspect grew up with his parents and brother. He says he's looking back on a great childhood in which he did not lack anything. His parents seem involved with him;
– social network: the suspect indicates that his circle of friends consists of serious boys, a large part of whom are employed. According to the suspect, there are no negative influences from his circle of friends. He ended up in the WhatsApp group by chance and he does not know any of them personally or call them his friends;
– substance use and addiction: the suspect claims never to consume drugs or alcohol, not even on occasions.

Looking at the case, it can be concluded that this is a regular case where imposing a community service sentence applies. In the case of first offenders with a similar social setting, the advice of the probation service is followed in almost all cases and community service is imposed by the judge.

5.2. Case 2

This case is about two high school friends, who were suspected of committing a series of car burglaries when they were only 18 years old. They were in pre-trial detention for two weeks and then released. When the probation service spoke with each of them 18 months had passed. The case was on trial three months after the completion of the reports. Defendant 1 denied all charges and had not been willing to talk with the probation officer. While waiting for the trial of this case, he had been convicted for several thefts. Because of his recidivism and no apparent will to change his situation, the advice of probation service was to impose a prison sentence. Since he had been detained, defendant 2 had changed the course of his life, the probation service reported. He had not committed any more crimes; he had gone back to school and he had broken with his 'criminal' friends. Although there was still a risk of recidivism, the probation service noted that this was not high. The defendant confessed to committing the car burglaries together with his former friend. It had been exciting and had been an easy way to make some quick cash. Because of the two weeks of detention, he had come to realize that he did not want to lead a criminal life. The report of the probation officer summed up several protective factors:

– the defendant had confessed his crimes to his parents who were willing to support him;
– his school results were very promising. His mentor described him as studious;
– he was admitted for an internship;
– the defendant had a temporary job and there were no financial troubles.

Weighing all factors, the advice of the probation service was to sentence the suspect to community service combined with a suspended prison sentence. There was no need for supervision by the probation service. During the court hearing it became clear that if defendant 2 were to be sentenced to imprisonment, he would lose his internship and would not be able to graduate. Although the circumstances of both defendants were the same when they committed the crimes, the outcome of the trial was quite different for each of them. The judge sentenced

defendant 1 to six months imprisonment, while defendant 2 was sentenced to 120 hours of community service and a suspended prison sentence of three months with a probation period of two year.

It can be concluded that for defendant 2 the report of the probation service was of tremendous importance. Without it, the judge would probably have sentenced him to a prison sentence as well. Because the probation officer had talked with the parents and the mentor at school, he was able to verify the information given by the suspect and sketch a reliable image of the defendant for the judge.

6. Conclusion

Based on the presented analyses of the system of alternative sanctions in Serbia and the Netherlands, with all shortcomings and advantages in the legal solutions concerning certain alternative sanction, it can undoubtedly be concluded that the system in the Netherlands is more efficient for one simple reason - the existence of developed probation service. Namely, in the Netherlands, there is a longstanding and completely independent probation service that is part of the criminal justice system and closely cooperates with all key actors in the judiciary. One of its main tasks is to compile a pre-sentence report on the perpetrator of the crime, which is submitted to the public prosecutor or court, depending on the stage of the criminal procedure. These reports have detailed assessment of the defendant, based on conversations with him and data which the probation service has already about him in its database, which is regularly updated and contains a number of analytical tools that help to get a more complete picture of the defendant, his psychological profile, previous life and the crime he/she committed, as well as the assessment of criminogenic risk. Also, the report that is eventually submitted to the court contains proposals for possible alternative sanctions and measures which, in the opinion of the probation service and its experts, can first lead to the rehabilitation of the perpetrator and have a special-preventive effect. As these are detailed and professional reports by the probation officer on the perpetrator, his previous life, and the crime he committed, judges in the Netherlands often rely entirely on them when deciding on the type and extent of a criminal sanction. In addition to the reasons related to the expertise of the probation service and the comprehensive analysis of perpetrators, judges (as well as public prosecutors) in the Netherlands are aware of the positive aspects of applying alternative sanctions proposed in these reports.

Considering the benefits of alternative criminal sanctions stated in the introduction of this work and having in mind the fact that their application in Serbia

is constantly symbolic and insufficient, it is an indisputable conclusion that the introduction of the said report of probation service and the development of the Commissioner's Service in general into an independent probation service certainly encouraged the greater application of non-custodial sanctions in practice. In that way, more direct and wider communication would be established between the court, the public prosecutor's office, and the competent Commissioner's Service and a judicial chain especially at the local level would be established, which would lead to a more detailed analysis of the defendant and criminal risk assessment, and the current problems in the execution of alternative sanctions would be solved almost every day, thus encouraging their more significant and high-quality application.

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THE EROSION OF THE SALDUZ DOCTRINE IN THE CASES OF *IBRAHIM AND OTHERS V. THE UNITED KINGDOM* AND *BEUZE V. BELGIUM*

The so-called Salduz doctrine that concerns the right to a fair trial and the right to the defense attorney emerged from the case of Salduz v. Turkey, decided on the part of the European Court of Human Rights where the Grand Chamber found the violation of Article 6, paragraph 3(c) of the Convention for the Protection of Human Rights and Fundamental Freedoms. In this connection, the aim of this paper is twofold. In the first place, the paper aims to demonstrate how the European Court of Human Rights has overturned the two main tenents of the so-called Salduz doctrine derived from its landmark case of Salduz v. Turkey in its later Judgments delivered in the case of Ibrahim and Others v. the United Kingdom and the case of Beuze v. Belgium. The two tenets derived from the Salduz doctrine being examined in the paper are the right to access to the defense attorney as a rule during pre-trial proceedings and the absolute exclusionary rule. In the second place, the paper aims to offer a critique of the standard of compelling reasons employed in the Ibrahim Judgment. In order to achieve its aim, this paper primarily analyses the jurisprudence of the European Human Court of Human Rights in the cases of Salduz v. Turkey, Ibrahim and Others v. the United Kingdom, and Beuze v. Belgium. Besides, the paper

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also touches upon other judgments of the European Court of Human Rights related to its subject. The paper in question, therefore, primarily relies on the case-law method in achieving its aims. The paper concludes that in overturning the Salduz doctrine in relation to aspects examined in the paper, the European Court of Human Rights has exacerbated the legal standing of the person against whom criminal proceedings are being conducted.

Keywords: *Salduz* doctrine, *Salduz* case, restriction of the right to access the defense attorney, the absolute exclusionary rule, *Ibrahim* case, *Beuze* case.

1. Introduction

According to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR), among other things, everyone charged with a criminal offense has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require (Article 6, paragraph 3(c) of the ECHR). In this connection, it is worth observing that the provision of Article 6, paragraph 3(c) differentiates between the substantive and the formal aspects of the right to defense. While the right to defense understood in the substantive sense supposes the right of the defendant to undertake in his favor any procedural actions standing at his disposal, such as examining witnesses and expert witnesses, proposing exculpating evidence, challenging incriminating evidence, the right to defense in the formal sense means the right to have the professional assistance and services of the defense attorney, which is in practice the main thrust of Article 6, paragraph 3(c) of the ECHR (Trechsel, 2005: 244). The right to the defense attorney is one of the fundamental features of a fair trial and consequently of the rule of law (Soo, 2018: 19). As other rights included in the ECHR, especially those being elements of a right to a fair trial, for proper understanding of the right to the defense attorney, one needs to take a closer look at the jurisprudence of the ECtHR. When it comes to the right to defense attorney under the ECHR and the jurisprudence of the ECtHR, two issues bearing significant theoretical and practical implications attract a great deal of attention, whereby the latter is far more controversial. The first question that ought to be answered is when the right to the defense attorney arises in the course of criminal proceedings. In other words, in which stage of the criminal proceedings the defendant must be provided with the right to the legal assistance and

services of the defense attorney. The second question deserving answering is whether high contracting parties enjoy the right to subject the right to the defense attorney to certain restrictions and which consequences occur if such restrictions arise during criminal proceedings. Regarding the first posed question as to whether Article 6 of the ECtHR covers the right of access to the defense attorney only at the stage of the court proceedings or whether this right also applies during the pre-trial stage of criminal proceedings, it could be said that the right to access to the defense attorney is observed by the ECtHR in light of the right to a fair trial. Moreover, the ECtHR has clarified on numerous occasions that the right laid out in Article 6, paragraph 3(c) of the ECHR is one element, amongst others, of the concept of a fair trial in criminal proceedings contained in Article 6, paragraph 1 of the ECHR (ECtHR, *Artico v. Italy*, no. 6694/74, paras. 32-33, Judgment of 13 May 1980, Series A no. 37; ECtHR, *Quaranta v. Switzerland*, no. 12744/87, para. 27, Judgment of 24 May 1991, Series A no. 205). In the case of *Imbrioscia v. Switzerland*, the ECtHR said that other requirements derived from Article 6 of the ECtHR, especially those of Article 6, paragraph 3 of the ECHR, „may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them" (ECtHR, *Imbrioscia v. Switzerland*, no. 13972/88, para. 36, Judgment of 24 November 1993, Series A no. 275). Even though the ECtHR made it clear that everyone charged with a criminal offense has the right to defend himself in person or through legal assistance pursuant to Article 6, paragraph 3(c) of the ECHR, the ECtHR at the same time opined that the cited provision does not specify the manner of exercising this right (*Imbrioscia v. Switzerland*, para. 38). It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the ECtHR's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (*Quaranta v. Switzerland*, para. 30; *Imbrioscia v. Switzerland*, para. 38). In this connection, the ECtHR stressed that the ECHR is aimed at guaranteeing not rights that are theoretical or illusory but rights that are practical and effective and that assigning the defense attorney does not in itself ensure the effectiveness of the assistance he may afford an accused (*Artico v. Italy*, para. 33; *Imbrioscia v. Switzerland*, para. 38).

When it comes to the right to the defense attorney under the ECHR or, to be more specific, the restrictions of this right and their ramifications for criminal proceedings taken as a whole, one can differentiate between the pre-*Salduz* era, the *Salduz* era, and the post-*Salduz* era. The standard the ECtHR applied before the *Salduz* doctrine regarding restricting the access to legal advice during pre-trial proceedings was a more lenient one. This approach was exemplified in the case of *John Murray v. the United Kingdom* decided on the part of the Grand

Chamber, as well as in the case of *Brennan v. the United Kingdom*, when the ECtHR recognized that national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation, which are decisive for the prospects of the defense in any subsequent criminal proceedings. The ECtHR went on further to say that even though in such circumstances guarantees derived from Article 6 of ECHR will normally require that the accused be allowed to benefit from the assistance of the defense attorney already at the initial stages of police interrogation, this right, which is not explicitly laid out in the ECHR, may be subject to restrictions for good cause. In this connection, the question arising in each case is whether the restriction has deprived the accused of a fair hearing in light of the entirety of the proceedings (ECtHR, *John Murray v. the United Kingdom*, no. 18731/91, para. 63, Judgment of 8 February 1996 [GC], Reports of Judgments and Decisions 1996-I; ECtHR, *Brennan v. the United Kingdom*, no. 39846/98, para. 45, Judgment of 16 October 2001, ECHR 2001-X). Therefore, one can make two conclusions with regard to the stance of the ECtHR when it comes to the deprivation of the right to the defense attorney during the initial stages of criminal proceedings before the emergence of the *Salduz* doctrine. In the first place, the jurisprudence of the ECtHR failed to provide any precise guidance on how to understand the concept of "good cause" (Sakowicz, 2021: 1986). In the second place, by taking a stance that restrictions of the right of access to the defense attorney should be assessed through the lenses of compliance with the requirement of a fair trial as a whole, the ECtHR significantly weakened the essence of this right (Sakowicz, 2021: *ibid*.).

2. Salduz v. Turkey

2.1. The Circumstances of the Case

The applicant Yusuf Salduz, a minor at the time of the conduction of the criminal proceedings against him, was charged on suspicion of having participated in an unlawful demonstration in support of an illegal organization. Besides, the applicant was also accused of hanging an illegal banner from a bridge in a local town in the Republic of Turkey (ECtHR, *Salduz v. Turkey*, no. 36391/02, paras. 4-5, Judgment of 26 April 2007). At the beginning of the criminal proceedings, the police officers took a statement from the applicant in which he admitted the charges (*Salduz v. Turkey*, para. 6). Afterward, the applicant was brought before the public prosecutor and then the investigating judge. In front of both of these officials, the applicant denied the content of his police statement, alleging that it had been extracted from him under duress. The same day, the applicant was

remanded in custody (*Salduz v. Turkey*, para. 7). The Izmir State Security Court convicted the applicant of aiding and abetting the terrorist organization (*Salduz v. Turkey*, paras. 8-9). As a basis for convicting the applicant, the Izmir State Security Court had taken into consideration the statements which the applicant had made to the police, the public prosecutor, and the investigating judge, as well as his co-defendants' testimony before the public prosecutor and other evidence (*Salduz v. Turkey*, para. 10). In the end, the Judgment of the Izmir State Security Court was confirmed by the Court of Cassation (*Salduz v. Turkey*, para. 12).

2.2. The Judgment of the Chamber

The case of *Salduz v. Turkey* (hereinafter also: the *Salduz* case) was first decided by the Chamber of the European Court of Human Rights (hereinafter: the Chamber) before the Grand Chamber of the European Court of Human Rights (hereinafter: the Grand Chamber) delivered its Judgment (hereinafter also: the *Salduz* Judgment) in the same case giving rise to the so-called *Salduz* doctrine. When examining the complaints of the applicant, the Chamber observed that the applicant was represented at the trial held before the Izmir State Security Court and during the appeals proceedings by his lawyer. Moreover, the Chamber stressed that statement the applicant made to the police during his pre-trial detention was not the sole basis for his conviction, and that he had had the opportunity of challenging the prosecution's allegations under conditions that did not place him at a substantial disadvantage vis-à-vis his opponent. According to the view of the Chamber, the court convicted the applicant on the basis of the facts and evidence before it as a whole (*Salduz v. Turkey*, para. 23). Having considered the above circumstances of the case in question, the Chamber held that the fairness of the applicant's trial was not prejudiced in this particular case in view of the fact that the applicant was not provided with access to the defense attorney during the period in police custody. As a result, the Chamber did not find the violation of Article 6, paragraph 3(c) of the ECHR *(Salduz v. Turkey*, para. 24). Accordingly, when assessing the claims of the applicant and reaching its decision in the case of *Salduz v. Turkey*, the Chamber did rely on the previous well-established jurisprudence of the ECHR with regard to restricting the access to the defense attorney and the consequences stemming from such restrictions for the rest of proceedings. As a result, the Chamber did not depart from the then-established case-law of the ECtHR according to which the absence of legal assistance occurring during the initial stages of criminal proceedings may be cured afterward provided that the criminal proceedings were fair taken as a whole.

2.3. The Judgment of the Grand Chamber

While the Chamber did not find the violation of the applicants' rights under Article 6, paragraph 3(c) of the ECHR, the Grand Chamber arrived at a different conclusion with regard to access to the defense attorney during the investigation (ECtHR, *Salduz v. Turkey*, no. 36391/02, Judgment of 27 November 2008 [GC]). The Grand Chamber took the stance that the applicant was undoubtedly affected by the restrictions on his access to the defense attorney in that his statement to the police was used for his conviction. The Grand Chamber held that neither the assistance provided afterward by the defense attorney nor the adversarial nature of the subsequent proceedings could cure the defects which had occurred during police custody (*Salduz v. Turkey* [GC], para. 58). In addition to the abovementioned, the Grand Chamber gave special weight to the fact that the applicant was a minor at the time of the conduction of the criminal proceedings against him. (*Salduz v. Turkey* [GC], para. 60). The Grand Chamber further went on to observe that the restriction imposed on the right of access to the defense attorney was systematic and applied to anyone held in police custody, regardless of his or her age provided that a person is charged with an offense falling under the jurisdiction of the State Security Courts (*Salduz v. Turkey* [GC], para. 61). To sum up, even though the Grand Chamber acknowledged that the applicant was provided with the opportunity to challenge the evidence against him at the trial and subsequently during the appeal proceedings, the Grand Chamber emphasized that the absence of the defense attorney while the applicant was in police custody irretrievably affected his defense rights (*Salduz v. Turkey* [GC], para. 62).

The two main principles of enormous significance for the legal standing of the accused may be derived from the *Salduz* doctrine. In the first place, the ECtHR made it clear that any systemic and mandatory statutory restriction as regards the right to access to the defense attorney renders a whole trial unfair. Namely, according to the view of the Grand Chamber expressed in *Salduz* Judgment, in order for the right to a fair trial to remain sufficiently „practical and effective", the provision of Article 6, paragraph 1 of the ECtHR requires that, as a rule, access to the defense attorney should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. To sum up, the *Salduz* doctrine laid out the rule requiring that the suspect has the right to be provided with access to the defense attorney when the former is subject to questioning on the part of the police (Vamos, 2016: 406). Accordingly, any restrictions of the right of access to the defense attorney in pre-trial proceedings come into play only upon the condition that compelling reasons are justifying the

subjection of the mentioned right to restrictions under the provisions of respective national criminal procedural legislation. Therefore, the right of access to the defense attorney is susceptible to restrictions on the condition of the existence of compelling reasons. Hence, such an approach adopted on the part of the Grand Chamber narrowed the possibilities of states regarding the restriction of the right to the defense attorney. Namely, the deprivation of the right to access to the defense attorney occurred without the existence of compelling reasons results in the violation of the right to a fair trial. Therefore, following this line of thought, the right to access to the defense attorney under the *Salduz* doctrine is susceptible to restrictions only in exceptional circumstances. In addition to the above, the Grand Chamber clarified that the existence of compelling reasons does not give states the carte blanche to limit access to the defense attorney. However, in later judgments molded on the basis of the *Salduz* doctrine, the ECtHR expanded the abovementioned right to the benefit of the accused to other procedural situations arising during pre-trial proceedings. Accordingly, the right of access to the defense attorney arises also during other procedural actions in addition to questioning, such as identification procedures or reconstructions of events (*İbrahim Öztürk v. Turkey*, no. 16500/04, paras. 48-49, Judgment of 17 February 2009). Also, in the case of *Brusco v. France*, the ECtHR removed any doubt about the lawyer's presence at interviews, by holding that the defendant had the right to be assisted by the defense attorney from the beginning of his detention and not only during questioning (ECtHR, *Brusco v. France*, no. 1466/07, paras. 45-54, Judgment of 14 October 2010). Furthermore, the ECtHR found the violation even when the applicant had remained silent in police custody while being denied the right to the defense attorney (ECtHR, *Dayanan v. Turkey*, no. 7377/03, para. 33, Judgment of 13 October 2009). For instance, in the case of *Dayanan v. Turkey*, the ECtHR held that the suspect should not only be assisted by the defense attorney while being questioned but also as soon as he or she is taken into custody to be able to obtain the whole range of services specifically associated with legal assistance, such as discussion of the case, organization of the defense, collection of evidence favorable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention (*Dayanan v. Turkey*, para. 32).

In the second place, perhaps the most significant implication of the *Salduz*, not underestimating the others, such as the one examined above, concerns the consequences stemming from depriving the suspect of the right to the defense attorney during pre-trial proceedings in relation to the fairness of criminal proceedings taken as a whole. Even though there is no doubt that the procedural moment when the right to defense attorney arises is of paramount significance for the suspect, this right would remain nothing more than the dead letter of the law

unless specific procedural consequences aimed at safeguarding the interests of the suspect are triggered by the violation of the right to the defense attorney. According to the Grand Chamber in the case of *Salduz v. Turkey*, even if the existence of compelling reasons *may exceptionally justify* denial of access to the defense attorney, *such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 of the ECHR*. The Grand Chamber further went on to say that „the rights of the defense will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to [the defense attorney] are used for a conviction" (*Salduz v. Turkey* [GC], para. 55). As a result of prohibiting the use of incriminating statements[1] made on the part of the suspect when he was deprived of the right to access the defense attorney, the Grand Chamber „construed an absolute, rights-based, categorical exclusionary rule for confessional evidence" obtained in such circumstances (Giannoulopoulos, 2019: 168). In this connection, the essence of the *Salduz* absolute exclusionary rule is summarized by the Dissenting Opinion of Judge Spano in the case of *Aras v. Turkey* (ECtHR, *Aras v. Turkey* (no. 2), no. 15065/07, Judgment of 18 November 2014, Dissenting Opinion of Judge Spano). The exclusionary rule derived from the *Salduz* case was based on „a purely automatic application of the requirement of legal assistance under Article 6, paragraph 3(c), without it being deemed necessary to show that the lack of such assistance had a prejudicial effect, even speculatively, on the fairness of the applicant's trial" (*Aras v. Turkey* (no. 2), Dissenting Opinion of Judge Spano, para. 2). Thus, the ECtHR made it clear that the *Salduz* doctrine requires the obligatory exclusion of self-incriminatory statements when it said „that the most appropriate form of redress for a violation of Article 6, [paragraph] 1 would be to ensure that the applicant, as far as possible, is put in the position in which he would have been had this provision not been disregarded. [...] Consequently, the Grand Chamber consider[ed] that the most appropriate form of redress would be the retrial of the applicant in accordance with the requirements of Article 6 [paragraph] 1 of the [ECtHR],

1 As regards the exclusionary rule under the *Salduz* doctrine, it is worth emphasizing that the ECtHR in the subsequent case-law has expanded the application of the exclusionary rule to other evidence in addition to directly self-incriminatory statements made when the suspect is deprived of the right to access to the defense attorney. Namely, according to the view of the ECtHR in the case of *Begu v. Romania*, the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Among others, the ECtHR drew attention to the fact that even testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case, for instance, to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility (ECtHR, *Begu v. Romania*, no. 20448/02, para. 54, Judgment of 15 March 2011).

should the applicant so request" (*Salduz v. Turkey* [GC], para. 72). In this connection, the previously mentioned rule as regard redress is further clarified in the Joint Concurring Opinion of Judges Rozakis, Spielmann, Ziemele, and Lazarova Trajkovska, who opined that „when a person has been convicted in breach of the procedural safeguards afforded by Article 6, he should, as far as possible, be put in the position in which he would have been had the requirements of that Article not been disregarded (the principle of *restitutio in integrum*)" (ECtHR, *Salduz v. Turkey*, no. 36391/02, Joint Concurring Opinion of Judges Rozakis, Spielmann, Ziemele, and Lazarova Trajkovska, para. 4). Therefore, in the view of the concurring Judges, the ECtHR „should seek to restore the status *quo ante* for the victim" whenever possible. In this connection, as regards the use of evidence obtained in violating the right to access to the defense attorney, the ECtHR stated that the required redress is the exclusion of such evidence. Consequently, in the *Salduz* case, despite not defining compelling reasons, the ECtHR left no doubt regarding the legal destiny of criminal proceedings where one of the bases of conviction was a self-incriminatory statement made during police interrogation without access to the defense attorney. Namely, regardless of other circumstances of criminal proceedings, such criminal proceedings always fall short of Article 6 requirements, while evidence obtained in the context of the absence of the defense attorney cannot be used as a basis for conviction with the aim of curing a described violation.

3. Ibrahim and Others v. the United Kingdom

3.1. The Circumstances of the Case

The Judgment of the Grand Chamber (hereinafter also: the *Ibrahim* Judgment) handed down in the case of *Ibrahim and Others v. the United Kingdom* (hereinafter also: the case) has probably been the most controversial decision of the ECtHR in the so-called post-*Salduz* era (Burić, 2018: 338). The event and surrounding facts giving rise to the case of *Ibrahim* and others arose in the aftermath of the tragic event attracting attention all around the world. Four suicide bombs exploded on 7 July 2005 on three underground trains and a bus in central London, killing fifty-two people and injuring hundreds more (ECtHR, *Ibrahim and Others v. the United Kingdom*, nos. 50541/08, 50571/08, 50573/08 & 40351/09, para. 14, Judgment of 13 September 2016 [GC]). Two weeks later, on 21 July 2005, Mr. Muktar Said Ibrahim, Mr. Ramzi Mohammed, and Mr. Yassin Omar (hereinafter: the first three applicants), and a fourth man, detonated four bombs on three underground trains and a bus in central London. On 23 July 2005,

a fifth bomb was discovered abandoned and undetonated in a London park. (*Ibrahim and Others v. the United Kingdom* [GC], para. 15). Even though the four bombs were detonated they did not explode due to the main charge, liquid hydrogen peroxide, failing to explode. (*Ibrahim and Others v. the United Kingdom* [GC], para. 16). The first three applicants and Mr. Osman all ran away from the scenes of their attempted explosions. In the days following the unsuccessful terrorist attack, the four men were arrested, the first three applicants in England between 27 and 29 July and Mr. Osman in Rome, Italy, on 30 July. They stood trial and were convicted for conspiracy to murder (*Ibrahim and Others v. the United Kingdom* [GC], para. 17). Mr. Ismail Abdurahman (hereinafter: the fourth applicant) gave Mr. Osman shelter at his home in London during the period when Mr. Osman was on the run from the police and before he fled to Rome. The police interviewed the fourth applicant in England on 27 and 28 July 2005 and arrested him on the latter date. In separate proceedings, he was tried and convicted of assisting Mr. Osman and failing to disclose information after the event (*Ibrahim and Others v. the United Kingdom* [GC], para. 18). In this connection, it is worth stressing that the safety interviews were undertaken in relation to the first three applicants. These interviews were conducted „for the purpose of protecting life and preventing serious damage to property", and, in accordance with the relevant national legislation in force at that time, police authorities were allowed to restrict the right to legal assistance up to 48 hours if needed (*Ibrahim and Others v. the United Kingdom* [GC], para. 23). Even though the first three applicants had requested to be provided with legal assistance, the police did not honor their requests on the following two grounds in view of the fact that „delaying the interview would involve an immediate risk of harm to persons or damage to property" and that „legal advice would lead to the alerting of other people suspected of having committed offenses but not yet arrested" (*Ibrahim and Others v. the United Kingdom* [GC], paras. 21-22, 28, 39-41, 43, 49-50, 51).

The applicants complained that their rights under Article 6, paragraphs 1 and 3(c) were violated in view of the fact they had been interviewed by the police without access to the defense attorney and that statements made in those interviews had been used at their trials (*Ibrahim and Others v. the United Kingdom* [GC], para. 5). The first three applicants argued that the *Salduz* doctrine imposed a bright-line rule prohibiting the use at trial of statements obtained during police interrogation in the absence of the defense attorney, which is a rule also applied in terrorism cases. (*Ibrahim and Others v. the United Kingdom* [GC], para. 236). They argued that there were no compelling reasons to restrict their right to the defense attorney and that even the undisputable gravity of the allegations could not alone justify a restriction. In their view, the absence of compelling reasons

was sufficient in and of itself to result in a violation of Article 6, paragraphs 1 and 3(c) (*Ibrahim and Others v. the United Kingdom* [GC], para. 237). In any event, they argued that the restriction on legal advice had led to undue prejudice in their cases. (*Ibrahim and Others v. the United Kingdom* [GC], para. 238). The fourth applicant complained that his guilt was established on the basis of the self-incriminating statement he had made as a witness, and therefore without having been notified of his privilege against self-incrimination or having been provided with access to the defense attorney (*Ibrahim and Others v. the United Kingdom* [GC], para. 295). Namely, the police initially treated the fourth applicant as a witness and, in that capacity, he was invited to the police station to assist with the investigation where he gave a self-incriminatory statement later used for his conviction (*Ibrahim and Others v. the United Kingdom* [GC], paras. 137-180, 296).

3.2. The Compelling Reasons

The Grand Chamber in the *Ibrahim* case employed the test set out in *Salduz* when establishing whether there was the violation of the right derived from Article 6, paragraph 3(c) of the ECtHR while admitting that the *Salduz* test needs clarification, especially in relation to the meaning of compelling reasons (Celiksoy, 2018: 234). Namely, according to the view of the Grand Chamber expressed in the *Ibrahim* Judgment, the *Salduz* test is two-tiered, considering that this test comprises two stages applied in a particular sequence (*Ibrahim and Others v. the United Kingdom* [GC], paras. 257-262). In this connection, when assessing whether the deprivation of access to the defense attorney resulted in the violation or the right to a fair trial, the ECtHR must evaluate, in the first stage of the *Salduz* test, whether there were compelling reasons for the restriction (*Ibrahim and Others v. the United Kingdom* [GC], paras. 257-262). Afterward, in the second stage of the *Salduz* test, the ECtHR must evaluate the prejudice caused to the rights of the defense by the restriction in the case in question. In other words, the ECtHR must examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair (*Ibrahim and Others v. the United Kingdom* [GC], para. 257).

The Grand Chamber accepted the claim of the Government that there were compelling reasons for the temporary restrictions on the first three applicants' right to legal advice arising from the potential for loss of life on a large scale, the urgent need to obtain information on planned attacks, and the severe practical constraints under which the police were operating. The Grand Chamber opined that compelling reasons may exist where an urgent need to avert serious adverse

consequences for life, liberty, or physical integrity has been convincingly made out. The ECtHR made it clear that there is no doubt that such a need existed at the time when the safety interviews of the first three applicants were conducted, considering that in suicide attacks on three underground trains and a bus two weeks earlier, fifty-two people had been killed and countless others injured (*Ibrahim and Others v. the United Kingdom* [GC], paras. 276, 279).

Turning to the issue of restricting the right to the defense attorney, the Grand Chamber in *Ibrahim* case came to the following observations when it comes to compelling reasons as the ground for restricting the mentioned right (Vamos, 2016: 407): 1) restrictions are only permissible in exceptional circumstances, have to be of a temporary nature and have to be based on an individual assessment of the circumstances of the case; 2) in assessing whether compelling reasons exist, it is of relevance that there is a legal basis in domestic law for restricting the right and this legal basis specifies the scope and content of the restriction in order to guide decision-making by the authorities responsible; 3) the compelling nature must be assessed on a case-by-case basis; 4) "the urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case can amount to compelling reasons to restrict access to legal advice for purposes of Article 6" (*Ibrahim and Others v. the United Kingdom* [GC], paras. 258–259); 5) a non-specific risk of leaks susceptible of jeopardizing the investigation arising from legal assistance cannot constitute compelling reasons (*Ibrahim and Others v. the United Kingdom* [GC], para. 259). Thus, it is worth observing that the existence of a substantive condition expressed in the existence of compelling reasons does not justify the restriction of legal advice in itself, considering that Article 6 of ECHR requires a procedural assessment of the compelling reasons to have been made with the aim of demonstrating such existence on the basis of contemporaneous evidence (*Ibrahim and Others v. the United Kingdom* [GC], paras. 258, 277, 300; Vamos, 2016: *ibid*.; Celiksoy, 2018: 234-239).

As we have seen, the Judgment of the Grand Chamber handed down in the case of *Ibrahim and Others v. the United Kingdom* does not affect the temporal scope of the right to access legal advice. In fact, by relying on the autonomous understanding of the term charge, the Grand Chamber clarified that the right to the defense attorney does not arise from the time of the first interrogation, that is when the person is formally presented with charges, but from the time of the carrying out the first action on the part of authorities conducting the process that is aimed to prosecute the person (Sakowicz, 2021: 2004 fn. 53). Nonetheless, on the other hand, in contrast to the *Salduz* Judgement, the *Ibrahim* Judgment opens far more leeway for states to restrict the right of the suspect to the defense attorney during pre-trial proceedings. In other words, while the right of the suspect to have

the defense attorney during the investigation remains intact according to the reasoning of the *Ibrahim* Judgment, this right may be the subject of certain restrictions based upon fulfilling substantive and procedural requirements depending on the particulars of each specific case. To put it simply, the issue stemming from *Ibrahim* is not when the right to the defense attorney arises during criminal proceedings, but whether this right is susceptible to restriction under national legislation and which consequences follow from the violation of this right for criminal proceedings as a whole. In this regard, the two critiques may be attributed to the reasoning of the Grand Chamber as for the understanding and application of the notion of compelling reasons.

In the first place, it may be said that it is questionable whether the understanding of the meaning of compelling reasons as a ground for legitimizing restricting the fair trial rights in the *Ibrahim* case is in line with the previous jurisprudence of the ECtHR. Even though there is no doubt that the provisions of Article 6 are susceptible to derogation in the time of war or other public emergency threatening the life of the nation of any High Contracting Party (Article 15, paragraph 1), it is not clear whether public or other overriding interests may allow the legitimate restriction of the fair trial rights resulting in making these rights qualified in other circumstances (Goss, 2014: 116–118, 176–201). Namely, according to some viewpoints in this respect, neither the ECHR nor the jurisprudence of the ECtHR implies that the rights derived from Article 6 can be simply set aside for public policy or other consequentialist reasons, on the basis that such restrictions are proportionate (Ashworth, 2007: 215). In this connection, in many cases, the ECtHR has sent a clear message refusing to employ public or other overriding interests for the purpose of the legitimization of the restriction of fair trials that would allow the restrictions to occur but not the violations of these rights (Goss, 2014: 178-183). In the case of *Teixeira de Castro v Portugal* concerning the fight against drug trafficking, the ECtHR stressed that „the right to a fair administration of justice [...] holds such a prominent place that it cannot be sacrificed for the sake of expedience" while rejecting the use of the public interest as a justification for the use of evidence obtained as a result of police incitement (ECtHR, *Teixeira de Castro v Portugal*, no. 25829/94, para 36, Judgment of 9 June 1998, Reports of Judgments and Decisions 1998-IV). Also, in the case *Hulki Güneş v. Turkey*, despite acknowledging the undeniable difficulties modern states are facing in combating terrorism, especially with regard to obtaining and producing evidence – and of the ravages caused to society by this problem, on the one hand, the ECtHR firmly stated that „such factors cannot justify restricting to this extent the rights of the defense of any person charged with a criminal offense", one the other hand (ECtHR, *Hulki Güneş v. Turkey*, no. 28490/95, para. 96,

Judgment of 19 June 2003, Reports of Judgments and Decisions 2003-VII). In addition to the above, the ECtHR left no doubt that even the fact that the person is charged with a most heinous criminal offense, such as crimes against humanity, does not allow that the interest of efficiency of the criminal proceedings supersedes the procedural safeguards derived from the right to a fair trial. For instance, when the Government attempted to justify the restriction to access to the defense attorney by drawing attention to the fact the applicant was tried and convicted of crimes against humanity, in rejecting the gravity of the offenses as a basis for restricting the abovementioned right, the ECtHR opined that „the fact that the applicant was prosecuted for and convicted of aiding and abetting crimes against humanity does not deprive him of the guarantee of his rights and freedoms under the [ECHR]" (ECtHR, *Papon v. France*, no. 54210/00, paras. 71, 84, 90, 98, Judgment of 25 July 2002). Last but not least, the previously mentioned reluctance of the ECtHR to take into account public interest considerations as a basis for undermining fair trial rights is obvious when having in mind the opinion of the Grand Chamber in the *Salduz* case when the ECtHR said that (Goss, 2014: 182) „it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies"(*Salduz v. Turkey* [GC], para. 50). Therefore, the cited paragraph may be interpreted in the sense that the procedural safeguards applied in a particular case should grow proportionally to the gravity of the charge, that is, the seriousness of the concerned criminal offenses.

When reading the *Ibrahim* Judgment, at first glance, it seems that the ECtHR remained faithful to the status of the right to a fair trial as an unqualified right. In the *Ibrahim* case, the Grand Chamber clarified that the general requirements of fairness derived from Article 6 apply to all criminal proceedings, regardless of the type of offense in the issue. Moreover, the Grand Chamber made it clear that „[t]here can be no question of watering down fair trial rights for the sole reason that the individuals in question are suspected of involvement in terrorism. In these challenging times, the [ECtHR] considers that it is of the utmost importance that the Contracting Parties demonstrate their commitment to human rights and the rule of law by ensuring respect for, *inter alia*, the minimum guarantees of Article 6 of the [ECHR]" (*Ibrahim and Others v. the United Kingdom* [GC], para. 252). Nonetheless, despite categorically stating that the gravity of criminal offenses cannot be the sole reason for watering down fair trial rights, the Grand Chamber went back on its own words in this sense by saying that „when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offense in issue may be taken into consideration". In addition, the Grand Chamber further took an explicit stance according to which the application of fair trial rights should not „put disproportionate difficulties

in the way of the police authorities in taking effective measures to counter terrorism or other serious crimes in the discharge of their duty under Articles 2, 3, and 5 paragraph 1 of the [ECHR] to protect the right to life and the right to bodily security of members of the public". Finally, the Grand Chamber held that taking measures that extinguish the very essence of fair trial rights cannot be justified by invoking public interest concerns (*Ibrahim and Others v. the United Kingdom* [GC], para. 252). Thus, having in mind the above considerations, one can easily observe the inconsistency of the Grand Chamber with regard to the unclear status of the fair trial rights in the sense of whether these rights are unqualified or qualified. Considering that the majority in the *Ibrahim* case devoted a great deal of attention to substantive and procedural requirements for the restriction of the fair trial rights while acknowledging that the application of the fair trial rights should not hamper the activities of police and other law enforcement authorities when they are suppressing and prosecuting serious criminal offenses, such as terrorism, the Grand Chamber endangered the status of Article 6 as unqualified. Namely, as Judges Sajo and Laffranque correctly observed in their Joint Partly Dissenting, Partly Concurring Opinion, the Judgment of the Grand Chamber in the *Ibrahim* case deviated „from the noble principle announced, and indeed the [majority] itself water[ed] down rights, by failing to adhere to the guarantees of Article 6 as interpreted in its own well-established case-law, and without expressly stating it, *de facto* depart[ed] from that earlier well-established case-law, which has been widely applied by the national courts. This is most disappointing" (*Ibrahim and Others. v the United Kingdom* [GC], Joint Partly Dissenting, Partly Concurring Opinion of Judges Sajo and Laffranque, para. 2). As a result of such approach of the Grand Chamber, the status of Article 6 as unqualified hangs in the balance since the majority in the *Ibrahim* case attempted to reconcile the two irreconcilable requirements: on the one hand, the majority initially declared that Article 6 rights are unqualified rights not susceptible to watering down when a particularly serious offense is involved, while immediately thereafter acknowledging that Article 6 rights may be set aside with the aim of pursuing the public interest when terrorism is concerned, on the other hand (Goss, 2017: 1149).

In the second place, the Grand Chamber did not provide a concrete explanation as to why it was necessary to restrict the right of the first three applicants to access the defense attorney when they were subjected to safety interviews on the part of the police. It is not difficult to agree with the finding of the Grand Chamber that the overriding priority of the police was gathering information on any further planned attacks and the identities of those potentially involved in the plot. In this connection, according to the view of the Grand Chamber, in relation to the first three applicants, there was the existence of an urgent need to avert serious adverse

consequences for the life and physical integrity of the public (*Ibrahim and Others. v. the United Kingdom* [GC], para. 276). However, the Grand Chamber in its reasoning failed to address the issue of how and why delaying the right to legal assistance as for the first three applicants contributed to fulfilling the aims of preventing further terrorist attacks or which security objectives were needed to be achieved that would have required restricting their right to the defense attorney (Burić, 2018: 346-347). Namely, as Judges Sajó and Laffranque said in their separate opinion in which they stated that „the fact that there is an urgent need to save lives does not explain why and how the advice and presence, in particular, of [the defense attorney], that is, of a right, would, as a matter of principle, be detrimental to saving lives" (*Ibrahim and Others. v the United Kingdom* [GC], Joint Partly Dissenting, Partly Concurring Opinion of Judges Sajo and Laffranque, para. 21). Therefore, in other words, in addition to acknowledging the existence of compelling reasons, the Grand Chamber should have clearly elaborated why these reasons in the present case justified restricting the right to legal assistance as for the first three applicants. This shortcoming of the Grand Chamber Judgment in this sense is easily observed when the following is taken into account. Namely, when examining the situation of one of the applicants, that of Mr. Ibrahim, with regard to the existence of compelling reasons, the Grand Chamber justified him being denied of the right to the defense attorney in view of the fact that police operated under a great deal of pressure, that during such a high-intensity situation is not unusual that minor breakdowns in communication occur, that the police needed to invest their maximum effort in conducting investigations and interviews and that therefore the police „cannot be criticized for having failed to realize that there was a small opportunity in which a consultation room with a telephone socket was available and in which Mr. Ibrahim could therefore have been afforded access to a lawyer by telephone". Additionally, the Grand Chamber also observed that in the same police station when Mr. Ibrahim was held, there were eighteen detainees arrested in connection with the attempted bombings and, all of whom had to be detained separately to avoid communication and cross-contamination of forensic evidence (*Ibrahim and Others v. the United Kingdom* [GC], para. 278). In this connection, it may be said that the right to access to the defense attorney in relation to Mr. Ibrahim was denied because of the objective conditions in the police station and the fact that the police operated under pressure, but not because of the fact that the exercise of his right to be provided with legal assistance would pose a threat to overriding interests or endanger the investigation or the prevention of other terrorist attacks. Therefore, the Grand Chamber did not follow its own standard requiring a case-by-case basis assessment of the existence of compelling reasons since the Grand Chamber did not undertake the assessment of each applicant's situation

with regard to the restriction of the right of access to the defense attorney as for the first three applicants (Celiksoy, 2018: 236). Accordingly, in light of the above considerations, it seems that for the ECtHR is enough that the exceptional circumstances requiring achieving overriding aims, such as preventing harm to life and limb of others, exist and that the suspect may be placed in some broader context related to satisfying the criterion of compelling reasons. However, such an approach literally amounts to a general ban on the right to access to the defense attorney since it could extend to dozens or even many more suspects in a hypothetical case which would clearly contradict the *Salduz* doctrine.

3.3. The Fairness of the Proceedings as a Whole Test

After acknowledging the existence of compelling reasons justifying the restriction of the right to the defense attorney with regard to the first three applicants, the Grand Chamber went on to assess the fairness of the proceedings as a whole in the *Ibrahim* case. However, it is worth observing that the Grand Chamber took the view the that *Salduz* test is always the two-stage test; therefore, regardless of the non-existence of compelling reasons with regard to restricting access to the defense attorney, it is necessary to assess whether the criminal proceedings as a whole were fair or not. In assessing whether the criminal proceedings in relation to the first three applicants were overall fair and whether the violation of their rights under Article 6 occurred, the Grand Chamber took into account a number of factors. In this connection, the Grand Chamber observed that the possibility of restricting access to the defense attorney had been based on the national legislation, as well as that „the police adhered strictly to the legislative framework which regulated how they had to conduct their investigation" (*Ibrahim and Others v. the United Kingdom* [GC], para. 281). In addition to the abovementioned, the Grand Chamber drew attention to the fact the first three applicants were at trial entitled to challenge the disputed statements they made in the absence of the defense attorney while having the opportunity to present evidence in their favor (*Ibrahim and Others v. the United Kingdom* [GC], paras. 282-283). Hence, albeit the statements contested on the part of the applicants were declared as admissible, the applicants had the right to challenge these statements at trial (*Ibrahim and Others v. the United Kingdom* [GC], para. 283). Moreover, the applicants subsequently requested the exclusion of the evidence again before the Court of Appeal in support of their argument that the admission of the evidence had rendered the trial unfair and that their convictions should be quashed (*Ibrahim and Others v. the United Kingdom* [GC], para. 284). Besides, in the further examination of the fairness of the criminal proceedings against the first

three applicants, the Grand Chamber noticed that „the statements were merely one element of a substantial prosecution case against the applicants", the quality of directions which the trial judge gave to the jury, and lastly the strength of the public interest in the investigation and punishment of the offenses in question (Burić, 2018: 349). In the end, the Grand Chamber concluded that the proceedings as a whole in respect of each applicant were fair regardless of the delay in affording the first three applicants' access to legal advice and the admission at trial of statements made in the absence of legal advice. As a result, the Grand Chamber did not find the violation of Article 6, paragraphs 1 and 3(c) of the ECHR (*Ibrahim and Others v. the United Kingdom* [GC], para. 294).

As earlier said, the circumstances surrounding the case of the fourth applicant differ from those of the first three applicants. In this connection, the Grand Chamber did not find the existence of compelling reasons on the side of the fourth applicant. However, this fact does not automatically lead to the whole criminal proceedings being rendered unfair in relation to the fourth applicant according to the view of the Grand Chamber in the *Ibrahim* case. Namely, when compelling reasons for the restriction of the right to legal advice do not exist, „the burden of proof shifts to the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice" (*Ibrahim and Others v. the United Kingdom* [GC], para. 301). With regard to the fourth applicant, the Grand Chamber observed that the decision to continue questioning the fourth applicant as a witness was without basis in domestic legislation and was contrary to the guidance given in the applicable code of practice. Namely, the failure to treat him as a suspect resulted in depriving the fourth applicant of the notification of his procedural rights since such a notification, pursuant to domestic law, is triggered by a decision that a person is suspected of an offense. In the view of the Grand Chamber, treating the fourth applicant as a witness constituted, in itself, a shortcoming in terms of the guarantees afforded by Article 6, which, among other things, include the right to be notified of one's privilege against self-incrimination. The Grander Chamber further emphasized that it was a particularly significant defect in the case in question, where the applicant was deprived of the right to access to the defense attorney who could have informed him of his rights, and the Government did not provide a convincing justification for such information (*Ibrahim and Others v. the United Kingdom* [GC], para. 303).

Given that the ECtHR has replaced „the automatic exclusionary rule" introduced by *Salduz* with „the proceedings as a whole test", there is no doubt that the ECtHR has done away with the main tenet of the *Salduz* doctrine, according to which the restrictions of the right to access to the defense attorney regardless of their

justification must not unduly prejudice the rights of the accused under Article 6 of the ECtHR (Soo, 2017: 335). Namely, the ECtHR in the *Salduz* case held that the use of incriminating statements made when the suspect is deprived of the right to access to the defense attorney as a basis for conviction automatically leads to the violation of the right to a fair trial (*Salduz v. Turkey* [GC], para. 55). In this connection, a precise critique of the *Ibrahim* Judgment is offered on the part of non-governmental organization Fair Trials International (hereinafter: FTI) acting as the third-party intervener in the case of *Beuze v. Belgium* (ECtHR, *Beuze v. Belgium*, no. 71409/10, paras. 108-113, Judgment of 9 November 2018 [GC]). Among others, FTI contended that the Judgment in the *Ibrahim* case had departed from the post-*Salduz* doctrine by asserting that, even in cases where their compelling reasons did not exist, „there was no reason in principle why such statements should not be used for a conviction, provided that the overall fairness of the proceedings was not affected" (*Beuze v. Belgium* [GC], para. 111). In addition to the above, the critique of the *Ibrahim* Judgement in the context of the substitution of the absolute exclusionary rule with the overall fairness test may be well-complemented with the Joint Concurring Opinion of Judges Kalaydjieva, Pinto de Albuquerque, and Turković, in the 2015 case of *Dvorski v Croatia* (ECtHR, *Dvorski v. Croatia* [GC], no. 25703/11, Judgment of 20 October 2015, Joint Concurring Opinion of Judges Kalaydjieva, Pinto de Albuquerque, and Turković). These judges started with the premise that „[i]n criminal procedure, there are some procedural rights so basic to a fair trial that their infringement can never be viewed as fair. The infringement of these rights results in a structural error, which affects the framework within which the trial proceeds" (*Dvorski v. Croatia* [GC], Joint Concurring Opinion of Judges Kalaydjieva, Pinto de Albuquerque, and Turković, para. 16). The right to legal assistance provided on the part of the defense attorney is such a right. Namely, as FTI emphasized as the third-party intervener in the case of *A.T. v. Luxembourg,* the right to the defense attorney is a fundamental guarantee facilitating the exercise of other procedural rights and extending beyond preventing suspects from confessing to the offense (ECtHR, *A.T. v. Luxembourg*, no. 30460/13, para. 58, 9 Judgment of April 2015). In this connection, it should be kept in mind that ensuring prompt access to the defense attorney decisively contributes to the lessening of the vulnerability of suspects in police custody, providing a fundamental safeguard against coercion and ill-treatment of suspects by the police and contributing to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, especially the equality of arms between the investigating or prosecuting authorities and the accused (*Ibrahim and Others v. the United Kingdom* [GC], para. 255). After all, the natural and objective inequality between the prosecutor and the suspect is most pronounced during the investigation because of an asymmetry in power and resources between

the former and the latter (Sidhu, 2017: 222). Turning back to Joint Concurring Opinion in the case of *Dvorski v. Croatia*, the Concurring Judges captured the essence of the categorical exclusionary rule as a remedy for the violation of the right to access to the defense attorney introduced with the *Salduz* case (Giannoulopoulos, 2019: 196) by saying that the *Salduz* doctrine „introduced an automatic exclusionary rule for self-incriminatory statements obtained without [the defense attorney] being present during questioning when there were no compelling reasons for denying access to [the defense attorney], that is, in situations of unjustified denial of access to [the defense attorney])" (*Dvorski v. Croatia* [GC], Joint Concurring Opinion of Judges Kalaydjieva, Pinto de Albuquerque, and Turković, para. 17). The Concurring Judges in the same case drew attention to the fact the exclusionary rule plays a vital role in the protection of the privilege against self-incrimination, and that the use of evidence collected in breach of this basic privilege will always render a trial unfair, irrespective of any other circumstances of the case. In their view, for this reason, the ECtHR held in the *Salduz* that basing any conviction on an admission or statement given in the violation of the right of access to the defense attorney constituted the violation of the general right to a fair trial guaranteed under Article 6, paragraph 1 of the ECtHR (*Dvorski v. Croatia* [GC], Joint Concurring Opinion of Judges Kalaydjieva, Pinto de Albuquerque, and Turković, para. 17). However, in reaching the decision in the *Ibrahim* case, instead of focusing on the fact that self-incriminatory statements were used as a basis for convicting the applicant, whereby such statements were made in the absence of the defense attorney, the ECtHR invented a test under which numerous non-exhaustive factors are relevant for the fairness of the proceedings as a whole, while none of the factors taken into account is decisive (Giannoulopoulos, 2019: 196). Therefore, as FTI correctly pointed out in the capacity of the third-party intervener in the *Beuze* case, a more flexible approach adopted by the *Ibrahim* court allowed the legitimization of situations in which the use of evidence obtained in the absence of the defense attorney was tolerated. As a result, the application of the *Ibrahim* test – a discretionary substantive assessment based on the numerous non-exhaustive factors opens space for varying interpretations and results (*Beuze v. Belgium* [GC], para. 112).

4. Beuze v. Belgium

4.1. The Circumstances of the Case

The erosion of the *Salduz* doctrine has not ended with the Judgment of the Grand Chamber delivered in the case of *Ibrahim and Others v. the United Kingdom*; on the contrary, the Judgment of the Grand Chamber handed down in the case of

Beuze v. Belgium (hereinafter also: the *Beuze* case, the *Beuze* Judgment) stroke another blow to the doctrine originating from the *Salduz* case (Celiksoy, 2019; Goss, 2019). In this connection, it is worth observing that the circumstances surrounding the *Beuze* case are similar to those of the *Salduz* case. Namely, Mr. Philippe Beuze (hereinafter: the applicant) complained that his rights under Article 6, paragraphs 1 and 3(c) were violated in view of the fact the defense lawyer had not been present when he had been questioned on 31 December 2007 by the Belgian police, while in police custody, and later by the investigating judge (*Beuze v. Belgium* [GC], para. 92). Besides complaining that he had been deprived of access to the defense attorney while in police custody, the applicant further complained that even once he had been able to consult with a lawyer, his lawyer could not assist him during his police interviews or examinations by the investigating judge or attend a reconstruction of events (*Beuze v. Belgium* [GC], para. 115). According to the view of the applicant, the denial of access to the defense attorney stemmed from the application of Belgian law, which, at the time of the proceedings against him, did not satisfy the requirements of the case-law of ECtHR as it did not, on account of the secrecy of the judicial investigation, grant legal assistance to the person in custody until after the investigating judge's decision on pre-trial detention (*Beuze v. Belgium* [GC], para. 92). Therefore, as in the *Salduz* case, the law applied to the applicant at the time of the criminal proceedings put in place a systematic, general, and mandatory restriction concerning the right to access to the defense attorney during the initial stages of criminal proceedings.

4.2. The Judgment of the Grand Chamber

The Grand Chamber did not dispute that the impugned restrictions in force at the time depriving the applicant of the right to legal assistance stemmed from the lack of provision in the Belgian legislation and the interpretation of the law by the domestic courts (*Beuze v. Belgium* [GC], para. 160). The Grand Chamber reiterated that restrictions on access to the defense attorney based on the existence of compelling reasons, at the pre-trial stage, are permitted only in exceptional circumstances, must be of a temporary nature, and must be based on an individual assessment of the particular circumstances of the case. The Grand Chamber further clarified that there was clearly no such individual assessment in the present case, as the restriction was one of a general and mandatory nature (*Beuze v. Belgium* [GC], para. 161). Moreover, the Grand Chamber said that the Government did fail to demonstrate the existence of any exceptional circumstances which could have justified the restrictions on the applicant's rights (*Beuze v. Belgium*

[GC], para. 163). However, in relying on the *Ibrahim* case, the ECtHR also made it clear that the absence of compelling reasons did not automatically result in the violation of Article 6. Namely, whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole. The ECtHR also drew attention to the fact that in the *Ibrahim* judgment, followed by the *Simeonovi*[2] judgment, the ECtHR rejected the argument of the applicants in those cases that the *Salduz* rule meant that restricting the right to the defense attorney without compelling reasons leads to the violation of the right to a fair trial (*Beuze v. Belgium* [GC], para. 144). According to the view of the majority in the *Beuze* case, in the absence of compelling reasons, the ECtHR must apply very strict scrutiny when conducting fairness assessment. In such a case, the burden of proof will then shift on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to the defense attorney (*Beuze v. Belgium* [GC], para. 145).

Even though the Grand Chamber did find the violation of Article 6, paragraph 3(c) of the ECHR, the reasoning of the Grand Chamber sparked off controversy (Celiksoy, 2019; Goss, 2019). What is more, even the four Judges comprising the Grand Chamber in the *Beuze* case expressed strong disagreements with the reasoning of the Grand Chamber in the *Beuze* Judgment, despite voting together with their colleagues in finding the violation of Article 6, paragraph 1 and 3(c) of ECHR (*Beuze v. Belgium* [GC], Joint Concurring Opinion of judges Yudkivska, Vučinić, Turković and Hüseynov). According to the views of the concurring Judges, the Grand Chamber departed from the standards of a fair trial developed in *Salduz* and *Ibrahim and Others*, taken together, under the guise of interpreting them. The concurring Judges also held that the Judgment of Grand Chamber in the case of *Beuze and Belgium* distorted and changed the *Salduz* principle and devalued the right previously established on the part of the ECtHR (*Beuze v. Belgium* [GC], Joint Concurring Opinion of judges Yudkivska, Vučinić, Turković and Hüseynov, para. 19). Namely, under the *Salduz* doctrine access to the defense attorney should be provided as from the first interrogation of the

2 In the case of *Simeonovi v. Bulgaria*, as a result of applying the principles from *Ibrahim* as for the assessing of the fairness of the criminal proceedings as a whole, the Grand Chamber did not find the violation of the right to a fair trial despite the fact the applicant was deprived of the right to legal assistance for three days while remanded in police custody (ECtHR, *Simeonovi v. Bulgaria*, no. 21980/04, paras. 132-145, Judgment of 12 May 2017 [GC]). In the same case, the Grand Chamber reiterated the reversion of the *Salduz* doctrine from the *Ibrahim* Judgement that the violation of Article 6, paragraphs 1 and 3(c) does not arise automatically because of restricting access to the defense attorney in the absence of „compelling reasons" that would justify such a restriction (*Simeonovi v. Bulgaria* [GC], para. 118).

suspect by the police or other authorities of criminal procedure. Therefore, according to the case of *Salduz v. Turkey*, access to the defense attorney is a rule required by Article 6 susceptible to restrictions only on the basis of the existence of compelling reasons justifying the restriction of this right in the light of the particular circumstances of each case (*Salduz v. Turkey* [GC], para. 55). The concurring judges opined that „[t]he Beuze judgment in this respect represents a regrettable counter-revolution: it has overruled the „as a rule" requirement – already repeated in more than one hundred judgments widely known as the „*Salduz* jurisprudence" – and has dramatically relativized it to the detriment of procedural safeguards" (*Beuze v. Belgium* [GC], Joint Concurring Opinion of judges Yudkivska, Vučinić, Turković and Hüseynov, para. 25). The *Salduz* rule in this regard is exemplified in the case of *Dayanan v. Turkey* when a systematic restriction under which the applicant did not have legal assistance while in police custody because it was not possible under the law then in force, that is, the automatic restriction taking place on the basis of the relevant statutory provisions, is sufficient in itself for the violation of Article 6 to occur, notwithstanding the fact whether the applicant remained silent or not when questioned in police custody (*Dayanan v. Turkey*, para. 33).[3] Moreover, the case of *Borg v. Malta* further epitomized the essence of the *Salduz* rule according to which the suspect should be provided the right to access the defense attorney in the initial stages of criminal proceedings. Namely, in the concerned case, the ECtHR took the stance that a systemic restriction applicable to all accused persons deprived the applicant of the right to legal assistance at the pre-trial stage which meant that this already fell short of the requirements of Article 6 under which the right to assistance of the defense attorney at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons. Accordingly, in the case of *Borg v. Malta*, in following the *Salduz* doctrine, the ECtHR confirmed that there is no need to examine the overall fairness of criminal proceedings or the existence of compelling reasons if the denial of the right to the defense attorney resulted from a general statutory restriction based upon applicable national legislation (ECtHR, *Borg v.*

3 In contrast to the case of *Dayanan v. Turkey*, in the case of *Zherdev v. Ukraine,* in following the *Ibrahim* standard of the overall fairness assessment, albeit the applicant, a particularly vulnerable person as a minor and a detainee at the time, was questioned without the presence of the defense attorney, the ECtHR did not find the violation of fair trial rights since it had established that the courts acting in the case did not rely on an admission made in the absence of the defense attorney as a basis for convicting the applicant. The ECtHR also gave weight to the fact that the applicant was positioned during the criminal proceedings to cast doubt on the authenticity of the incriminating evidence at the trial, that the applicant did not retract his guilty plea, and that there was other conclusive evidence determining the conviction (ECtHR, *Zherdev v. Ukraine*, no. 34015/07, 149-151, 161-169, Judgment of 27 April 2017).

Malta, no. 37537/13, paras. 62-63, Judgment of 12 January 2016). Accordingly, in the Judgment handed down in the case of *Beuze v. Belgium*, the Grand Chamber did not proceed on the earlier assumption derived from the Salduz doctrine according to which a restriction on access to the defense attorney of a systemic nature (i.e. where national legislation prohibits contact between the suspect and the defense attorney) results in automatic violation of Article 6, paragraphs 1 and 3(c) of the ECHR (Sakowicz, 2021: 2006). Thus, according to the *Beuze* Judgment, even if there is a systematic, general, and mandatory statutory restriction with regard to access to the defense attorney not accompanied by the existence of compelling reasons, which would result in the automatical violation of the right to a fair trial under the *Salduz* doctrine, hypothetically speaking, under the view of the Grand Chamber in the *Beuze* case, criminal proceedings in which such a violation occurred may still be regarded as a fair one on the condition that such criminal proceeding satisfies an assessment of the overall fairness of the proceedings. As a result, the right to access to the defense attorney is no longer a rule under the *Beuze* Judgment since even a systematic statutory restriction of a general and mandatory nature in relation to the right to the defense attorney will not in itself constitute a violation of Article 6, paragraph 3(c) of the ECHR (Celiksoy, 2019: 18).[4]

5. Conclusion

Having in mind the above analysis of the jurisprudence of ECtHR with regard to the right to access to the defense attorney during the initial stages of criminal proceedings and the consequences of restricting this right, there is no doubt that the ECtHR has overturned the *Salduz* doctrine in the case of *Ibrahim and Others v. the United Kingdom*, as well as in the later case of *Beuze v. Belgium*. Namely, both of the two most prominent tenets of the *Salduz* Judgment - the right to the defense attorney as a rule during the initial stages of criminal proceedings and the automatic exclusionary rule as a proper redress for the violation of the first rule - are a thing of the past.

The first of these rules stemming from the *Salduz* doctrine to be eroded was the second one. As for the second rule, it is worth observing that the automatic

4 In the case of *Doyle v. Ireland*, decided after the *Beuze* case, the ECtHR took the categorical stance that the *Salduz* doctrine did not establish an absolute rule under which the statutory and systematic origin of a restriction on the right of access to the defense attorney in the absence of compelling reasons leads to requirements of Article 6 to have been breached (ECtHR*, Doyle v. Ireland*, no. 51979/17, para. 76, Judgment of 24 May 2019). In so doing, the ECtHR confirmed the disappointing view of the Grand Chamber in the *Beuze* case that opens the door to a systemic and general restriction of the right to the defense attorney in the long run.

exclusionary rule has been superseded with the proceedings as a whole test or the test of overall fairness constructed in the *Ibrahim* case to the detriment of the accused. Namely, according to the *Ibrahim* test, a plethora of factors affects the fairness of criminal proceedings, while none of these factors is of a conclusive nature for fairness in general. Thus, evidence obtained in the context when the suspect is deprived of the right to defense attorney may still be used as a basis for a conviction provided that criminal proceedings were fair as a whole. Furthermore, according to the view of the majority comprising the Grand Chamber in the *Ibrahim* case, even though fair trial rights as supposedly unqualified ones must not be susceptible to diluting, the application of these rights should not hamper law enforcement authorities when the latter are discharging their duties directed against those suspected of committing serious criminal offenses. Besides, the way the Grand Chamber employed the criterion of compelling reasons as the justification of restricting the right to the defense attorney is tantamount to a general ban, considering that the Grand Chamber did not carry out a case-by-case assessment of the situation of each applicant even though such an approach is required by the test devised on the part of the Grand Chamber itself in the *Ibrahim* case.

As for the first rule, it is worth emphasizing that the right to the defense attorney as a rule during the initial stages of criminal proceedings was abolished in the *Beuze* case. Namely, according to the *Salduz* doctrine and the subsequent jurisprudence drawn upon the former, a systematic denial of the right to access to the defense attorney of a mandatory nature leads to the violation of fair trial rights. On the contrary, in the view of the majority in the *Beuze* Judgment, even if such denial took place, there is no automatic violation of the right to a fair trial, considering that the ECtHR would employ the test of overall fairness, giving the state the chance to redeem itself by proving that such a violation was remedied in the subsequent stages of criminal proceedings or that the criminal procedure was fair in view of other circumstances. Therefore, as a result of the more recent jurisprudence of the ECtHR, the suspect is deprived of the categorical right to access the defense attorney during the initial stages of criminal proceedings even though he had enjoyed that right under the *Salduz* doctrine. To put it simply, a systemic and mandatory restriction of the right to access to the defense attorney does not contradict fair trial rights according to the *Beuze* case.

To summarize, in bringing together both the *Ibrahim* Judgment and the *Beuze* Judgment, we may arrive at a devastating and shameful conclusion under which the suspect does not need to have the defense attorney during pre-trial proceedings, while his self-incriminating statements made in such context are admissible as evidence for reaching a conviction, whereby fair trial rights can be left aside if needed for the sake of convenience of police activities.

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IMPACT OF MODERN TECHNOLOGIES ON FREE MOVEMENT OF EVIDENCE IN EUROPEAN UNION

According to the estimate of the EU Commission 85 percent of criminal investigations require electronic evidence, while in almost two thirds (65 percent) of the investigations where e-evidence is relevant. Investigation and prosecution of crime increasingly relies on the possibility to have access to data held by service providers, as private company. Modern criminal investigation and use of electronic evidence imposes challenges to the right to fair trial and rule of law standards.

The paper identifies benefits and challenges of proposed EU instruments for facilitating e-evidence. The European Commission proposed Regulation of Production Order and Preservation Order with the aim to facilitate access to relevant data stored by service providers. The paper recognizes shortcomings of the proposed Regulation. The biggest challenge is lack of judicial oversight of orders, as a guarantee of fair trial. The paper includes recommendations and policy options for promoting judicial system for cross border access and collection of electronic data in line with EU fundamental rights standards.

Key words: mutual legal assistance, EU acquis, digital evidence, legal remedy, production and preservation order

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1. Introduction

The EU member states have cooperated in criminal matters for several decades. However, until the entry into force of the Maastricht Treaty in 1993, cooperation in criminal matters stood completely outside the EU Treaties (Willems, 2021: p. 33). Cooperation initially took place under the auspice of the Council of Europe and relevant international instruments.[1] Nevertheless, within the European Union initiatives were taken to regulate cooperation in criminal matters with the EU acquis. Already, signing of Schengen Treaties in 1985[2] led to creation of favorable environment while the Lisbon Treaty signed in 2007 changed the whole framework by Article 67 of the Treaty on Functioning of the EU. Article 67 states that the EU shall constitute an area of freedom, security and justice through measures to prevent and combat crime and encourage coordination and cooperation between police and judicial authorities in criminal matters. Furthermore, the Article 82(1) of the Treaty on Functioning of the EU stipulates that judicial cooperation in criminal matters shall be based on the principle of mutual recognition and should include the harmonization of the legislative framework of the Member States in criminal matters having a cross-border dimension (Herlin-Karnell, 2012: 34).

The principle of mutual recognition is defined by the European Commission in the Communication on Mutual Recognition of Final Decision in Criminal Matters as being based on the idea that another State may not deal with a certain matter in the same or even a similar way as one's own State, the results will be such that they are accepted as equivalent to decisions by one's own State.[3] Provided definition reflects EU Member States agreement to promote judicial cooperation by not requiring to change national criminal laws, but only to accept judicial decisions originating from other Member States (Mitsilegas, 2006: 279)

To the mutual recognition has been referred to as cornerstone of judicial cooperation in criminal matters by EU institutions,[4] including Court of Justice of

1 Council of Europe, European Convention on Mutual Assistance in Criminal Matters, 1959, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030?module=treaty-detail&treatynum=030

2 The Schengen Acquis - Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, Official Journal L 239, 22.09.2000.

3 Commission of the European Communities (2000): Mutual Recognition of Final Decisions in Criminal Matters, Communication from the Commission to the Council and the European Parliament, COM(1999) 495 final.

4 Point 35 of the Tampere conclusions. See: European Council (1999): 'Presidency Conclusions, Tampere European Council 15th–16th October 1999, European Council.

the European Union.[5] The objective of mutual recognition is to remove the possibility of political involvement and to avoid a second examination as to the substantive merits of the case (Klimek, 2017: 9). It may be possible to verify that a decision has been taken by an authority in another Member State, but the merits of that decision should not be reviewed.

To enable application of the mutual recognition principle in judicial cooperation in criminal matters, the Member States agreed to develop and adopt specific measures that concerns all stages of the criminal process (Mitsilegas, 2016: 126). The first instrument was European Arrest Warrant, leading to mutual recognition in extradition.[6] Other instruments have been adopted on execution of freezing and confiscation orders,[7] bail decisions,[8] enforcement of financial penalties,[9] recognition of probation orders and alternative sanctions,[10] custodial sentences[11] and European Investigation Order.[12]

Existing EU mutual recognition instruments have been designed to balance the principle of effective investigation and prosecution of crime and principle of effective judicial control of investigation authorities' actions (orders/requests). The mutual recognition instruments are based on the high level of trust between EU Member States and strict respect of high standards of individual rights protection in each Member State (Suominen, 2011: 51). These instruments foresee *ex ante* control by competent judicial authority in the country of issuing of EU instrument and in the country of execution of cross-border request. The aim is to ensure that appropriate legal procedures are followed and supervised by competent oversight bodies (Carrera, Stefan, 2020: 14), namely the EU Member States' judicial authorities. However, the EU Member States' judicial authorities have a duty to recognize and execute criminal justice decision issued by another EU country, only if fundamental rights protection is ensured (Lenaerts, 2017: 809.)[13] In addition, the mutual recognition instruments are based on the premise that the criminal courts

5 Judgment of the Court of Justice of the European Communities of 3rd May 2007, case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, para. 4 .

6 Council Framework Decision 2002/584/JHA, OJ L190/1.

7 Regulation 2018/1805, OJ L 303/1.

8 Council Framework Decision 2009/829/JHA, OJ L 294/20.

9 Council Framework Decision 2005/214/JHA, OJ L 76/16.

10 Council Framework Decision 2008/947/JHA, OJ L 337/102.

11 Council Framework Decision 2008/909/JHA, OJ L 327/27.

12 Directive 2014/41/EU, OJ L 130.

13 According to article 1 (3) of the Framework Decision 2002/584 mentioned decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

meet the standards of effective judicial protection, which include in particular independence and impartiality of these courts.[14]

The revolution caused by IT is affecting the whole criminal justice system in every country and consequently the instruments of mutual legal assistance in criminal matters. Authorities investigating and prosecuting crime are relying on cross-border data so EU instruments for judicial cooperation in criminal matters provide investigating and prosecuting authorities with possibility to request needed information also in digital form, from competent authorities of another EU Member States (Stefan, Gonzalez, 2018: 8).

According to the estimate of the EU Commission 85 percent of criminal investigations require electronic evidence, while in almost two thirds (65 percent) of the investigations where e-evidence is relevant, a request to service providers across the borders is needed, which is consequence of use of modern technologies in everyday life.[15]

The increasing use of internet and transfer of data in digital form led investigation and prosecution authorities to rely on this information as valuable evidence. Granting law enforcement actors the possibility to efficiently gather different types of electronic data across borders is considered crucial for for the investigation and prosecution of criminal offences.

The aim of the article is to identify how the increasing use of information and telecommunication technologies, and the digitalisation of everyday social and economic interactions, influenced on rules and instruments of the cross-border gathering and exchange of evidence in criminal proceedings.

2. EU initiatives for modernization of cross-border cooperation in criminal matters

As part of the modernization efforts the European Commission proposed in April 2018 two legislative documents on gathering of electronic evidence in criminal matters. One proposal relates to the European Production and Preservation Orders for Electronic Evidence in Criminal Matters[16] and second on harmonizing

14 Case C-216/18 PPU *Minister for Justice and Equality v LM*, Judgment of 25 July 2018 [ECLI:EU:C:2018:586], para. 79.

15 Commission Staff Working Document – Impact Assessment accompanying the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters and the Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, SWD(2018) 118, p. 14.

16 Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018)225 final.

rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.[17] As terrorist attacks from September 11, 2001 incentivized adoption of European Arrest Warrant, the terrorist attacks in Brussels of 22 March 2016 triggered the Joint Declaration of EU Justice and Home Affairs Ministers and Representatives of EU institution to stress the need to find a approach to obtain more quickly digital evidence by intensifying cooperation with service providers that are active on European territory. Later in 2017 the European Council asked Commission to prepare a legislative proposal.[18] The available judicial cooperation and mutual assistance instruments are too slow and complex, enabling criminals to resort to new technologies, so new proposal should address existing challenges (Tinoco-Pastrana, 2020: 46). Proposed Regulation and Directive aimed at creating a legal framework allowing law enforcement in one EU Member State to directly request service providers in another Member State to produce or preserve data (Tosza, 2020: 162). Implementation of proposed acts would require new challenges to be created for direct interconnection of investigating and prosecuting authorities and private companies in all EU members states. (Carrera, Mitsilegas, Stefan, 2021: 26).

In addition to legislative documents, the European Commission in July 2020 adopted the EU Security Union Strategy[19] as a planning document for development of tools and infrastructures necessary for law enforcement and criminal justice practitioners to cooperate and share information. The document noted that use of digital technologies can improve the efficiency of justice system and a key priority should be adopted of proposed Regulation on Production and Preservation Orders.[20]

However, currently, most data exchanges in the EU cross-border judicial cooperation still take place on paper, which is slower and less efficient than using electronic means. The EU initiated increasing the efficiency of EU cross-border judicial cooperation through enhanced digitalisation in criminal matters. The European Commission intends to propose new legislation to make the digital channel the default one for all EU cross-border judicial cooperation communication and

17 Proposal for a Directive of the European Parliament and of the Council laying down harmonized rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM(2018)226 final.

18 Council Conclusions on the Joint Communication to the European Parliament and the Council: Resilience, Deterrence and Defence: Building strong cybersecurity for the EU, 14435/17, https://www.consilium.europa.eu/media/31666/st14435en17.pdf

19 COM/2020/605 final.

20 Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters COM/2018/225 final 2018/0108 (COD); and 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 COM/2018/226 final 2018/0107 (COD).

data exchanges between the competent national authorities, which is presented in the Communication on digitalization of justice in the European Union adopted by the Commission on 2 December 2020.[21] The European Commission will work on a legislative proposal to digitalize cross-border judicial cooperation procedures in civil, commercial and criminal matter. Furthermore, the fight against serious cross-border crime requires data exchange between Eurojust, Europol and European Public Prosecutor Office. Connection between three criminal justice institutions will ensure knowledge of ongoing investigation and prosecution. The interconnection between EU institutions is the first step, but EU Members States should put efforts to digitalize their registers and enable interconnection.

The EU main IT tool for cross-border cooperation is e-CODEX that enables secure cooperation in civil, commercial and criminal proceedings across borders. Another digital tool that was developed with the aim to facilitate e-evidence digital exchange is eEDES, which ensures swiftly and securely exchange of European Investigation Orders, mutual legal assistance requests and associated evidence in digital format. The key shortcoming that limits use of the eEDES is that not all EU Member States are connect to the tool.

3. Covid 19 impact on mutual legal assistance in criminal matters

The COVID-19 pandemic has shown how certain types of modern technologies can play a critical role in ensuring the continued functioning of justice at national and EU level, especially at times of persisting health emergencies and in light of the backlog derived from court lockdowns. To enable functioning of the courts, countries where level of information technology development allowed introduced modalities of online hearings and/or other use of modern technologies during proceedings like electronic filing (Matić Bošković, Nenadić, 2021: 281).

Videoconferencing tools and digital communication systems have allowed courts and justice systems to operate during the health crisis, and by doing so they have contributed to guaranteeing the delivery of key legal safeguards, including the right to judicial control of deprivation of liberty and the right to an effective remedy. In contexts where restrictive and preventive measures are still being adopted to deal with the coronavirus pandemic, these technologies can mitigate the negative effects of health-emergency regimes and address immediate concerns related to access to justice. However, when it comes to the mutual recognition

21 COM/2020/710 final.

instruments, the EU Member States were facing challenges to implement the European Investigation Order when the hearing by videoconference was requested.[22] In some Member States, it was possible to conduct hearing by videoconference only in very important and urgent cases. In addition, the national authorities faced serious challenges arising from lack of staff and technical difficulties caused by the pandemic. The COVID-19 measures often meant that trained administrative staff specializing in technical matters were not available on the dates requested by issuing authorities and alternative videoconferencing platforms were used instead of standard ones, which cause additional technical problems.

At the national level the COVID-19 pandemic enhanced the process of digitalization of the justice system. A number of initiatives are being taken ranging from allowing court users to monitor on-line the stages of proceedings to organize on-line hearings. The crisis led to an acceleration of digitalization in criminal trials, where the Prosecution service was granted the possibility to hear witnesses and examine suspect through video conference and appoint experts.[23]

In some EU countries, COVID-19 has led to the introduction of new means to digitally produce or exchange legal documents, including evidence in criminal proceedings. In Italy, for instance, a new 'cloud system' has been created to enable documents from the defence and the prosecutor to be filed and exchanged digitally. In other countries, the COVID-19 crisis has led authorities to introduce new systems for filing documents to the courts or prosecutor's office (either by phone or electronically), or to enable digital access to justice services, for instance by signing documents and exchanging them electronically.[24]

The COVID-19 impacted judicial cooperation in criminal matters. In particular, the pandemic affected the most frequently used instruments of judicial cooperation and posed challenges for practitioners. When it comes to the request for transmission of an European Investigation Order the Member States faced challenges when physical presence of a person was needed, typically for the hearing of witness or a suspect. Although execution of European Investigation Order was still possible, in some Member States were willing to do so only in urgent case.[25]

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22 The Impact of COVID-19 on Judicial Cooperation in Criminal Matters – Analysis of Eurojust's Casework, EUROJUST, 2021, p.16

23 2020 Rule of Law Report – Country chapter on rule of law situation in Italy, SWD(2020) 311 final, p. 5. Information received in the context of the country visit and of the consultation process for the preparation of the report, e.g. Ministry of Justice contribution (an increase of 89% in videoconferences has been registered in May 2020 with respect to May 2019).

24 European e-Justice Portal, "Digital Tools in Member States".

25 The Impact of COVID-19 on Judicial Cooperation in Criminal Matters – Analysis of Eurojust's Casework, EUROJUST, 2021, p.26.

Based on the experience during COVID-19 the EUROJUST is calling for the establishment of a single electronic platform for the exchange of the most frequently used tools of judicial cooperation that does not depend on the transmission of hard copies.

4. European Production and Preservation orders as attempt to regulate digital evidence

Electronic evidence differs from other evidence causing the current legal framework impractical for law enforcement. The proposed European Production and Preservation Orders have been developed to answer on technological developments and ensure access to the growing need to have access to digital evidence.

Electronic evidence is held on servers owned by service providers who are often foreign, non-EU, companies. Given the market share of major service providers most often these companies are USA legal entities (i.e. Google, Facebook, Microsoft, Apple). The origin of the company is part of the challenge, to the complexity of data gathering can contribute location of servers where data are stored, and which could be in the third country. Investigation and prosecution in cases where electronic evidence is involved, require use of instruments of international legal cooperation, which is time-consuming.[26] In addition, the territorially-based mutual legal assistance instruments does not work with physical, technological and corporate structures that are used to deliver cloud-based services (Krishnamurthy, 2016: 1). Also, USA Supreme Court judges endorsed the view that US courts are not empowered to issue warrants for foreign searches (Daskal, 2015: 354).

Additional challenge for investigating authorities might be if data are not stored on a single server so requests for access to digital evidence cannot be fulfilled (Frenssen, 2017: 538). The investigation authorities depend much more on cooperation of service providers, not only in the country where their headquarter is, but also where data are stored and where the subsidiaries are located. The courts in EU are trying to overcome this problem through asserting their jurisdiction against headquarter company through their local subsidiaries. The European Court of Justice confirmed as right the approach of Spanish courts to order the search of provider's Californian parent company.[27] However, the law enforcement authorities are lacking mechanism to obliged service providers to respond on their

26 Non-paper: Progress Report following the Conclusions of the Council of the European Union on Improving Criminal Justice in Cyberspace, 2 December 2016, 15072/16, p 5.

27 *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case C-131/12, ECLI:EU:C:2014:317, para. 43

requests. The example of the abandoning of territoriality was deliver[28]ed by Belgium, first in case law of the Supreme Court in case of Yahoo in 2011, 2012 and 2015 and latter in case against Facebook (De Hert, P., Parlan, C., & Thumfart, J., 2018: 343). Provisions allowing remote evidence gathering through the internet have been introduced lately in national legislation of Belgium, Germany and Austria. (Warken, 2018: 227)

The European Production and Preservation Orders are design to bring a new dimension in mutual recognition. The European Production Order consists of a binding request that member state investigating, and prosecuting authorities could issue to a service provider offering services in the EU and established or represented in another member state to produce electronic evidence.[29] The European Preservation Order would instead impose mandatory request to service providers to preserve electronic evidence in view of a subsequent request for production of such data. Both orders may only be issued for criminal proceedings, both during the pre-trial and trial stage.[30]

The proposal is diverging from usual approach of the mutual recognition of judicial decision within the Union and is mainly directed to enabling law enforcement actors to request, access and share data held by service providers across borders.

The proposed regulation should have limited scope and European Production Orders could be issue only for offence capable of attracting a custodial sentence of three years of more, or when the underlying offence falls under one of the definitions adopted under EU instruments regarding money counterfeiting, child sexual abuse, cybercrime and terrorism.[31] Production Orders targeting subscriber data and access data may be issued for any criminal offence.

The proposed Regulation makes distinction between content data and transactional data on the one hand, and access data and subscriber information on the other.[32] The proposal foresees that different authorities would be responsible for issuing the orders depending on the type of data sought.

The investigating and prosecuting authorities have main role in issuing production order for subscriber and access data, while judicial authorization in the issuing country would be obligatory when a production order concerns the production transactional or content data.[33] The validation of production order

28 *Yahoo! Inc. v Belgium* case, Hof van Cassatie of Belgium, 1 December 2015, case P.13.2082.N.

29 Article 2(1) of the proposed Regulation.

30 Article 3 of the proposed Regulation.

31 Article 5 of the proposed Regulation.

32 Article 2(7)(10) of the proposed Regulation.

33 Article 4 of the proposed Regulation.

could be done directly by prosecutors. Judicial scrutiny would not be required for subscriber and access data since these categories are perceived as less intrusive and hence do not require the same level of *ex ante* scrutiny.

Service providers fall into the scope of the draft Regulation only if they are offering services in the EU and are established or represented in another member state.[34] The proposal introduced the solution that regulation apply to the service providers that offer services in the European Union.

Non-compliance with the order may trigger two types of consequences: sanctions and enforcement procedure. As to the sanctions, the proposed Regulation leaves to the member states to provide necessary rules, However, the Council of the EU in the General approach on the proposal for a Regulation added a clause that member states shall ensure that pecuniary sanctions of up to 2% of the total worldwide annual turnover of the service provider can be imposed.[35] If accepted, such sanction could theoretically be imposed for refusal to provide data in case of a simple offence that fulfils the minimal thresholder of imprisonment, which would not be proportional sanction. Judicial authorities of the enforcing member state would eventually be involved in the process in cases where the service providers decide not to execute the issued order within the deadline or without providing reasons accepted by issuing authority.[36] The proposed solution of the enforcement procedure by competent authority is similar to classical mutual recognition instruments. In addition, the enforcement authority might refuse to act upon request based on grounds listed in the proposed Regulation.[37]

5. Inconsistency of proposed instrument with rule of law standards

The proposed Regulation raised concerns among several groups of key stakeholders, including critical opinions expressed by EU bodies[38] and association of legal professionals.[39] Even the European Commission in the Explanatory Memorandum

34 Article 2(3).

35 Article 12 of the proposed Regulation, Council of the European Union, Brussels, 11 June 2019, 10206/19.

36 Article 14 of the proposed Regulation.

37 Article 14 (4)(5).

38 European Data Protection Board (EDPB), Opinion 23/2018 on Commission proposals on European Production and Preservation Orders for electronic evidence in criminal matters (Art. 70.1.b), adopted on 26 September 2018.

39 ECBA Opinion on European Commission Proposals for: (1) A Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence & (2) a

to the proposal recognizes that the use of the Production and Preservation Orders could potentially affect a number of fundamental rights, including the right to protection of personal data, the right to respect private and family life, the right to freedom of expression, the right of defense, the right to an effective remedy and to a fair trial. Although the proposed Regulation envisages situation when prior intervention of a judicial authority is obligatory, the proposed provisions do not offer guarantees that independent judicial scrutiny will be ensured systematically in the issuing country nor in the execution country. The involvement of public prosecutors, without judicial control, could raise issue of impartiality in decision making. As noted by the Venice Commission, in some countries a prosecutorial bias seems to lead to a quasi-automatic approval of all such request from the prosecutors, which can put in danger independence of the judiciary.[40]

Proposed solution on issuing and executing authority is not in line with the EU Court of Justice jurisprudence related to the mutual recognition instruments (Carrera, Stefan, 2020: 33). In 2019 the Court of Justice assessed that German public prosecutor offices could not be considered as judicial authority for the purpose of the issuing European Arrest Warrant.[41] The Irish Supreme Court submitted the preliminary request which considered the execution of the three European Arrest Warrants issued prior to judgment for the purposes of conducting a criminal prosecution by two German public prosecutor offices. The Court of Justice held that the issuing authority in an European Arrest Warrant case "must be in a position to give assurance to the executing judicial authority that it acts independently in the execution of those of its responsibilities".[42] The Court of Justice added that a clear sign of a lack of independence was the power of the Ministry of Justice to issue instructions to public prosecutors offices and directly influence on prosecutor in issuing a decision.[43] The Court of Justice requires from several EU countries to either align their public prosecution services with the judicial independence benchmarks or subject their decisions to the independent judicial oversight mechanisms.[44]

Directive of the European Parliament and of the Council laying down harmonized rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.

40 European Commission for Democracy through Law (Venice Commission) (2011), "Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service", 2011 Study no. 494/2008, Strasbourg.

41 *Minister for Justice and Equality v OG and PI,* Joined Cases C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456.

42 Para 74.

43 Para 83.

44 Who qualifies as a 'judicial authority for the purposes of issuing a European Arrest Warrant?, (2018) Fair Trials, available at https://www.fairtrials.org/sites/default/files/publication_pdf/CJEU_27_May_2019_cases_IP_LB_final.pdf

The proposed Regulation is abandoning the approach of mutual recognition instruments that envisages judicial control in the executing state (Mitsilegas, 2018: 263), but foresees role of judicial authorities only in enforcing foreign authority order once when service provider failed to comply with it.

The lack of systematic judicial control of issued order by executing state could have impact on legal certainty and limits the exercise of right to effective legal remedy that is guaranteed by EU acquis to suspect and accused persons. When an order concerns a person who has residence in the executing state, the judicial authority in the executing state should conduct *ex ante* control which is in line with the principles of fair trial. Without the opportunity to seek remedies in the executing state, the risk exists of increasing appeals against companies who provided data through civil law. However, the civil law protection could not be accepted as effective legal remedy in criminal justice (Carrera, Stefan, Mitsilagis, 2020: 59).

Although the proposed Regulation have been presented as an instrument that intended to tackle serious crime and terrorism, the provision of the Regulation refers to the threshold of three years for Production orders, while for Preservation orders there is no such requirement. Expending the scope of Production and Preservation orders could be detrimental, since judicial authorities would need to review large numbers of orders.

The proposed definition of fines for non-compliance with order could have effect on protection of privacy. If proposed threshold for sanction of 2% of annual turnover would be accepted, the services provider could feel compelled to execute orders even when they should have done so.

According to the Explanatory Memorandum of the proposed Regulation,[45] personal data covered by the instrument are protected and may be processed only in line with General Data Protection Regulation (GDPR)[46] and the Data Protection Directive for Police and Criminal Justice Authorities.[47] Furthermore, article 8 of the EU Charter on fundamental rights applies to processing of personal data and although there is distinction between sensitive data that have additional protection, all private data should be protected in line with basic data protection standards.

45 Recital 20 of the proposed Regulation.

46 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ L 119, 4.5.2016, p. 1–88*

47 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, *OJ L 119, 4.5.2016, p. 89–131*

Based on this understanding it is not clear why the proposed Regulation is providing lower level of protection to subscriber and access data. (Carrera, Stefan, 2020: 51)

The proposed Regulation should be also assessed against the Court of Justice jurisprudence. The Court of Justice has ruled that when metadata, such as traffic and location data, could lead to establishing of profile of the individuals, such information is sensitive same as the actual content of communication, in relation to the right to privacy.[48] (Corhay, 2021: 448)

The challenge caused by differentiation of data and level of protection becomes more problematic in relation to admissibility of those data as evidence across the EU member states. In some EU countries evidence collected according to the wrong procedure, without the required judicial validation, will still be admissible due to lack of EU legal framework of admissibility of evidence and different national regulation across the EU member states.

6. Conclusions

Development of IT technologies affected criminal justice systems and majority of evidence are in the electronic form by service providers that might have headquarter in another EU member state, or very often outside the EU. Access to those electronic evidence poses challenges for law enforcement and criminal investigation authorities. Traditional instruments of mutual legal assistance and mutual recognition have operational and technical shortcomings, however the proposed Regulation on Production Order and Preservation Order is not in line with EU rule of law standards.

To align proposed Regulation with the EU criminal justice standards, including protection of right of suspect and accused person, and data protection standards, it is necessary to envisage involvement of competent judicial authorities, both in issuing and executing country. Effective judicial oversight over the issuing and execution of production orders should be always ensured, regardless of type of data sought.

The scope of application of Production and Preservation orders should be limited to more serious crimes. The list of specific harmonized offences on which orders would be applicable could be drafted and annexed to the Regulation.

Furthermore, the proposed Regulation should include grounds for objection by service providers against a receive orders, including clarification when fundamental rights are under the risk. The sanctions for non-compliance should be

48 *Tele2 Sverige AB v Post – och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* Joined Cases C-203/15 and C-698/15, ECLI:EU:C:2016:970, para 27.

reviewed to avoid situations that service providers due to the risk of high penalties disclose information even when fundamental rights are violated.

The proposed Regulation is attempt to mitigate risks that IT development put in front of criminal justice systems, but it cannot undermine the rule of law standards and fundamental right protection. Criticism of proposed instruments confirm shortcomings of the proposed Regulation, not only from the perspective of rights of suspect and accused person, but also from the position of service providers and judicial authorities. The way forward must include additional consultations and revision of the proposed document to ensure all standard and address the need to have efficient mutual recognition tool that will tackle electronic evidence.

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E-EVIDENCE OF CYBERCRIMINAL ACTIVITIES AS A NEW LEGAL PHENOMENON (BASED ON THE CRIMINAL PROCEDURE CODE OF THE SOCIALIST REPUBLIC OF VIETNAM, 2005)

Today's modern global society is facing an unexpected situation where cybercrimes are becoming more and more complicated, severely violating social order and security. The Criminal Procedure Code (CrPC) Vietnam 2015 has made important amunpredictable endments and supplements to evidence and evidence institutions, which are important institutions on which procedural bodies base to perform their duties and exercise their powers. Most prominently, the regulation of evidence sources which is electronic data, an entirely new source of evidence, is to respond promptly to crimes using high technology. Within the scope of this article, the author focuses on the new points of the CrPC Vietnam 2015 on the source of evidence that

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is electronic data in high technology crimes. Further the principles of the evidence act has been explained with amendments in regard to electronic evidence. Finally the safeguards and procedure which needs to be adopted by the Vietnamese judiciary in handling electronic evidences.

Keywords: electronic evidence, proof process, cybercrime, data message, electronic document value evideniary.

1. Introduction

According to the recent Global Cybersecurity research currently, 3.5 billion people are online and the digital world is estimated to be 44 zettabytes, with no risk of unavailable storage thanks to cloud computing. Furthermore, the proliferation of ICTs has hit the broader national ecosystem, giving rise to new organizational possibilities, such as e-government services, and new economic and productive paradigms such as Industry 4.0 and the broader digital economy.

All countries are affected to some extent by the digital divide, and as a key driver of economies, societies and governments, which depend on digital systems, cybersecurity should be a top priority.

The COVID-19 pandemic has dramatically affected how societies operate. As the pandemic began to take hold in April 2020, Akamai noted Internet traffic increased by 30 per cent.[1] From teleworking to distance learning, technology has played a key role in keeping people connected. For the digital age to realize its potential, a reliable and secure cyberspace must be essential. A year after COVID19 was declared a pandemic by the World Health Organization and the development of new vaccination and management systems, our dependence on digital technology continues to grow. And because the world connects what is not connected, a safe and reliable cyberspace must be guaranteed.

There is an increased recognition of cybersecurity risk.[2] The ongoing pandemic has created distrust, especially online. Many challenges today erode online trust and prevent the digital society from operating at its full potential. For example, global losses due to cybercrime are estimated from as low as USD 1 trillion in 2020[3],

1 *Can the internet keep up with the surge in demand,* available at: https://blogs.akamai.com/2020/04/can-the-internet-keep-up-with-the-surge-in-demand.html, accessed on 29.09.2021.

2 *Global risks report 2020,* available at: *http://reports.weforum.org/global-risks-report-2020/executive-summary/*, accessed on 02.10.2021

3 *The Hidden Costs of Cybercrime,* available at: https://www.mcafee.com/enterprise/en-us/assets/reports/rp-hidden-costs-of-cybercrime.pdf, accessed on 05.10.2021.

to as high as USD 6 trillion in 2021.[4] Developing legal and regulatory frameworks to protect the public and promote a secure digital environment is critical and should be the start of any national cybersecurity effort.

The legal and regulatory framework includes the establishment of legislation identifying what constitutes illegal activity in cyberspace, along with definitions of the procedural tools needed to investigate, prosecute and enforce those laws; establish a cybersecurity baseline and compliance mechanism for various national stakeholders; and procedures to ensure consistency with international obligations.

More than 90% of responding countries reported that cybercrimes were most often brought to the attention of law enforcement authorities through individual or corporate victim reports. Responding countries estimated that the true victimization rate of cybercrimes reported to the police was over 1%. A global private sector survey shows that 80% of individual victims of basic cybercrimes do not report the crime to the police. The lack of reporting stems from a lack of awareness of victimization and reporting mechanisms, victim shame and embarrassment, and perceived reputational risk to businesses. Authorities from all regions of the world are highlighting initiatives to improve reporting, including online reporting systems and hotlines, public awareness campaigns, connecting with the private sector and increasing police awareness and information sharing. However, incident-based responses to cybercrime must be accompanied by medium- and long-term tactical investigations that focus on the crime market and the architects of criminal patterns. Law enforcement in developed countries is involved in this area, including through undercover units targeting offenders on social networking sites, chat rooms, instant messaging, and P2P services. Challenges in cybercrime investigations arise from criminal innovation by perpetrators, difficulties in accessing electronic evidence, and internal resources, capabilities, and logistical limitations. Suspects often use anonymization and undercover technology, and new techniques are rapidly reaching large criminal audiences through the online crime marketplace.

Law enforcement cybercrime investigations require a mix of traditional and new policing techniques. While some investigative actions can be carried out with traditional strengths, many procedural settings do not translate well from spatial and object-oriented approaches to approaches that involve electronic data storage and real-time data flow. The research questionnaire refers to ten investigative acts on cybercrime, ranging from general searches and seizures to special powers, such as computer data storage.

4 *Cybercrime To Cost The World $10.5 Trillion Annually By 2025,* available at: https://cybersecurityventures.com/cybercrime-damages-6-trillion-by-2021/, accessed on 04.10.2021.

Vietnam is ranked 25th out of 182 countries in the 2020 Global Cyber Security Index (GCI) by the International Telecommunication Union, the United Nations specialized ICT agency, compared to 50th and 100th positions in 2018 and 2017. This jump has surpassed the goal of joining the top 30 GCI countries by 2030 (Prime Ministerial Decree No. 749 / QDTTg 3 June 2020) and demonstrating its determination and performance in ensuring cyber security, and in combating cyber crime.

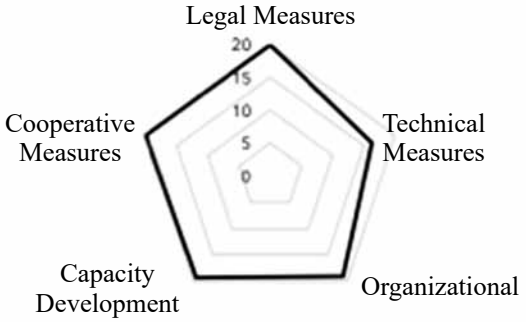
In 2019, Vietnam established the Vietnam Cybersecurity Emergency Response Teams / Coordination Center (VNCERT / CC). This agency is dedicated to coordinating security incident response and verifying information security nationally. The establishment of VNCERT/CC is timely, given the increasing number of cyber attacks in Vietnam. Another agency responsible for dealing with major cybercrimes is the Department of Cybersecurity and Crime Prevention Hitech (Department A05) under MPS.

Table 1. GCI results: Asia-Pacific region[5]

Overall Regional Country Name Score Rank
Korea (Rep. of) 98.52 1
Singapore 98.52 1
Malaysia 98.06 2
Japan 97.82 3
India 97.49 4
Australia 97.47 5
Indonesia 94.88 6
Viet Nam 94.55 7
China 92.53 8
Thailand 86.5 9
New Zealand** 84.04 10
Bangladesh 81.27 11
Iran (Islamic Republic 81.06 12 of)
Philippines 77 13
Pakistan 64.88 14
Sri Lanka 58.65 15
Brunei Darussalam 56.07 16
Nepal (Republic of) 44.99 17
Myanmar 36.41 18

5 *Global Cybersecurity Index,* available at: https://www.itu.int/en/ITU-D/Cybersecurity/Pages/global-cybersecurity-index.aspx, accessed on 01.10.2021.

Viet Nam (Socialistic Republic of)



Development Level:
Developing Country

Area(s) of Relative Strenght
Legal, Cooperative Measures
Area(s) of Potential Growth
Technical Measures

Overall Score	Legal Measures	Technical Measures	Organizational Measures	Capacity Development	Cooperative Measures
94.55	20.00	16.31	18.98	19.26	20.00

Source: ITU "Global Cybersecurity Index", 2021.

Chart 1. CGI of Vietnam[6]

Cybercrime acts are perhaps unique amongst crime in general, in that widespread technology-based prevention measures exist – including anti-virus and network security products and firewalls.[7] The role of such products is usually based on scanning, identifying and filtering for certain electronic "signatures". These may be content-based, or traffic-based, such as communications to or from "blacklisted" IP addresses.[8] Many products also include heuristic detection that checks for suspicious file and connection behavior against predefined conditions. Activity logs generated by technology-based security products then capture a subset of cyber content and traffic events that may, in some circumstances, correspond to the component of a cybercrime act. Attempts or completion of acts of illegal access to computer systems or illegal interference with computer systems or computer data, for example, may be detected by the product and result in a response. An obscure analogy is a home burglar alarm that detects events on the doors and windows of a house. The fact that the alarm has been triggered does not necessarily mean that a crime has been committed. However, a certain percentage of crime can raise the alarm.

6 *The Global Cybersecurity Index (GCI) 2020,* available at: https://www.itu.int/en/ITUD/Cybersecurity/Pages/ global-cybersecurity-index.aspx, accessed on 02.10.2021

7 *OECD Guidelines for the Security of Information Systems and Networks: Towards a Culture of Security*, available at: https://www.oecd.org/sti/ieconomy/oecdguidelinesforthesecurityofinformationsystems andnetworkstowardsacultureofsecurity.htm , accessed on 05.10.2021.

8 Callanan, C. et al. (2009) *Study on Internet blocking, balancing cybercrime responses in democratic societies*. Aconite Internet Solutions.

The advantage of technology-based cybersecurity products is that a large number of "anti-theft tools" can report events logged in a central location, enabling the production of aggregated cybersecurity statistics. Many private sector cybersecurity vendors generate reports based on these statistics. However, providers often use very different definitions; calculation method.

1.1. Criminal activities

Vietnam has become a hotbed of cybercrime, with criminals turning into more and more more state-of-the-art at the same time as banks nonetheless the usage of old, insecure technologies.

Many banks in Vietnam have suggested approximately clients dropping statistics approximately their money owed to criminals via phishing assaults and different methods.

In a latest assertion Techcombank stated it had detected many instances of fraud and misappropriation of cash via way of means of faking Western Union transactions.

The criminals could ship sufferers faux Techcombank messages claiming that they'd acquired cash via Western Union, and inform them to visit a faux Techcombank internet site and log in to verify the transaction, ensuing of their account informatons being stolen.

In this year, Maritime Bank has issued a statement warning customers about a scam in which criminals contact them via phone calls, text messages, social networks, and emails posing as bank employees. They then ask victims to provide their account information in exchange for money, promotions or gifts. Other major banks such as VPBank and Vietcombank have also issued similar statements warning customers against disclosing their OTP codes to anyone, including the bank itself, under any circumstances. They are also required to closely monitor their accounts for any abnormal activity and immediately report to the bank if they receive suspicious phone calls or text messages. According to global statistics recently released by cybersecurity firm Kaspersky Lab, nearly 36% of cyberattacks in the second quarter 2021 involved financial services, of which more than 21% targeted banks and 8.17% targeted online stores[9].

Eight criminals were arrested in Vietnam and three more in the UK[10]. All of these criminals are linked to the „mattfeuter" family of websites (mattfeuter.ru,

9 Le, T. T. et al. (2020) Cyber crimes in the banking sector: Case study of Vietnam. *International Journal of Social Science and Economics Invention, 6(*5), pp. 272-277. https://doi.org/10.23958/ijssei/vol06-i05/207

10 *Vietnamese Carders arrested in MattFeuter.ru case,* available at: *https://blogs.msmvps.com/garwarner /2013/06/05/vietnamese-carders-arrested-in-mattfeuter-ru-case/,* accessed on 02.10.2021.

mattfeuter.cc, mattfeuter.su, mattfeuter.com, etc.) where about 16,000 members buy and sell stolen credit card data in bulk. Purchases from the website are believed to have facilitated more than $200 million of credit card fraud worldwide through the sale of more than 1.1 million credit cards. SOCA and PCeU merged to form a new National Crime Agency later this year, but are already conducting joint operations such as this one in anticipation of the UK's new National Cyber Crime Unit.

Operations of this nature could now no longer be feasible with out the guide of personal area partners, in this example on the whole Visa and MasterCard.

In retaining with UK law, the names of the 3 arrested there aren't given, simplest their names and locations:

- 37 year old man from West Ham .
- 34 year old man from Thornton Heath .
- 44 year old man from Manor Park.

In the US, the New Jersey US Attorney's office has filed charges on 23 year old Duy Hai Truong, of Ho Chi Minh City, in Vietnam.

Vietnamese media has identified those arrested in Vietnam, the five in HCM City were accused of illegally publishing and using information from the Internet. The three in Hanoi are accused of using credit card information for online gambling. The gang leader, is accused of setting up the website Mattfeuter, where credit cards are sold for between $2 and $20 per card. As site operators, he and his group have earned about $1.5 million in commissions from their sales. While we haven't heard of many Vietnamese cybercrime cases, improvements in Vietnamese laws passed in 2009 have made it a crime to fraudulently obtain card data from overseas targets, as well as from victims in Vietnam.

In a statement from the New Jersey US Attorney's Office, Paul Fishman announced that Truong was charged with "conspiring to commit bank fraud. From 2007 until his recent arrest, Truong was suspected of defrauding financial institutions as part of a large-scale scheme in which information Personal identities are linked to more than 1.1 million credit cards stolen and resold to criminal customers worldwide". The New Jersey statement alludes to "arrests made last week in the UK, Vietnam, Italy, Germany and elsewhere", so I'm sure there will be more news in the near future as details of this case come to light.

The official complaint against Truong revealed that fees on the mattfeuter.biz and mattfeuter.com websites ranged from $1 to $300 per "garbage dump" (a landfill which refers to the magnetic stripe read by credit cards), and that taxes are generally paid via Western Union or Liberty Reserve. Truong is being held in Vietnam awaiting settlement of the charges in the UK, but if convicted in the US, Truong could face up to 30 years in prison and a $1 million fine or double the income from the offence, or double. much of the loss caused by the infringement,

if greater. New Jersey also released a sworn complaint from FBI Special Agent Russell Ficara, who testified that he had reviewed more than 1,100 bank accounts and numerous searches for email accounts, residences, offices, and addresses linked to the case. His testimony includes many of the email accounts used, including mattfeuter123@gmail.com, augustino267@gmail.com, ho.robbie@gmail.com, and included more than 150,000 email messages with more than 1.1 million credit card numbers being traded, including cards and Personally identifiable information (PII) related to many victims residing in New Jersey.

Like many criminals, Truong also has a Facebook account that refers to his real name, refers to the conspiracy and contains photos of messages to and from landfill buyers and refers to stolen credit cards.

It has been documented that one Western Union office "in Ho Chi Minh City, Vietnam or surrounding areas" has received over $1.9 million in payments related to the MTCN (money transfer control number) alone documented in emails from three account referrals, all controlled by Truong.

Evidence in criminal cases not only has a great legal significance to prove criminal acts, but it also has a very important meaning when manipulating to collect, analyze and convert electronic evidence to traditional evidence in order to investigate, prosecute and adjudicate cases that criminals abused advanced scientific and technical achievements as tools and means to commit crimes (high-tech crimes)[11].

One of the most important sources of evidence in high-tech crimes cases is the evidence seized at the place where the crime occurred, bearing a criminal trace such as: „cookies", „URLs", web servers logs, Email logs... (these are computer generated information); or may also be man-made electronic information stored in computers or other electronic devices, such as documents, tables, images, information stored in electronic signals.

Most people who use high technology to commit crimes have a high level of legal awareness and knowledge, and when committing crimes, there are sophisticated tricks to hide criminal information, When they detect a risk of disclosure, they quickly remove traces to denounce (such as deleting related data; demolishing Web sites), so collecting, restoring and transmitting electronic evidence into the traditional evidence to prove the crimes of the subjects is extremely important, it determines the success or failure of a specialized case.

At the present time, developments in information technology, digital evidence plays an increasingly significant role in criminal and civil litigation. Today, digital evidence is now applied to prosecute all types of crimes, not just cybercrime.

11 *Một số bất cập về chế định chứng cứ trong Bộ luật Tố tụng dân sự năm 2015,* availabe at: *https://tapchitoaan.vn/bai-viet/phap-luat/mot-so-bat-cap-ve-che-dinh-chung-cu-trong-bo-luat-to-tung-dan-su-nam-2015,* accessed on 01.10.2021.

Because many types of digital evidence may be necessary for litigation, the judicial system has to be assured of its accuracy, dependability, and verifiability. Correspondingly, establishing the chain of custody when authenticating digital evidence in the courtroom is extremely important and utterly necessary. The chain of custody must account for the seizure, storage, transfer, and the condition of the evidence. This sounds far beyond just finding and extracting the data, examining and interpreting its relevance, and generating a report.

Digital evidence can be active, deleted, hidden, encrypted, or overwritten, and cannot be determined by the naked eye. When dealing with digital evidence, relevant scientific principles relating to the collection, processing, and examination of evidence must be accompanied

These days, the admissibility of electronic evidence in any jurisdiction is increasingly more common: comments in social media, video recordings, instant messaging, certified emails, etc.

Taking into account the complex and dangerous situation of this group of criminals, if the 1999 Criminal Law only provides for 3 crimes in the field of information technology, including the crime of creating, disseminating and disseminating computer virus programs (Article 224); violation of computer network operations, The crime of using and using the rules (Article 225); the crime of illegally using the network and computer information (Article 226), the criminal law revised in 2009 added two new crimes in this regard, namely the crime of illegally entering the computer network, telecommunications networks, the Internet (Article 226a); crimes involving the use of computer networks, telecommunications networks, the Internet, or digital devices for the purpose of embezzling property (Article 226b). With the passage of the 2015 Criminal Code on November 27, 2015, the number of crimes officially stipulated by laws in the field of information technology has increased significantly.

But this wide variety of sources of digital evidence must have access to the judicial process through some of the legally prescribed means of proof. For clarifying this topic, in this article we will answer the following question : what is electronic evidence?

1.2. What is electronic evidence?

In a presentation presented at the Workshop „Prevention of traditional and non-traditional crimes" organized by the Ministry of Public Security and the People's Police Academy in April 2018; Dr. Tran Van Hoa, Deputy Director of the High-tech Crime Prevention Police Department, said: "Electronic evidence is

evidence stored in the form of electronic signals in computers or in devices with a set of digital memory involved in criminal cases". According to the International Criminal Police Organization (Interpol), electronic evidence is investigative information and data that is stored or transmitted by a computer, computer network or others technical electronic device.

We define electronic evidence as all information with probative value that is included in an electronic media or is transmitted by said media.

For this, we distinguish two basic types of electronic evidence:

1. Data stored in computer systems or devices.

2. Information transmitted electronically through communication networks.

The 2015 Criminal Procedure Code (CPrC) has great significance for the reality of the investigation, prosecution, and adjudication of criminal cases[12]. One of the new and progressive regulations to effectively serve the requirements to fight against crime in the new situation is the provision of sources of evidence - electronic data (electronic evidence). A newly added source of evidence requires the corresponding provisions on the collection, inspection, and evaluation as well as monitoring these processes on such evidence to create a premise for the proper resolution of criminal cases. This will be especially appropriate for cases in the field of high technology and the cases using information technology as tools and means of crime.

It can be assumed that the overall situation of current crimes, especially information technology crimes, is becoming more and more complex, and behaviors and tricks are becoming more and more complex. Ordinary criminals also use electronic means to commit crimes. Therefore, the 2015 Criminal Procedure Code added „electronic data" as a new and valuable source of evidence, as an additional source of evidence, as a basis for determining criminal offenses and handling criminal offenses. In addition, the regulations are in full compliance with international conventions and Vietnamese laws.

2. Methodology

2.1. The provisions of the law on electronic evidence

Electronic data - as a source of evidence, is defined as "symbols, letters, numbers, images, sounds or the other similar forms which are stored, transmitted or received by electronic means "(Art. 99 CPrC). This provision expresses the consistency and concretization of the concept of "data" in the 2006 Law on Electronic

12 Criminal Procedure Code of the Socialist Republic of Vietnam, No. 101/2015/QH13, dated November 27, 2015

Transactions: "Data is information in the form of symbols, letters, numbers, images, sounds or similar format"[13]. Electronic data has been recognized as legal and valid as evidence since 2006 - in electronic transaction law. However, it was not until the 2015 CPrC, that electronic data was legalized, considered as one of the sources of evidence. This overcomes the inconsistency between content law and formal law in the CPrC of 2003.

When electronic data is collected in accordance with the measures provided by the CPrC and satisfies the properties of the evidence, the electronic data is considered to be electronic evidence. So, what is electronic evidence? Although the current law does not have the legal concept of "electronic evidence", but in terms of legal science, we can understand: "Electronic evidence is the evidence stored in the form of electrical signals in computers or in devices with digital memory related to criminal cases" (Nguyen, 2016: 317). In addition, it can be understood that "electronic evidence is investigative information and data stored or transmitted by a computer, computer network or other digital electronic devices" (Tran, 2015:70).

From the above interpretations, electronic evidence can be seen having the following characteristics:

- It's a type of non-traditional evidence, not an object or event as previously conception. It's digital characters stored in media, electronic devices or on the global information network which, after the processing process, will produce data including numbers, words, sounds, images, etc., thereby providing information related to the crime event;

- It's created in cyberspace and without borders or territories. Therefore, the collection, inspection, and evaluation as to convert them into traditional evidence, which is used as a basis for proving crimes, is also unique, requiring specific provisions and in-depth instructions. However, at present, the CPC only stipulates the "collection of electronic means and electronic data" (Article 107 of the CPrC). As for the examination and evaluation of electronic evidence, there are no separate regulations. Therefore, the examination and evaluation of electronic evidence shall comply with the general provisions on examination and evaluation of evidence prescribed in Article 108 of the CPrC.

In addition, to evaluate electronic evidence, the provisions of Clause 3, Article 99 of the CPrC can be applied. Accordingly, "the value of evidence in electronic data is determined based on the manner in which it is created, stored or transmitted electronically, and the way to ensure and maintain the integrity of electronic data, the manner to identify creators and other relevant factors" (Tran,

13 Law on Electronic Transactions of the Socialist Republic of Vietnam, No: 51/2005/QH11, dated November 29, 2005

Phung, 2018). It can be said that the provisions on "evidence value of electronic data" in the CPrC are derived from the provisions on evidence value of data messages prescribed in Clause 2, Article 14 of the 2006 Law on Electronic Transactions. "The evidence value of data messages is determined based on the reliability of the way the data are created, stored or transmitted; the way ensure and maintain the integrity of data messages; the manner to identify creators and other relevant factors".

Based on the above grounds, they divide electronic data into categories:

Firstly, electronic data created by users: are documents and data created by human beings and stored in electronic memory, such as documents, tables, digital images, e-mail, web pages, service user information, online chat content, customer feedback ...

Second, electronic data generated by a computer automatically: A result created after a computer program processes the input data according to a defined algorithm. For example: Computer file transfer logs (FTP transfer logs), network protocol logs from internet providers (IP logs from ISPs), operating system logs/ registry files (Operating System Logs / Registry Files); Webmail IP logs and records ... The human impact on computer-generated data is very limited. Therefore, this type of data has a very high level of evidence.

Most electronic evidence is created by both humans and computers. We can exploit them from many electronic devices such as:

- Mobile devices: Mobile devices often store important evidence for investigations: Messages, calls ... or even some mobile devices automatically save the user's browser schedule.

- CD Roms, removable drives (External Drives), routers.

- Service providers (Email, website, server ...) is an important source of electronic data. They will provide litigation agencies with information about users of services, data logs, copies of computer data, etc.

However, the problem of discovering, preserving, evaluating and using this type of evidence is very difficult because its existence depends on the time, storage setup process, storage devices and time of detection. Criminals can delete, edit quickly to destroy electronic data, making it difficult to collect and recover evidence (according to Tran, Phung, 2018).

2.2. Actual work of collecting, checking and evaluating electronic evidence

Criminals increasingly tend to use sophisticated tricks related to information technology. Criminal cases in which subjects using electronic means and technological

equipment to commit crimes are increasing, taking place in many types of crimes such as fraud, appropriation of property, prostitution, gambling ...

In criminal cases where criminals use information technology and electronic devices as means of crime without electronic data provisions, the procedure-conducting bodies still collect, examine and evaluate electronic evidence. The collection of electronic evidence shall be conducted in the same order as other sources of evidence. It is an electronic means of the seizure (usually a telephone), which holds information about electronic data. After seizing electronic means, the Procedure Agency conducts the data extraction, duplicates the data but mainly transcribes the contents of the conversation (in the form of messages still stored in the device) or statistics of transaction history (mainly incoming calls, outgoing calls). However, there are also cases where Procedure Agency does not seize electronic means (computers) but extract data with the owners from computers on paper, as documents to record (signed) confirmation by extractor). For complex cases, Procedure Agency conducts data recovery through professional individuals and organizations. These individuals and organizations are committed to the restored content. These data are transformed into physical evidence and used to fight the criminals.

However, due to the absence of specific regulations related to collecting, examining and evaluating electronic evidence, in reality, electronic evidence collection, test, and evaluation often depend on capacity, qualifications of direct performers. On the other hand, the collection of electronic evidence as above is incomplete, which is not true to the nature of electronic evidence; especially in the case of Procedure Agency transcribing the content of transactions that are still stored in electronic media. Collecting in this way will miss data that the user has deleted. In this case, it is difficult to recover data in electronic media system logs or extract data from the operator because it has not been legalized, so the operator often take reasons of Customer information security and refuse to cooperate.

The establishment of the 2015 Criminal Procedure Code with legalized data and specified measures to collect electronic means and electronic data (Article 107) have overcome the previous disadvantages. Through practical work of resolving a number of criminal cases related to information technology, it is realized that the collection, examination, and evaluation of electronic evidence are carried out as follows:

- For electronic media with electronic data storage (computer hard drive, smartphone, USB, memory card, optical disc, camera, camera, email ... smartphone ...) of offenders, crime victims, persons with related rights and obligations: Procedure Agency seizes, records, seals and preserves the evidence. When handing over material evidence to data recovery experts for copying data, they must

ensure the provisions of the law on procedures for opening and sealing. In case the Procedure Agency directly copies electronic data (for example, messages stored in the phone), to ensure objectivity, they must make a record of the content of the electronic data, accompanied by testimony and confirmation of digital device owner and bystander.

- Electronic data related to the case is not only stored on the device of the culprit, the victim, but also stored on the servers of internet providers, banks, and other third-party servers, network operators, electronic exchanges, electronic payment gateways, tax authorities, customs authorities ... Therefore, besides the act of Procedure Agency directly copying electronic data from captured digital devices as evidence, The electronic data collection at operators of mobile phones that the subjects have used is essential to check the accuracy of information copied from captured digital devices.

- In procedural practice, Procedure Agency also conducts electronic data assessment. The electronic data assessment performed by judicial examiners is mainly recovering, decoding and analyzing activities focusing on finding data stored, existing in-network storage devices or in your personal digital device, to find data as evidence. This is not a comparison, traceability of electronic data because there is no original file as a standard but this activity is only to search for data with content related to criminal acts, perpetrators, victims, or damage.

After the conclusion of the assessment, the electronic evidence is converted into physical evidence in combination with other relevant evidence such as material evidence, testimony, etc. which is the basis for proving the crime and contributes to the correct and objective judgment. It can be said that the collection of electronic evidence is very important in the practice of proceedings for the type of technology crime. However, the practice of collecting, examining and evaluating electronic evidence still faces many difficulties and obstacles.

2.3. Difficulties and problems in the collection, inspection, and evaluation of electronic evidence

Firstly, In terms of legal documents: In the current legal system, electronic data is specified in the 2006 Law on Electronic Transactions. As a source of evidence, electronic data is recorded in the CPrC 2015 of Articles 87, 88, 99, 107. In addition, Clause 3, Article 223 of the CPrC also refers to the "collection of confidential electronic data" as a special method of investigating proceedings. At present, there are no legal documents detailing this issue. Besides the specific provisions on the collection of electronic means, electronic data (Article 107),

other contents such as: inspection, evaluation, preservation, sealing, etc., shall be applied to evidence. Electronics comply with current general regulations. However, electronic evidence with characteristics differ from traditional evidence requires strict legal provisions on the process of seizure and restoration of this type of evidence to protect the integrity of data, maintain the evidence value of the data; as well as regulations on the responsibilities of individuals in the use and preservation of this particular kind of evidence; Especially with regard to "collecting electronic data", it is also related to human rights and civil rights. The lack of specific guidance has led to an arbitrary, similar application by investigating authorities.

In addition, the provisions of the CPrC also reveal inconsistencies, namely: Article 107 of the CPrC 2015 provides for the collection of electronic means and electronic data but in Clause 1 of this law stipulates that "electronic media must be seized promptly and fully…" and "in case electronic storage media cannot be seized, competent authorities shall carry out electronic data backup procedures...". It can be seen that lawmakers seem to agree on the concept of "electronic media collection" and "electronic media seizure"[14]. They only pose a problem for electronic data collection because electronic data is only a source of evidence, and electronic means are only where electronic data is contained.

Secondly, regarding the conditions of facilities, capacity and coordination with agencies and organizations in the inspection and evaluation of electronic evidence: To solve criminal cases with evidence being electronic data, it requires legal proceeders to be knowledgeable about electronic data types and have a certain understanding of information technology. The reality shows that for cases that are not too complicated, such as cases of prostitution, drug trafficking, gambling, subjects often use digital devices to send messages, make phone calls and exchange content together. The collection of electronic data to prove or consolidate evidence is usually at a simple level, after seizing the digital device, the investigating authority shall make a record of checking, extracting and copying data such as messages, call history between subscribers used by the subjects to fight the object (Ngo, 2015). When the subject declares appropriately, a copy of the above data is included in the case file as proof of a crime.

However, in more complex cases, the subject uses more sophisticated tricks, leaving traces of criminals in computer network data, telecommunications networks, transmission lines, and other electronic sources. We must access encrypted

14 *Bài viết một số quy định về chứng cứ trong Bộ luật tố tụng hình sự năm 2015,* available at: *http://www.vksquangninh.gov.vn/tin-ho-t-d-ng-xd-nganh/xay-d-ng-nganh/2094-bai-vi-t-m-t-s-quy-d-nh-v-ch-ng-c-trong-b-lu-t-t-t-ng-hinh-s-nam-2015,* accessed on 28.09.2021.

database sources, block data collection on the transmission line (between server-server, personal-server computer, data transmitted by ADSL, mobile, satellite), decode encrypted data, etc., and must cooperate with professional organizations, experts or competent agencies (third agencies) to conduct the search, recovery, conversion of electronic data into visible form that we can read, listen, look... However, waiting for the results from these agencies is related to the time limit for the procedure. For cases where electronic evidence is the most important basis for determining the criminal acts of the subjects, this greatly affects the progress of the case resolution.

Thus, although the collection of electronic means takes place quickly, promptly and in accordance with the provisions of the Criminal Procedure Code, the law does not strictly stipulate the time limits and responsibilities of third agencies. As there is no coordination mechanism, the use of electronic evidence to solve criminal cases has not been effective.

3. Discussion

The author will show the following some solutions to remove difficulties and obstacles in the work of collecting, inspecting and evaluating electronic evidence in the next time:

Firstly, in terms of legal documents, it is necessary to have clear and specific regulations on the collection, inspection and evaluation of electronic documents as well as the promulgation of guidance documents on the way to deal with High-tech crimes in the 2015 Penal Code, amended in 2017[15]. Also, it is necessary to have strict regulations on responsibilities and even sanctions against individuals and organizations (third agencies) in delaying the provision of electronic data, electronic data expertise affects the resolution of the case.

Secondly, the people conducting legal proceedings need to improve the basic knowledge about electronic data, information technology (certain knowledge about the objects being exploited) ... In order to do that well, it is necessary to determine the direction for the electronic data collection activities that are: (i) Must come from the information, documents and initial evidence on the collected case, this is the first basis to help the competent authority determines the direction for electronic data collection; (ii) Deriving from the rule of electronic traces that are distinct from other criminal traces, based on the origin and characteristics of electronic traces (electronic media, computer networks), telecom

15 Penal Code of the Socialist Republic of Vietnam, No. 100/2015/QH13, dated November 27, 2015

network or online); (iii) The operation rules of the offenders for different systems and types of subjects are different, such as: The operation rules of high technology users violating national security will have unique characteristics compared to the operation rules of information technology-using subjects for fraudulent activities of appropriating property...

Thirdly, it is necessary to have scientific and practical conclusions on the collection, evaluation, and use of electronic evidence in criminal cases. On the other hand, electronic data is a non-traditional source of evidence, exists in cyberspace, that existence can go beyond the scope of a country and the type of crime that leaves this trace is often of nature. substance transnational. Therefore, the competent authority should strengthen international cooperation in combating this type of crime.

It can be said that the legalization of electronic data as a source of evidence in the CPrC 2015, along with the addition of regulations on some new crimes in the field of information technology in the 2015 Penal Code, is a timely and suitable adjustment of lawmakers, meeting the urgent needs of the reality of fighting against high-tech crimes that are increasing in number, complexity, and danger to society (Nguyen, Le, 2016).

4. Conclusion

In summary, compared with the 2003 Criminal Procedure Code, the 2015 Criminal Procedure Code has made important amendments in terms of evidence and proof, making the proceedings faster, more objective and comprehensive, and better protecting human rights through specific regulations, meeting the requirements set out in the 2013 Constitution and the judicial reform strategy up to 2020. In which, the addition of several new sources of evidence, especially data sources. Electronic data is a great step forward, in line with the extremely complex situation of computer crime in practice and also following the international conventions to which Vietnam is a member. However, the regulations on the collection of electronic media and electronic data as well as the method of confidential collection of electronic data still have many limitations and are unclear, making it difficult for the application process, needs to be supplemented and perfected

We thus realize that the mere mention of e-evidence in the statute cannot help the cause. The procedural glitches that have been induced by the inclusion of e-evidences need to be dealt at the earliest. With commuting times, the law needs to keep pace with improvements in technology.

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THEORETICAL ASPECTS REGARDING THE INTEGRATION OF SPECIAL INVESTIGATIONS IN THE CRIMINAL PROCESS OF THE REPUBLIC OF MOLDOVA

The article is devoted to the issue of the interaction of the special investigation activity and the criminal process. The purpose of the paper is to conduct, based on theoretical research, scientific investigations on the integration of special investigations in the criminal process of the Republic of Moldova. The objectives of the paper include the analysis of contradictory theoretical views on the subject, establishing the legal nature of special investigative measures and the legal nature of the results obtained by performing them.

Keywords: special investigation activity, criminal trial, criminal investigation, evidentiary procedure, evidence.

1. Introduction

Since 2012, the new model of criminal justice, based on foreign experience, has been operating in the Republic of Moldova. This model has been the result of a broader judicial reform, accompanied by adherence to and alignment with international legal standards, the recognition of international law as part of the domestic legal system and the use of foreign experience in the national interest

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and style. One of the significant novelties of the modernization of the criminal process was the integration of the special investigation activity (SIA) in the criminal process.

But this integration has essentially changed things. SIA from a priority proactive activity has become a priority reactive activity, which has considerably diminished the anti-criminogenic potential of this type of activity.

In the context of the recovery, a working group (4) was set up in 2015 to propose and put forward appropriate proposals to remove legislative impediments in the field of special investigations so that it becomes possible to carry out special investigative measures not only to detect and investigate crimes, but also for: revealing, preventing, stopping criminal attacks; identifying the people who organize and commit them; the search for missing persons or those who hide from the criminal investigation bodies or the court or evade the execution of the sentence; detecting goods from illegal activities and collecting evidence on these goods; collecting information about possible events and / or actions that could endanger state security.

Due to the lack of consensus and conflicting views on the legal nature of special investigative measures integrated in criminal proceedings, their relationship with prosecutions, the relationship between the results obtained by carrying out those measures and the evidence obtained through traditional evidentiary procedures to this day, it has been possible to draft a law that would have been voted in the plenary of the Parliament of the Republic of Moldova.

In the following, we will analyze to the opinions of experts in the field of special investigations and criminal proceedings who have expressed themselves on the issue addressed in the hope that we will obtain clarity in this regard.

2. Main part

Analyzing the issue of the legal nature of special investigative techniques (special investigative measures) included in the Romanian Criminal Procedure Code, Professor Nicolae Volonchu said: "It is difficult to outline the legal nature of these new institutions, as they are certainly not evidence, no means of proof. The special techniques are rather similar to the classic evidentiary procedures found for a long time in criminal legal regulations. But here a specific note appears. An on-site investigation, reconstitution, confrontation, lifting of objects or search takes place with full knowledge of this activity by the investigated person, while in the case of special investigative techniques they remain hidden from the subject" (Deacon, 2013).

In general, determining the legal nature of MSI is a very controversial doctrinal issue, with some researchers considering that these are evidentiary proceedings and must belong to criminal proceedings, while others remain adamant that they have a different legal status (Udroiu, Slăvoiu, Predescu, 2009).

According to the arguments of the proponents of the first concept, in a certain historical period, mentions the Russian researcher Baranov A.M., the preliminary investigation was artificially divided into two types of independent procedures: the special investigation activity and the criminal investigation activity (preliminary investigation, criminal investigation). However, says the researcher, "the methods of collecting information about a crime in both types of activity are practically the same, but to delimit them and avoid confusion, different names have been introduced and separate procedures have been established for the production and practically recording the same actions" (Baranov, 2006:160). In his vision, "with the legalization of the special investigation activity, methodological and technical-legal errors were committed. The secret evidence-gathering procedures have been strengthened in another activity, and the information obtained as a result of their implementation should be used in criminal proceedings. The laws on special investigative activity have failed to eliminate this contradiction" (Baranov, 2006:161).

In general, we can agree with Baranov A.M. that at a certain historical moment the two types of activity were divided. However, it is not very clear what the author meant by the expression "artificially". It seems, however, that everything that is done by man is artificial. Or we cannot say that the preliminary investigation in both its forms (public and secret) came from God or naturally. The thing is that both the criminal investigation and the special investigation activity went hand in hand throughout the entire evolutionary process of mankind. When civilization, however, reached a certain level of development and enshrined the rights of the person as supreme social values, it was considered absolutely normal that in order to exclude judicial errors and avoid punishing innocent people, the basis for their accusation should no longer be evidence obtained in a non-transparent manner is allowed, provided that the data subject is deprived of the opportunity to defend himself. It was therefore obvious that prosecution, only through its public form of gathering evidence, would have been if not unnecessary then extremely difficult. Respectively, in its help, non-transparent procedures continued to be used permanently, not to collect evidence, but useful information for the evidence process. Namely, in order to specialize, streamline and develop these two branches of activity, the respective division was made.

Regarding the methodological and technical-legal errors of legalization of the special investigation activity, invoked by Baranov AM, it seems that the error is not in the field of the law of the special investigation activity, but in the CPC

where the mechanism should have been regulated for the admission of information obtained as a result of special investigative measures. Proponents of this concept themselves acknowledge that the problem is in the preconceived notion of some jurists that the results obtained outside the criminal investigation, including through special investigative measures, should not be admitted in the evidentiary process. The CPC is the law that must regulate the evidentiary procedures that allow the verification of any type of information, including those obtained through special investigative measures. If the information submitted to the criminal investigation body is not possible to verify, and not only in terms of veracity but also in terms of the legality of their administration, they should not be admitted as evidence. Therefore, the issue of the admissibility of the results of the special investigation measures should not have been solved in the text of the Law on the special investigation activity, but in that of the CPC.

Comparing the delimitation of the spheres of criminal procedure and the operative investigation activity in Russia and abroad, Volynsky A.F. stressed that in none of the countries of Western Europe is there such a categorical and artificial distinction between SIA and criminal procedure, and in some of them the so-called "police investigation" has historically developed and found legislation, organic public and secret methods and procedures for obtaining evidence, but under the effective control of the judicial authorities (Volynsky. 2004: 5).

Frankly, such arguments are a bit exaggerated. If we look at the legislation of the Baltic countries (Estonia, Lithuania and Latvia), members of the European Union, then we will see that there is still a difference between evidentiary procedures and special investigative measures, while the rest of the ex-Soviet republics, which adhered to the merger special investigation measures with prosecutions actions (Ukraine, Kazakhstan, Georgia, Kyrgyzstan), try to eliminate any difference between them.

In order to give the SIA results the status of evidence, according to the proponents of the same concept, it is necessary to give criminal procedural character to the methods and secret means of collecting information (evidence), ie to regulate them by criminal procedural law. In this way, says Baranov A.M., "from the minds of lawyers, the reasons that prevent the use of information obtained as a result of the secret collection of evidence (obtained today within the OIA) will disappear" (Baranov, 2006:164).

The same idea was expressed by researchers Mazunin Ya.M. and Mazunin Ya.P.: "if the secret proceedings will be given the procedural form, then" the credibility of the information obtained as a result of the AOI will have priority over the criterion of admissibility and the content over the form of evidence" (Ya. Mazunin, P. Mazunin, 2015).

Therefore, the problem rather lies in the stereotype of the thinking of some lawyers who consider unacceptable as evidence the information obtained through SIM just for the simple reason that it is not provided in the CPC. In essence, things did not change even after the inclusion of SIM in the CPC. Now, as before, in order to become evidence, the information obtained by performing the SIM must first pass the admissibility exam and only after that we can discuss about the evidence. If the results obtained by performing the SIM fail this exam, then we have no evidence.

Contrary to the views indicated above, it is the researchers' arguments that disapprove of the concept of including SIM in the criminal procedure law. Russian Professor Sheifer S.A. is one of the most remarkable experts belonging to this group. In his view, the fusion of procedural elements with those of special investigations seems deeply erroneous and especially from a methodological point of view. The professor draws attention to the fact that the norms that regulate the development of criminal prosecution actions form a specific institution of the criminal process. It has a rich content and covers many prescriptions that determine the procedure of a criminal prosecution. Their implementation gives rise to a complex system of legal relations that accompanies the collection of evidence. It can be argued that the legal relationship is the most important sign of a criminal prosecution action, without which the action cannot be considered a criminal prosecution. But legal relations cannot take place when secret measures are taken, because the parties to the process do not participate and cannot participate in the report. Thus, concludes the expert, the merger of criminal prosecution and operative investigations is unacceptable, because it destroys the fundamental foundations of the criminal process (Sheifer, 2015: 121).

Ghinzburg A. Ya., A distinguished professor in Kazakhstan and a well-known specialist in the field of criminal proceedings and the OIA, also spoke in favor of not accepting the combination of the two types of activity (criminal prosecution and special investigations) as a whole. They are different in the form and in the essence. The institution of secret criminal prosecution, the professor claims, ultimately leads to chaos and destroys the entire scientific and methodological basis of the criminal process; destroys the imagination about the legal system of the criminal process and the practice of judicial evidence. In the evidentiary process, he continues, two types of information circulate: procedural, regulated by the CPC and non-procedural, including that regulated by the Law on Operational Investigations. In the composition of the procedural information obtained in accordance with the procedural law as a result of the criminal prosecution actions, the evidentiary information is highlighted, which constitutes the content of the evidence and which serves the evidentiary purpose. In the structure

of the non-procedural information, the information obtained as a result of the SIA is highlighted. In relation to the evidentiary process, such information is indicative, auxiliary (to decide the further direction of the investigation, the preparation and tactics of the criminal prosecution, etc.). Thus, these different types of state activities, which coexist and interact successfully, but are not mutually absorbed, solve the problem of consolidating the rule of law.

Professor Ginzburg A.Ya. it also considers it illegal to institute secret probation proceedings. According to the legislation, each criminal prosecution action must not only be defined, but also clearly and completely regulate its implementation both in form and content. The CPC does not regulate the procedure for carrying out secret actions, nor can it be done, as this is contrary to the legislation on state secrecy. Therefore, the professor asks: how can a secret investigation be carried out legally if its procedure is not provided by law? In addition, the professor continues, the merger of MSI with criminal prosecution actions, as well as the recognition of their results directly (without verification) as evidence, throws back the criminal process in a period of imprisonment not too far away (Ginzburg, 2013).

It is extremely difficult not to share these arguments, given that they are focused on absolutely logical and quite convincing reasoning.

Approaching the subject of the legal nature of the interception of telephone conversations provided, on the one hand, by the CPP of the Russian Federation (art. 186) and, on the other hand, by the Law of the operative investigations activity (p. 10 of art. 6), several researchers claim that in both cases it would be about carrying out the same operative investigative measure and not about a criminal investigation action, because, they say, the defining feature of the criminal investigation action is missing - the personal extraction of information by the criminal investigation officer through direct contact with footsteps (Sheifer, 2015: 122).

Indeed, the criminal investigation body does not carry out any cognitive operation and is limited only to issuing a request to the court for telephone interceptions and sending it for enforcement to the competent authority. In fact, there is only the request for information of an operational nature and not a criminal prosecution. This explanation also becomes valid for the other SIMs provided in the CPC, the criminal investigation body being limited only to the preparation of the documents necessary for the initiation and implementation of the investigative measures by another body, which in turn, in the end, making available to the initiator the results obtained.

While Russian criminals still oppose the introduction of SIM in their criminal law, experts in Kazakhstan are already discussing the exclusion of several covert actions from Chapter 30 CPC (controlled delivery; operational infiltration;

imitation of criminal activity; undercover investigation and (or) examination of the premises; covert surveillance of a person or premises; acquisition of control) because, they claim, their results do not meet the requirements of the evidence (reliability and possibility of verifying them by other criminal prosecution). The purpose of these covert actions, they rightly argue, is not the secret collection of evidence but, above all, the secret identification of signs of crime in the course of operational investigative activities (A.Akhpanov, N.Khan, 2016: 132).

Other researchers in Kazakhstan, following the scientific investigations carried out, understanding the issue discussed, have faced a dilemma: 1) the Western model of the criminal process is fully adopted (the powers of the investigating officer will merge with those of the prosecuting officer in one the person); 2) the failure to integrate MSI in the criminal process is acknowledged and the previous model is returned (Nurgaliev, Lakbaev, Kusainova, 2019).

3. Conclusions

The analysis of the literature allows us to conclude that the integration of special investigations in the criminal process, both in the Republic of Moldova and in other countries that have joined this model, generates serious problems that undermine respect for the rights and freedoms of participants in criminal proceedings. The problem of capitalizing on MSI results has not been fully resolved. By performing MSI, as before, no evidence is obtained, but information. This information can only become evidence if it meets the procedural requirements for evidence. From this point of view, things have not changed. In essence, the anti-crime potential of special investigations has been considerably reduced, with the most effective MSIs being allowed only during the prosecution phase and being banned outside its limits.

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The Journal of Criminology and Criminal Law is triannual, peer reviewed scientific journal with a 59-year long tradition, co-published by the Institute of Criminological and Sociological Research- Belgrade and the Serbian Association for Criminal Law Theory and Practice. According to the categorization of the Ministry of education, science and technological development the Journal is categorized as M51 (Prominent/outstanding journal of the national importance). The Journal includes articles in the field of criminal law, criminology, penology, victimology, juvenile delinquency and other sciences that study etiology, phenomenology, prevention and repression of crime. Moreover, the Journal is indexed in the prestigious global database HeinOnline.

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